

**Opinion on the proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses<sup>(1)</sup>**

(95/C 133/07)

On 28 September 1994 the Council decided to consult the Economic and Social Committee, under Article 100 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Social, Family, Educational and Cultural Affairs, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 9 March 1995. The Rapporteur was Mr Liverani.

At its 324th Plenary Session (meeting of 29 March 1995), the Economic and Social Committee adopted the following Opinion by 95 votes to 80, with four abstentions.

## 1. General comments

### 1.1. *The reasons for revising Council Directive 77/187/EEC*

1.1.1. During the 1980s, a series of problems arose over the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, which the European Court of Justice has tried to resolve in several judgements.

1.1.2. Furthermore, one of the weak points of the 1977 Directive arises from the lack of any specific protection for employees transferred in the context of insolvency proceedings or because the undertaking is experiencing serious economic difficulties. In this respect, the European Court of Justice has held, on several occasions, that the Directive does not apply in the case of transfers taking place in the context of liquidation proceedings which do not allow the company to survive.

1.1.3. Therefore, the Commission has decided to revise the 1977 Directive, in order to remedy its shortcomings and loopholes, within the framework of Community case law.

1.1.4. The shortcomings and loopholes of the 1977 Directive must be eliminated in order to address the needs for high levels of employment and social protection in the EU. However, the 1977 Directive must be revised without prejudice to workers' rights.

### 1.2. *Ambiguities in the proposed revision of Council Directive 77/187/EEC*

1.2.1. Unfortunately, the Commission's proposal for the revision of the 1977 Directive is, in some respects, ambiguous.

1.2.2. In its Explanatory Memorandum, the Commission states that 'any appraisal of the shortcomings and loopholes of the transfer Directive must take into account (...) the case law of the European Court of Justice' (point 2). Moreover, the fourth recital of the proposal states that 'the purpose of this proposal is to amend Council Directive 77/187/EEC of 14 February 1977 in the light (...) of the case law of the European Court of Justice'.

1.2.3. However, although several sections of the Commission proposal take European case law into account (definition of transfer, application of the Directive to undertakings engaged in nonprofit making activities), the second sub-paragraph of Article 1(1) introduces a distinction between 'economic entity' and the 'activity' of an undertaking which seems highly ambiguous.

1.2.4. There are, in fact, consistent references in Court of Justice case law (e.g. the Spijkers case<sup>(2)</sup>) to the concept of an economic entity which retains its identity, and the Court has indicated the actual conditions which must be taken into consideration for the implementation of the 1977 Directive. The Commission proposal, in mentioning not just the 'transfer of an economic entity which retains its identity', but also the 'transfer of only an activity of an undertaking, business or part of a business' introduces new elements of uncertainty, since it is not clear whether the latter phrase has bearing on the case-law concept of 'economic entity which retains its identity' or adds something extra to this concept.

1.3. The Committee is concerned that the text proposed by the Commission may have indirectly discriminatory effects. For example, if the intention of the revision of Article 1(1) is to exclude the sub-contracting of ancillary activities from the scope of the Directive then this is likely to have a disproportionate effect on women. As the labour force statistics of the OECD

<sup>(1)</sup> OJ No C 274, 1. 10. 1994, p. 10.

<sup>(2)</sup> Judgement of 18 March 1986, Spijkers (case 24/85), in European Court Reports, 1986, pp. 1119-1130.

make clear, the majority of workers employed in such occupations in both the public and private sectors are women. If the proposed text is adopted by the Council then many women will find themselves deprived of rights that are otherwise more generally available to men at work. It is strongly arguable that this is contrary to the Treaty provisions guaranteeing equal treatment of men and women and other equal opportunities legislation.

## 2. Specific comments

### 2.1. *Definition of 'employee'*

2.1.1. The proposal provides no definition of 'employee'.

2.1.2. The European Court of Justice has ruled that, for the purposes of the 1977 Directive, the term 'employee' must be interpreted as including anyone who, in the Member State concerned, enjoys protection as an employee under national labour law. A decision as to whether this is actually the case falls within the competence of the national legal authorities.

2.1.3. It follows that the interpretation of the term 'employee' in the new Directive must be the same as that provided by the European Court of Justice for the 1977 Directive.

### 2.2. *Definition of transfer*

2.2.1. The European Court of Justice has given a wide interpretation to the use of the term 'transfer' in the 1977 Directive.

2.2.2. Thus, the Commission proposes, in the light of Community case law, that the new definition of 'transfer' should cover any transfer of undertakings, businesses or parts of businesses from one employer to another.

2.2.3. This new definition is both more explicit and more exhaustive.

2.2.4. The Committee believes that, for greater clarity, it should be specified that the Directive applies to all transfers, as detailed above, which affect workers.

### 2.3. *The distinction between 'economic entity' and 'activity'*

2.3.1. The second sub-paragraph of Article 1(1) of the proposal provides for a distinction between the 'transfer of an economic entity which retains its identity' and the 'transfer of an activity of an undertaking, business or part of a business'. This distinction is not to be found in the 1977 Directive.

2.3.2. The reference to 'economic entities which retain their identity' occurs consistently in the Court of Justice's case law. According to the Court of Justice, the decisive criterion for establishing, for the purposes of the 1977 Directive, whether there is a transfer, is that the economic entity retains its identity, taken to mean a self-contained set of elements pursuing a specified economic objective, even where the activity is an ancillary one.

2.3.3. The Commission's proposed distinction between 'economic entity' and mere 'activity' is difficult to interpret. Moreover, there seems to be no clear legal basis for not recognizing the Court of Justice's case law.

2.3.4. From a legal standpoint, the distinction is ambiguous, and it will require further interpretation by the Court of Justice in order to make a clear distinction between 'economic entity' and mere 'activity'. The Committee wonders, for example, which designation will cover contracting out of services.

2.3.5. Obviously there will be much doubt in interpreting the new provision for 'the transfer of only an activity of an undertaking, business or part of a business' and, ultimately, it will always be left to the judge to clarify the matter.

2.3.6. Thus the proposal could be interpreted as a step backwards compared to the 1977 Directive, since it would once again bring into question issues which seemed to have been already resolved from a legal point of view.

2.3.7. In short, in contrast with its declared aims (safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of businesses), the proposal undermines employees' rights in this respect.

### 2.4. *Applying the Directive to public and private undertakings*

2.4.1. The Committee endorses the application of the Directive to both public and private undertakings.

### 2.5. *Applying the Directive to undertakings engaged in non-profit making activities*

2.5.1. In the absence of any explicit provision in the 1977 Directive, the Court of Justice has ruled that an entity may be engaged in economic activity and be regarded as an undertaking for the purposes of Community legislation even if it is not operated for gain.

2.5.2. The proposal extends the scope of the Directive to include undertakings engaged in non-profit making activities.

2.5.3. The Committee endorses this extension.

2.5.4. Nevertheless, given the differences in Member State legislation, the Committee feels that it would be expedient to specify that the Directive also applies to the cooperative sector.

## 2.6. *Applying the Directive to sea-going vessels*

2.6.1. The 1977 Directive does not apply to sea-going vessels.

2.6.2. The proposal also extends the safeguarding of employees' rights to the crews of seagoing vessels. However, for practical reasons, and in view of the special nature of sea-going employment, it gives Member States the power not to apply Section III (information and consultation) of the Directive.

2.6.3. The proposal is most certainly a considerable improvement on the 1977 Directive; it should be said, however, that this option, which is designed to provide greater flexibility for the marine navigation sector, nevertheless constitutes a departure from the principle that all workers, including the crews of sea-going vessels, must enjoy the same rights.

## 2.7. *Extension of the Directive to part-time, fixed duration and temporary employees*

2.7.1. The 1977 Directive makes no reference to part-time, fixed duration and temporary employees.

2.7.2. The scope of the proposal is explicitly extended to include these categories.

2.7.3. The Committee endorses this.

## 2.8. *Definition of representatives of employees*

2.8.1. In certain Member States, some people who sit on company administrative, governing or supervisory bodies do so as employees' representatives. The 1977 Directive excludes them from the definition of 'representatives of the employees'.

2.8.2. The proposal for a Directive quite rightly makes no reference to this exclusion.

2.8.3. It would, however, be wise to include in the definition of 'representatives of the employees', a reference to the recent Council Directive 94/45/EC of

22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

2.8.4. Furthermore, it is obvious that this reference could not be included in the proposal for a Directive, since the proposal (8 September 1994) predates the Directive (22 September 1994).

## 2.9. *Joint liability of transferor and transferee*

2.9.1. The 1977 Directive gave Member States the option of providing for the joint liability of transferor and transferee.

2.9.2. The new proposal obliges Member States to incorporate provisions for joint liability of transferor and transferee into national law, and introduces a twofold limitation of this liability.

2.9.3. Whilst appreciating the Commission's efforts in this direction, the Committee expresses its concern regarding this twofold limitation.

## 2.10. *New provisions in insolvency situations*

2.10.1. The 1977 Directive includes no specific provisions for the transfer of undertakings, businesses or parts of businesses involving insolvency proceedings.

2.10.2. The proposal's new provisions on insolvency situations are a welcome attempt to introduce an element of flexibility.

2.10.3. However, these new provisions do not seem to eliminate completely the fraudulent use of bogus liquidation proceedings.

2.10.4. Furthermore, the provision for Member States to allow employers and employees' representatives to change the conditions of employment by an agreement concluded as a means of ensuring the survival of the undertaking, introduced in Article 4(3) of the proposal, does not seem to provide adequate employment protection, and could undermine the conditions of employment.

2.10.5. The power to change the conditions of employment could give rise to genuine disparities between employers and employees. The latter could in fact be faced with the choice of either accepting a pay-cut or seeing the closure of the firm.

2.11. *The need to refer to Council Directive 92/56/EEC in insolvency situations*

2.11.1. The proposed exclusions to the application of the new Directive in insolvency situations must not, however, undermine employees' rights.

2.11.2. The Committee therefore believes it necessary to include, in the provisions on transfers related to insolvency situations, a specific reference to Council Directive 92/56/EEC of 24 June 1992, amending Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies. This would afford better protection for employees, and give them the cover provided for in collective redundancies.

2.12. *Status and functions of the employees' representatives*

2.12.1. The Committee believes that the status and functions of the employees' representatives in transfer cases are adequately preserved.

2.13. *The transnational dimension of information and consultation*

2.13.1. The transnational dimension of information and consultation does not seem to be adequately developed.

2.13.2. Furthermore, the Committee emphasizes the need for a provision on confidentiality making it possible to withhold sensitive financial information or communicate it on a confidential basis, in accordance with current rules and practices in the Member States.

2.13.3. The Committee therefore believes that the provisions on information and consultation should include a specific reference to Council Directive 92/56/EEC of 24 June 1992, amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, and Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

2.14. *Derogation on the obligation to inform and consult for certain categories of undertakings or businesses*

2.14.1. The proposal allows Member States to limit the obligation to inform and consult to certain categories of undertakings or businesses.

2.14.2. Consequently, for the purposes of the Directive, undertakings and businesses which normally employ less than 50 workers or which do not fulfil the workforce size thresholds for the election or nomination of a collegiate body representing the employees, could be excluded from the obligation to inform and consult, which the transferor and the transferee are normally required to comply with.

2.14.3. The Committee does not endorse this option. The Committee also regrets the fact that the Directive makes no reference to the retention of more favourable Member State legislation in this area.

2.15. *More favourable provisions*

2.15.1. The proposal gives Member States the power to promote or allow collective agreements or agreements between social partners which are more favourable to employees.

2.15.2. The Committee endorses this addition.

2.16. *Procedures for non-compliance with the requirements of the new Directive*

2.16.1. The proposal requires Member States to introduce into their national legislation such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from the new Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

2.16.2. The Committee endorses this addition.

3. **Suggestions for concrete solutions to the problems posed by the new Directive**

3.1. *The recitals*

3.1.1. The Committee would delete the seventh recital.

3.2. *Article 1*

3.2.1. The Committee would add the following phrase to the first subparagraph of Article 1(1): 'and which affects workers.'

3.2.2. The Committee would amend the second subparagraph of Article 1(1) as follows:

'For the purposes of this Directive, the transfer of an undertaking, business or part of a business shall be deemed to occur when there is a transfer of an economic entity which retains its identity'.

3.2.3. The Committee would add the following to Article 1(5):

'provided that employees enjoy protection which is at least equal to that provided for in Council Directive 92/56/EEC of 24 June 1992 on collective redundancies'.

### 3.3. Article 2

3.3.1. The Committee would add the following to Article 2(1)(c):

'or by Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees'.

### 3.4. Article 4

3.4.1. The Committee would amend Article 4(5) as follows:

'Without prejudice to paragraph 2 of this Article, where the agreement referred to in paragraph 3 is not concluded, the Member States may confer on the competent judicial authorities the power to alter or terminate contracts of employment or employment relationships existing on the date of a transfer effected in the framework of insolvency proceedings referred to in Article 3(4) to ensure the survival of the undertaking, business or part of a business, provided that the employees enjoy protection which is at least equal to that provided for by Council Directive 92/56/EEC of 24 June 1992 on collective redundancies'.

### 3.5. Article 6

3.5.1. The Committee would add a further subparagraph to Article 6(1) as follows:

'When applying the present Directive in the context of information and consultation, consideration shall be given to Council Directive 92/56/EEC of 24 June 1992, amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies and Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees'.

3.5.2. The Committee would then add a further subparagraph to Article 6(1) as follows:

'Member States may grant the transferor and transferee the right to withhold sensitive financial information or communicate it on a confidential basis, in accordance with current rules and practice in the Member States.'

3.5.3. The Committee would add a second paragraph to Article 6(4), to read as follows:

'A Works Council shall be established in Community-scale undertakings for the purposes of informing and consulting employees, prior to any possible transfer, on any measures envisaged which might affect their interests, in keeping with the provisions of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council'.

3.5.4. The Committee would delete Article 6(5).

3.5.5. The Committee would add a further paragraph after the last paragraph of Article 6, as follows:

'The provisions of this Article shall be without prejudice to the application of more favourable provisions for employees, as currently enshrined in individual Member State legislation.'

Done at Brussels, 29 March 1995.

*The President*  
*of the Economic and Social Committee*  
Carlos FERRER

## APPENDIX I

## to the Opinion of the Economic and Social Committee

The following members, present or represented, voted for the Opinion:

Mr/Mrs/Miss: ABEJÓN RESA, d'AGOSTINO, ANDREWS, ATTLEY, BAEZA SANJUAN, BELABED, BERNARD, BETELU BAZO, BLESER, BORDES-PAGES, BRIESCH, van den BURG, Vasco CAL, CARLSLUND, CARROLL, CASSINA, CEBALLO HERRERO, CHAGAS, CHEVALIER, CHRISTIE, COLOMBO, DANTIN, DECAILLON, DELAPINA, van DIJK, DRIJFHOUT-ZWEIJTZER, DRILLEAUD, DUNKEL, ENGELEN-KEFER, ETTL, ETTY, EULEN, FERNANDEZ, FORGAS I CABRERA, FREEMAN, GEUENICH, GIRON, GRUSELIN, HAAZE, HAGEN, HERNANDEZ BATALLER, JENKINS, KANNISTO, KARGAARD, de KNEGT, KONITZER, KOOPMAN, KORYFIDIS, LAUR, LEMMETTY, LIVERANI, LÖNNEBERG, LYONS, MADDOCKS, MARGALEF i MASIA, MASUCCI, MAYAYO BELLO, MENGOZZI, MOLINA VALLEJO, MUÑIZ GUARDADO, NIELSEN B., NYBERG, OLAUSON, PAPAMICHAÏL, PE, PELLARINI, PICKERING, PIETTE, QUEVEDO ROJO, REBUFFEL, REUNA, ROSSITTO, RUPP, SÁNCHEZ MIGUEL, SANDERSON, SANTILLÁN CABEZA, SANTOS, SCHMITZ, SCHUNK, von SCHWERIN, SEPI, SEQUEIRA, STRÖM, TIXIER, TSIRIMOKOS, TÜCHLER, VINAY, VOGLER, WAHROLIN, WESTERLUND, WILMS, WRIGHT, ZARKINOS, ZÖHRER, ZUFIAUR NARVAIZA.

The following members, present or represented, voted against the Opinion:

Mr/Mrs/Miss: ANDRADE, ASPINALL, BAGLIANO, BARROS VALE, BEALE, BENTO GONÇALVES, BERNABEI, BOUSSAT, BREDIMA-SAVOPOULOU, BROOKES, BUNDGAARD, BURANI, BURKHARD, CAVALEIRO BRANDÃO, CONNELLAN, DENKHAUS, DE NORRE, DONOVAN, FARNLEITNER, FRERICH, FUCHS, GARDNER, GHIGONIS, GIACOMELLI, GIESECKE, GREEN, GUILLAUME, HAMRO-DROTZ, HAUSMANN, JOHANSEN, KALLIO, KAZAZIS, KIELMAN, KIENLE, KONTIO, KRITZ, LEHNHOFF, LEVITT, LINDMARK, LINSSEN, LITTLE, LÖW, LUNDH, LUSTENHOUWER, MAIER, MEGHEN, MERCÉ JUSTE, MERIANO, MOBBS, MORELAND, MORGAN, MULLER, NIELSEN L., NOORDWAL, OSENAT, PARDON, PASOTTI, PELLETIER R., PEZZINI, PRICOLO, REGALDO, REGNELL, RODRÍGUEZ DE AZERO Y DEL HOYO, RODRÍGUEZ GARCÍA CARO, SANTIAGO, SARALEHTO, SCHLEYER, SEGUY, SIRKEINEN, SOLARI, STECHER NAVARRA, STOKKERS, STÖLLNBERGER, STRASSER, STRAUSS, THYS, VERHAEGHE, VEVER, WALKER, WHITWORTH.

The following members, present or represented, abstained:

Mr: ATAÍDE FERREIRA, LERIOS, de PAUL de BARCHIFONTAINE, PELLETIER Ch.

## APPENDIX II

## to the Opinion of the Economic and Social Committee

The following amendments, which received at least one quarter of the votes cast, were defeated during the discussion:

(COUNTER-OPINION)

Replace by the following:

'1. Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, was intended to provide for "the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded".

2. In broad legislative terms, there is no denying the social effectiveness of the protection secured by the Directive.

Any appraisal of the shortcomings and loopholes of the transfer Directive must take account of the internal market, the development of 'emergency law' to deal with the rescue of undertakings in economic difficulties, and the case law of the European Court of Justice, as well as the Commission's proposed revision of the collective redundancies Directive, to which the transfer Directive is closely related.

3. Accordingly, the Commission proposes to clarify the scope of the Directive as presently worded. To a large extent, this is to be done by following and consolidating the broader interpretation advocated in the case law of the European Court of Justice. The Commission also proposes certain other alterations, largely designed to foster and protect the interests of employees, namely in cases of insolvency proceedings, in public undertakings, non-profit making undertakings and sea-going vessels.

4. The Committee welcomes the Commission's move and considers that it does much to clarify the issue. It feels that the proposal taken as a whole is wellbalanced, although certain reservations with regard to specific points may be warranted.

5. In order to further the Commission's declared aim of clarification, and in view of the generally negative response to the case-law solution to the "Schmidt" case, the Committee feels that the proposal would be significantly improved if Article 1 were to include the following:

"...

The transfer of an economic entity which retains its identity, taken to mean a set of independently organized resources, with a view to pursuit of an economic activity, whether essential or ancillary, shall be deemed to be a transfer within the meaning of this Directive.

The following shall be presumed not to be a transfer within the meaning of this Directive, unless the conditions set out in the preceding subparagraph are proved to be met:

- recourse by an undertaking to an external supplier for an activity previously performed by the undertaking itself;
- change of supplier, where the employer already has recourse to an external supplier for an activity;
- resumption, by the undertaking itself, of an activity previously performed by an external supplier."

#### *Result of the vote*

For: 84, against: 99, abstentions: 2.

#### **Point 2.2.2**

Add after last sentence:

'From this definition should be excluded the situation when the employer is transferring the work to a contractor and also the situation when such a contract is transferred to a subcontractor.'

#### *Reasons*

The Commission has stated that the directive should make it possible for an employer to transfer a single activity from one employer to another. This follows from the expression in the directive that there is a difference between the transfer of entities and the transfer of activities. This method, however, could lead to new difficulties, in particular when it comes to the separation of these definitions.

#### *Result of the vote*

For: 76, against: 88, abstentions: 4.

#### **Point 2.2.4**

Delete.

#### *Reasons*

This is not the intention of the Directive nor should it be.

#### *Result of the vote*

For: 70, against: 94, abstentions: 2.

**Point 2.6.3**

Delete this paragraph and substitute it with the following text:

'The Committee welcomes the clause of Article 1(4) giving Member States the power not to apply Section III of the Directive to sea-going vessels. It is regrettable, however, that the recognition of the maritime sector's particular characteristic is not acknowledged in relation to the Directive as a whole as was the case in the 1977 Directive.'

*Reasons*

The Draft Directive is land orientated and seems to ignore the special characteristics prevailing in the maritime transport sector.

A ship is much more in the nature of an asset than of an undertaking and the buying and selling of such assets is very much part of the normal commercial activity of many shipping companies.

Unlike a land-based situation, an individual ship does not have a regular and stable complement of personnel. The need for regular leave relief means that, either a company's seafarers are permanently employed for deployment between a number of ships operated by it, or they are employed only for a specific voyage on a particular ship for an uninterrupted period on a specific ship. In the first case, in the event of a sale, the seafarers serving on the ship at the time would normally retain their employment with the company and be deployed on other ships. However, in the other circumstances if the ship is sold, there will be a termination of employment, but this amounts to no more than the bringing to an earlier end a short-term contract of employment. If the voyage is terminated unexpectedly early by the sale of the ship, or if the ship were sold abroad, financial compensation would be payable to the seafarers, either as a result of legislation or collective agreements, and they would be repatriated.

This situation is even more important when a ship is sold abroad. Unlike a land-based industrial unit, when a ship is sold to foreign owners it will be subject to an entirely different legislation of the new flag state. Such legislation could be very different in the areas of crew nationality, crew qualifications and manning provisions.

If merchant vessels were to be subject to Section II of the Directive, it would be illegal for dismissals to take effect when they were sold. As a result the purchasing company would be uncertain as to whether and to what extent it would be subject to claims arising from the former crew. A situation could well arise whereby the new owner would seek compensation from the previous owners for having to retain their crew. The end result would be to discourage the purchase of EU flag ships, particularly by foreign shipowners, reduce their value and damage safety by making it more difficult for a purchaser to man a ship with its own crew members.

The practical employment arrangements evident in the shipping industry reflect the fact that a ship is a uniquely mobile asset. There needs to be a legal regime in place which meets such particular characteristics. To avoid the adverse consequences described above, a full exclusion for shipping is considered essential.

*Result of the vote*

For: 65, against: 96, abstentions: 7.

**Point 2.8.3**

Delete.

*Reasons*

This is not necessary since the Directive 94/45/EC stands by itself and will apply only where such legislation is created.

**Point 3.3.1**

Delete.



*Reasons*

Same as 2.8.3.

*Result of the vote*

For: 40, against: 96, abstentions: 19.

**Point 2.10**

Add new point:

'It is essential that where an enterprise becomes insolvent that every effort should be made to save it as an entity and therefore in considering Article 4 reference should be clear that Article 1(5) be amended so that it should apply to the whole text of the Directive when insolvency proceedings are enacted providing employees are protected under Directives 92/56/EEC on collective redundancies and 80/987/EEC on insolvency protection.

In the text of the Opinion where it refers to Directive 92/56/EEC on collective redundancies should be added after "and Council Directive 80/987 on insolvency".'

*Reasons*

Self explanatory.

*Result of the vote*

For: 43, against: 98, abstentions: 17.

**Point 2.10.4**

Should be deleted.

*Reasons*

The survival of a company in distress is a common interest for the employees and the employers. One option for the employees is to accept less favourable conditions of employment.

**Point 2.10.5**

Delete.

*Reasons*

That paragraph should be deleted as a consequence of the suggested change.

*Result of the vote*

For: 38, against: 97, abstentions: 4.

**Point 2.14.3**

Amend the first sentence to read:

'The Committee supports this proposal.'

Delete the second sentence completely.

*Reasons*

The arguments of the Commission for the suggested change should be considered. It is of particular importance that the rules will not put too heavy liabilities on small companies.

*Result of the vote*

For: 68, against: 102, abstentions: 7.

The following paragraph of the Section Opinion was deleted after an amendment was adopted during the debate:

**Paragraph 1.1.3**

'The Directive has been interpreted in different ways by the ECJ which has meant that it has not been possible to implement into national practice or legislation. In addition the existing Directive is unduly rigid, hinders the development of good business practice and competition and has had a damaging effect on the prospects of rescuing insolvent business. The fact that a considerable number of references have been made to the ECJ by national courts seeking preliminary ruling is itself evidence that the scope and application of the existing directive is not clear. This is damaging to both employees and business.'

*Result of the vote*

For: 81, against: 60, abstentions: 8.

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**APPENDIX III****to the Opinion of the Economic and Social Committee**

Following the vote by name on the whole text, the Small Business Category of the ESC made the following declaration (cf. Rule 47 of the Rules of Procedure):

'The Small Business Category of the ESC welcomes the European Commission's proposal to amend Directive 77/187 relating to the safeguarding of employees' rights in the event of transfers of undertakings. The ESC representatives of small and medium-sized businesses believe that the Commission is right to propose now to exclude from the scope of the Directive the transfer of only one activity of a business. These ESC members think it must also be quite clear that the Commission seeks to ensure that the Directive does not apply to the contracting-out of services.

In addition, the Directive should not apply to temporary agency staff, since they have no contract of service with the business involved in any form of transfer.

Finally, the ESC small business representatives think that firms of a limited size, for instance, those with less than fifty employees, should be exempted from the obligation to inform and consult employees, since the existing informal employer-work relations in such firms are far more suitable than formal statutory consultation machinery, which does not seem to work in smaller firms.'

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