



ETUC's answer to the questionnaire of the Member States and the social partners at community level on the effect of the provisions of Council Directive 2001/23.

1. SCOPE AND DEFINITIONS

A) Despite the increasing number of cross-border transfer of undertakings the transnational effects of the legislation on transfer of undertakings are not satisfactory yet.

Even though in some countries article 1.2 (ex. Denmark, Netherlands, Slovakia) of the directive is explicitly transposed, such provisions have not been used.

It is likely due to the fact that the scope is not clear. This might be the reason why some legislation does not even mention this paragraph in the national transposition law (Italy).

B) At large, the scope of the directive seems to be well defined even if difficulties in giving a single and coherent definition of “part” of enterprises persist. The differences in national legislations on the definition of “part of enterprise” can bring about to discrimination practices or elusive behaviors. It would also be an impediment to a transnational application of the measures protecting employees in case of a cross border transfer of enterprise.

C) Definitions of “part” of enterprises threaten the effectiveness of the measures of the legislations after the amendments provided in article 32 of the act d.lgs. 276/03 which leaves at the transferee and the transferor the possibility to decide how large is the part of the enterprise transferred, leaving them the power to influence the scope of the legislation.

D) In Denmark the protection of employees in the event of a change of employer in accordance with article 4 has been seriously eroded. The Industrial Court has thus, in a recent ruling, established that in the case of work submitted for tenders, the employer has the right to dismiss all employees since he or

she may not be certain of regaining the contract or certain that the transferee will take over the work in a way which is in accordance with the Act.

LO finds that it ought to be specified that the transferee is under an obligation to take over the employees to the extent that he or she lacks the human resources to perform the tasks at hand so that the transferee cannot be exempt from the scope of the Act simply by rehiring staff to perform these tasks.

We will also work to obtain a specification of the Act so that dismissals are only allowed once the future staff requirements have been specified.

2. SAFEGUARDING OF EMPLOYEES' RIGHTS

A) We have no precise data proving a relationship between exemptions and company surviving. We are aware that, normally, collective bargaining can provide solutions able to get companies out from crisis matching the economic needs of the company with a satisfactory level of protection of the employees, taking care of safeguarding employment level, even in derogation of the legal provisions. Of course, it must be evaluated case by case and the case law is significant in each country.

At large, we can affirm that where the collective bargaining exists, the current legislation shows a sufficient degree of efficiency and flexibility.

B) It should be clarified that the directive applies also if the employees of the undertaking or the part of the undertaking that is the object of the transfer, are not employed by the company acting as the transferor himself but by another company belonging to the same group of companies. Such a provision is desirable because of the fact that in many groups of companies most of the employees are legally employed by only one of the companies of the group (a personnel company) and deployed by this company to the other companies of the group.

3. INFORMATION AND CONSULTATION

A) If the aim is to enhance collective bargaining as means to preserve worker rights there is a need to preserve the principle of collective exercise of information and consultation rights. Even though, on one hand, we are fully convinced that, in the absence of employee representatives, employees must be directly informed as provided in article 7.6, nonetheless the employees must always be able to be properly consulted. And it is self-evident that employees can only reasonably deliver their opinion

though their representatives. In the case in point, it would thus opportune to extend the right to be informed to the trade unions operating on the territory on which the employees of both transferor and transferee are employed.

This provision is even more urgent in EU 25 as we are aware of how large is the number of the employees unable to appoint their representatives on the workplace in the new member states. The rate of workplaces without autonomous representative bodies is so low that would be *naïve* to charge it on the will of the employees.

ETUC want to forward to the European institutions those complains we daily record from our member organizations which alert that the aim of the directive can be hardly achieved throughout Europe. In order to avoid discrimination it would be desirable to include local trade unions (or local offices of national trade unions) as addressee of the information provided in article 7.6.

B) Concerning article 7.3, our Danish affiliates alerts on the fact that according to the Danish rules, the provision is only sanctioned by the possibility to lay on information against the undertaking with a view to imposing a fine on the undertaking. As a fine cannot be imposed on the public authorities, the provision is presumably under-implemented.

4. GENERAL

A) Our member organizations more and more complain the fact that much of the restructuring events are now driven by mergers and acquisitions following the transformation of capital markets and the intervention of the new mechanism of corporate finance and credit instruments allowing for financial take over.

The Transfer of Undertakings Directive covers only transfers from one employer to another employer. It is generally accepted that the directive, which applies only where there is a transfer to another employer, fails to achieve its objective when the undertaking is transferred through a share purchase. The employees are under contract with the company. The transfer of shares in the company does not legally alter their employment status with the company. So although there is *effectively* a change of ownership - in that the company is now owned by another person - the transaction falls outside the scope of the directive. As matter of the fact we deem certain aspects of this directive out-of-date.

European unions are afraid by the fact that provisions requiring a transfer formally to engage another employer is a positive obstacle to the operation of the *acquis communautaire* in social field.

But the main aim of the directive is to safeguard the employees' rights. It means that (also looking at the ECJ case law) the quality of the transaction should be secondary respect the fact that employees are actually affected by the transaction.

Some policies of the directive must be extended to cover changes in the company ownership as such events should not change arrangements regarding, for example, information and consultation of workers' representatives. Even though the jurisprudence and the recent amendments in the Transfer of Undertaking Directive tend to extend the scope of the directive in order to cover the employees when the "quality" of their relationship with the employers change, the legal construction is far from granting rights to the employees whose company change the owner because of a financial transaction on the share market.

And our experience shows that such events come along with deep restructuring of the company and again it put under threat vested rights of the employees in particular if they are the result of collective bargaining.

In principle, major changes in a company's structure due to financial movements may not be allowed to result in unilateral changes in the part of corporate governance concerning labour relations. Specifically, labour relations within a company are the result of a complex interplay of interests.

This being the case, the European Commission should strive, together with the social partners, to find suitable tools to make the labour relations system in the company neutral vis-à-vis the company's financial transactions. For the time being the Transfer of Undertaking Directive seems to be the closest measures to the case in point. The request is to extend some of the measures safeguarding employees' rights to the cases where the undertaking is "transferred" through a purchase of shares (for example article 3.1 and 2, article 6 and article 7).

B) A case pointed out by our Czech affiliates. Article 5.2(a) heavily needs a clarification. As to one opinion there are series of conditions: Article 5.1 stipulates that judicial liquidation normally does not

involve transfer of undertakings. This is true except for selling whole enterprise or part of it by one contract as per Sec. 27a Judicial Liquidation and Reorganization Act. In that case Article 5.2(a) stipulates claims of employees shall not be transferred to a transferee only in case employees are provided for protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, and, or alternatively Article 5.2(b). In Czech law there is no such protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC.

As to opposite opinion where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor in the Czech Republic (under the supervision of a competent public authority), does not exist in accord with wording of the Article 5 such a specific provision providing for (non obligatory) regulation contained in Article 5.2. In Article 6 the autonomy of worker representatives should be clarified.

C) Finally we would like to draw your attention on the fact that the questionnaire is incomplete as it does not cover all the articles of the directive and namely it neglects some aspects that, on the contrary, ETUC considers extremely important for the effectiveness of the employees' rights. We specifically refer to article 2.2, article 6 and article 7.1 and 7.2.

This omission seems further more inopportune if we consider that such measures could not be investigated in the previous report on the implementation status of directive 77/187 as it was issued in 1992 well before the directive was amended.