FIRST PHASE CONSULTATION CONCERNING CROSS BORDER TRANSFERS OF UNDERTAKINGS, BUSINESSES, OR PARTS OF UNDERTAKINGS OR BUSINESSES

a) Do the social partners agree with the above analysis on the issue of cross-border transfers?

The ETUC agrees with the Commission's analysis in sections 2 and 3. It is very clear from Article 1.2 of the transfer of undertaking Directive that the same rules apply to a transfer whether cross border or domestic. As the Commission rightly points out in section 6, the law applicable to the employment contract does not change merely because the transferee is governed by a different national law. However, the ETUC does not agree with the analysis in section 7. The Commission introduces a distinction between a change of place of work preceding, following or simultaneously with the transfer of undertakings. The ETUC considers that this artificial division does not constitute an accurate reading of the Directive and leads to unnecessary and dangerous confusions. The only relevant distinction to be operated within the framework of the transfer of undertakings Directive is whether or not the transfer constitutes the reason for a variation of employment terms and conditions.

Indeed, the object of the Directive 2001/23/EC is the safeguarding of employees' rights in the event of a transfer. According to Article 3.1 of the Directive, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer shall be transferred. In most Member States, the place of work is considered as a substantial part of an employment relationship.

It follows that an employer cannot decide to change the place of work solely for the reason of the transfer. Any such relocation shall therefore be deemed void. The logical conclusion is that the law applicable is the one that governed the employment relationship before the transfer, as determined by the Rome Convention. In other words, the rights acquired under the transferor's law are to be preserved in the case of cross border transfers. In that sense, the solution outlined by the Commission in the case of a cross border transfer without a change in the place of work (section 6) remains valid for all types of cross border transfers.

The issue of the timing of the attempted change of the workplace is irrelevant as long as the variation in employment conditions is linked to the transfer. The ETUC stresses that allowing different laws to apply depending on whether the place of work was changed before, simultaneously or after the transfer is contrary to the spirit of the Directive as this would promote forum shopping to the detriment of the worker.

---

1 In Daddy Dance Hall the ECJ held that an employment relationship “may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment” C 324/86 at paragraph 17
On the other hand, changes of the place of work which are clearly independent from the transfer itself should be treated as a separate issue. With this regard, the ETUC is also satisfied that the choice of law rules devised in the Rome Convention, soon to be transposed in the Rome I Regulation, provide an adequate protection to workers. These rules are designed in such a way that, in the absence of choice, the applicable law is in principle the one of the country where the workplace is situated unless it appears from the circumstances that the contract it is more closely connected with another country. In case of choice of law in the contract of employment, an employee can always invoke mandatory rules of law of the place of work. In general, such rules will be applicable as soon as they are more favourable to the employee.

The ETUC does not share the Commission's analysis with regard to choice of rules applicable to collective labour law. In the member states where the collective agreement is regarded as a civil law contract, Articles 3 and 4 of the Rome Convention have vocation to apply. In some member states, such as France, collective agreements have a strong public law connection, due to the extension of the collective agreement to give an erga omnes effect. In these member states the collective agreement is regarded as public law legislation, which means that choice of law rules will not be considered applicable.

b) Is it necessary or advisable to amend Directive 2001/23 in order to deal with the issue of cross border transfers with a change in the place of work?

As set out under a), the ETUC does not believe that cross border transfers should be subject to different rules than domestic transfers. In particular, the key provision in the acquired rights Directive is to ensure that the rights acquired under the transferor's law are not changed by reason of the transfer. With this regard, the ETUC would oppose any revision of the Directive that would weaken in any way the protection afforded by the existing provisions.

However, the ETUC believes that there is room to adapt the current information & consultation provisions to the specificities of cross-border transfers. In particular, employees' representatives at national level should have the right to go for transnational contacts and meetings with their colleagues even beyond EU borders if necessary.

On a separate issue, the ETUC is satisfied with the current conflict of law rules as determined by the Rome Convention. However, concerned that the future Rome I Regulation will not be applicable to the UK and Denmark, the ETUC would welcome some clarifications from the Commission with regard to the interaction between the Rome Convention and Rome I and whether consistency between the two systems will be ensured.

With regard to the conflict of jurisdiction rules, the ETUC is still considering its position and might submit its views in the framework of the pending revision of the Brussels I Regulation.
c) Is any other type of Community action in this field necessary or advisable?

The ETUC is of the opinion that the transfer of undertakings Directive is one of the cornerstones of European labour law. The last revision of the Directive dates back to 1998. In a context of increasing corporate mobility, it is important that the efficiency of the Directive is comprehensively reviewed with a view to adjust its provisions to new developments. With this regard, the ETUC is concerned that the Commission is neglecting key aspects in its consultation:

- **Scope**

Although total empirical evidence of cross border cases remains limited, 109 in 2005, a sharp increase of cross border cases between 2001 (10) and 2005 (109) must be noted. The ETUC agrees with the Commission that it is clear that production factors can be expected to become increasingly mobile in a context influenced by globalisation, enlargement and consolidation of the internal market.

The Commission notes that most of these transactions do not involve the transfer of an undertaking within the meaning of the Directive. The ETUC urges the Commission to gather precise and comprehensive data on this issue so that the social partners can take an informed position in view of a possible adjustment of the transfer of undertakings Directive to new economic realities.

The ETUC deplores that an employee who is the subject of the transfer under the Directive is better off than his counterpart in a similar situation but where the legal personality of the company has not been changed (i.e. in the case of a shares sale). This is particularly worrying in a context of increasing financialisation of investments, as aggressive job cutting and frozen wages are often the price to pay for the excessive debt burden undertaken by a leverage buy out. The ETUC stresses that the transfer of cost and risks to the workers runs against the spirit of the transfer of undertakings Directive.

Consequently, the ETUC renews its call for a revision of the scope of the Directive so that transfers through a change of ownership can also be covered. In its 2007 report, the Commission considered that such change is not justified at this stage as Directive 2002/14/EC makes such changes subject to appropriate information and consultation procedures. However, the ETUC reminds the Commission that one of the important differences between the information & consultation Directive and the transfer of undertakings Directive is that the latter also prohibits transfer connected dismissals and provides for a transfer of rights and obligations arising from the employment relationship from transferor to transferee.

- **Ironing out the protection**

The ETUC appreciates, and does not call into question, that the transfer of undertakings Directive intends to harmonise minimum standards only. However, the ETUC is concerned that key elements of protection remain optional which leads to differentiated treatment of workers across Europe.

---

2 COM (2007) 334 final
Consideration should be given to rendering mandatory the following options, amongst others:

- joint and several liability (Article 3.1 alinea 2)
- continued effect of collective agreements (Article 3.3 alinea 2)
- transfer of occupational pension entitlements (Art. 3.4.a). This would encourage cross border mobility.
- protection against dismissal of all workers (Art. 4.1 alinea 2)
- no threshold for information and consultation requirements (Art. 7.5)

d) Should the collective aspects and the individual aspects of the employment relationship be treated separately?

In view of the answer to question a), the ETUC sees no reason to separate collective and individual aspects of the employment relationship.

e) Should cross-border transfers with a change in the place of work outside the EEA be subject to specific treatment?

Article 1.2 of the Directive clearly extends the scope of the Directive to transfers outside the EEA. The 'triggering' factor for the application of the Directive is the country where the transferor is situated. The location of the transferee is therefore irrelevant.

However, the Commission notes that given the differences in the legal, economic and social environment are likely to be substantial, it could be argued that a transfer outside the EEA would not maintain the identity of the economic entity. In this case, the protective rules of the Directive would not apply.

The ETUC believes that differentiated treatments depending on the transferee's residence would betray the spirit of the Directive. It would also amount to unjustified and unacceptable discrimination amongst European workers. According to the extensive case law of the ECJ, several factors must be taken into account to determine whether a transfer has taken place. The residence of the transferee is not one of them. It must therefore be deduced that relocation of the company outside and inside the EU/EEA should be subject to same rules.

The ETUC would welcome clarifications in this sense.

ETUC, 15 October 2007