

# Employees' rights in the event of transfers of undertakings

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Directive 2001/23/EC of 12 March 2001

# Background and objectives

- The Social Action Programme of 1974-76:
  - ✓ full and better employment
  - ✓ improvement of living and working conditions
  - ✓ greater participation in the economic and social decisions of the Community. under this subheading two specific proposals: directive on collective dismissals and the directive on transfer of undertakings

## Background and objectives (continued)

- First draft dating from 1974
- ✓ Justification: the rapid increase in the number of concentrations and the fact that MS legislation did not always take into account the interests of the workers
- ✓ Primary aim of the proposed directive: to ensure that employees do not forfeit essential rights and advantages acquired prior to a change of employer

# Background and objectives (continued)

- Economic and Social Committee and European Parliament fully support the proposal
- New proposal of 1975 with minor changes
- The Council introduced further amendments. The Directive is less specific about the possible adverse effects on workers' living and working conditions. Now the main justification is that the differences in MS legislations may have adverse effects on the functioning of the common market

## Background and objectives (continued)

- In 1994 new Commission proposal to incorporate clarifications made by the case-law of the ECJ and in particular transfers made in insolvency proceedings
- After consultation of the European Parliament and the Economic and Social Committee, new proposal of 1997

# Scope of the Directive

- **Which countries?**
  - ✓ The undertaking to be transferred is situated in the EU or the EEA
- **Which kind of undertakings?**
  - ✓ Economic entities: organised groupings of resources having the objective of pursuing an identifiable economic activity
  - ✓ Essential element: the entity is engaged in economic activities, i.e. that it provides goods or services on a market
  - ✓ Exclusions:
    1. Activities involving the exercise of public authority
    2. Administrative reorganisation of public administrative authorities
    3. Sea-going vessels
  - ✓ Any type of undertakings whether they are public or private and whether or not they are operating for gain

# Scope of the Directive (continued)

## ■ Which employees?

- ✓ Any person who, in the Member State concerned, is protected as an employee under national employment law
- ✓ Includes: 1. part time workers  
2. temporary workers
- ✓ Exclusions: 1. employees who have already left the undertaking on the date of the transfer  
2. employees engaged after the date of transfer

# Scope of the Directive (continued)

- **Which operations? Two conditions:**
  1. Change of employer
    - ✓ There must be a change, in terms of contractual relations, in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the entity
    - ✓ The transfer of ownership of most of the shares in a company or a change in the majority shareholder does not constitute a transfer of the undertaking

# Scope of the Directive (continued)

2. **Maintenance of the identity**
- ✓ type of undertaking or business,
- ✓ whether or not tangible assets such as buildings and movable property are transferred,
- ✓ the value of intangible assets at the time of transfer,
- ✓ whether or not the majority of employees are taken over by the new employer,
- ✓ whether or not the customers are transferred,
- ✓ the degree of similarity between the activities carried on before and after the transfer,
- ✓ the period, if any, for which those activities were suspended

# Scope of the Directive (continued)

- **Special consideration of the type of activity**
- ✓ Production activities: a transfer of assets is necessary
- ✓ Services:
  1. activities based essentially in manpower (cleaning , surveillance)
  2. activities based essentially on assets (transport, catering)

# Scope of the Directive (continued)

- **The nature of the transaction at the origin of the transfer**
- ✓ **irrelevance of the means through which the transfer takes place: contract, unilateral act, a judicial decision or a law**
- ✓ **examples of transactions where the Court held that a transfer had taken place**

# Scope of the Directive (Examples of transfers continued)

- ✓ in the course of a procedure such as a 'surséance van betaling' (judicial leave to suspend payment of debts
- ✓ where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee
- ✓ where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee ;
- ✓ to the transfer of an undertaking pursuant to a lease-purchase agreement and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision;
- ✓ where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party

# Scope of the Directive (Examples of transfers continued)

- ✓ to a situation in which a public authority decides to terminate the subsidy paid to a foundation, which is its only source of income, as a result of which its activities are fully and definitively terminated, and to transfer it to another foundation with a similar
- ✓ to a situation in which one entrepreneur, by a contract, assigns to another entrepreneur responsibility for running a facility for staff, which was formerly managed directly;
- ✓ to a situation in which an undertaking holding a dealership for a particular territory discontinues its activities and the dealership is then transferred to another undertaking which takes on part of the staff and is recommended to customers, without any transfer of assets;
- ✓ in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade;

# Scope of the Directive (Examples of transfers

continued)

- ✓ where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out.
- ✓ where an undertaking which used to entrust the cleaning of its premises to another undertaking decides to terminate its contract with that other undertaking and in the future to carry out that cleaning work itself or trust that task to a third undertaking, if the new employer takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task;
- ✓ to a situation in which a company belonging to a group decides to subcontract to another company in the same group contracts in so far as the transaction involves the transfer of an economic entity between the two companies.

# Scope of the Directive (Examples of transfers continued)

- ✓ where a municipality, a legal person governed by public law operating within the framework of specific rules of administrative law, takes over activities relating to publicity and information concerning the services which it offers to the public, where such activities were previously carried out, in the interests of that municipality, by a non-profit-making association which was a legal person governed by private law;
- ✓ to a situation in which an entity operating services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of an administrative concession, to a private-law company established by another public body which holds its entire capital;
- ✓ to a situation in which a contracting authority which had awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, even where the second contractor has expressed the intention not to take on the employees of the first contractor.

# Consequences of a transfer

- **Transfer of rights and obligations to the transferee**
- ✓ What is transferred? All rights and obligations arising from the employment contract existing on the date of the transfer
- ✓ It takes place automatically by the mere fact of the transfer
- ✓ It may not be subject to the intention of the transferor or the transferee or the agreement of the employees

# Consequences of a transfer ( continued )

- **Protection against dismissal**
- ✓ Transfer does not in itself constitute grounds for dismissal either by the transferor or by the transferee
- ✓ But dismissals may take place for economic, organisational or technical reasons
- ✓ MS can withdraw this protection for certain specific categories of workers who are not protected against dismissal
- ✓ Employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful

# Consequences of a transfer ( (continued) )

- **Transfer of undertaking and collective agreement applicable**
- ✓ The transferee has to continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
- ✓ Member States may limit this period, provided it is not less than one year.

# Consequences of a transfer ( continued )

- **Transfer of undertaking and changes in working conditions**
- ✓ If before the transfer the national law allowed to amend the employment relationship to the detriment of the employee, the transferee will continue to have this right in the same terms as the transferor
- ✓ If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is regarded as having been responsible for termination of the employment contract or employment relationship

# Consequences of a transfer (continued)

- **Non-entitlement to waive the rights conferred by the Directive**
- ✓ The protection conferred by the mandatory provisions of the Directive is a matter of public policy: an employee cannot waive the rights conferred upon him by the Directive and these rights cannot be restricted, even with his consent

# Consequences of a transfer ( continued )

## ■ **Employee's right not to continue the employment relationship with transferee**

✓ In the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be.

✓ The Member States may provide, in particular, that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or employment relationship should be maintained with the transferor

# Consequences of a transfer ( continued )

- **Non-application of the Directive to benefits outside statutory social security schemes**
- ✓ Transfer does not cover employees' rights to old-age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes
- ✓ But Member States must adopt the measures necessary to protect the interests of employees and persons no longer employed in the transferor's business at the time of transfer

# Consequences of a transfer ( (continued) )

- **Transfers effected in the context of insolvency proceedings**
- ✓ MS are allowed not to apply art. 3 and 4 to insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority
- ✓ Articles 3 and 4 apply to other insolvency proceedings under the supervision of a competent public authority, in but some flexibility is allowed to MS as for certain debts and the possibility of alteration of the terms of the employment contract

# Consequences of a transfer ( continued )

- **Protection of the functions of the employees' representatives**
- ✓ if the business transferred continues to exist as a separate operating unit rather than being absorbed by a more complex structure ,the status and function of the representation of employees must be preserved
- ✓ if it does not, MS must take the necessary measures for the proper representation of the workers

# Information of workers

- **Who?** Both transferor and transferee
- **Whom?** the representatives of the employees affected by the transfer. If there are no workers' representatives, the employees concerned
- **Content of the information:**
  - ✓ the date or proposed date of the transfer,
  - ✓ the reasons for the transfer,
  - ✓ the legal, economic and social implications of the transfer for the employees,
  - ✓ any measures envisaged in relation to the employees
- **Moment**
  - ✓ the transferor, in good time before the transfer
  - ✓ the transferee, before his employees are directly affected by the transfer as regards their conditions of work and employment

# Consultation of workers

- **Who?** The transferor or transferee that envisage measures in relation to their employees
- **Whom?** the representatives of the employees concerned
- **When?** In good time
- **Aim?** With a view to reaching an agreement

Sanctions for not informing and/or consulting

- National law must provide for effective, proportionate and dissuasive sanctions in the event of the employer's failure to inform and consult the employee representatives