COUNCIL DIRECTIVE 98/50/EC

of 29 June 1998

amending Directive 77/187/EEC 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Parliament ([2]),

Having regard to the opinion of the Economic and Social Committee ([3]),

Having regard to the opinion of the Committee of the Regions ([4]),

(1) Whereas the Community Charter of the fundamental social rights of workers adopted on 9 December 1989 ('Social Charter') states, in points 7, 17 and 18 in particular that: 'The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. Such information, consultation and participation must be implemented in due time, particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers';

(2) Whereas Directive 77/187/EEC ([5]) promotes the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time;

(3) Whereas the purpose of this Directive is to amend Directive 77/187/EEC in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of undertakings in economic difficulties, the case-law of the Court of Justice of the European Communities. Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies ([6]) and the legislation already in force in most Member States;

(4) Whereas considerations of legal security and transparency require that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice; whereas such clarification does not alter the scope of Directive 77/187/EEC as interpreted by the Court of Justice;

(5) Whereas those considerations also require an express provision, in the light of the case-law of the Court of Justice, that Directive 77/187/EEC should apply to private and public undertakings carrying out economic activities, whether or not they operate for gain;

(6) Whereas it is necessary to clarify the concept of 'employee' in the light of the case-law of the Court of Justice;

(7) Whereas, with a view to ensuring the survival of insolvent undertakings, Member States should be expressly allowed not to apply Articles 3 and 4 of Directive 77/187/EEC to transfers effected in the framework of liquidation proceedings, and certain derogations from that Directive's general provisions should be permitted in the case of transfers effected in the context of insolvency proceedings;

(8) Whereas such derogations should also be allowed for one Member State which has special procedures to promote the survival of companies declared to be in a state of economic crisis;

(9) Whereas the circumstances in which the function and status of employee representatives are to be preserved should be clarified;

(10) Whereas, in order to ensure equal treatment for similar situations, it is necessary to ensure that the information and consultation requirements laid

([1]) OJ C 274, 1. 10. 1994, p. 10.
([2]) OJ C 33, 3. 2. 1997, p. 81.
([3]) OJ C 133, 31. 5. 1995, p. 13.
([4]) OJ C 100, 2. 4. 1996, p. 25.
([5]) OJ L 61, 5. 3. 1977, p. 26.
([6]) OJ L 48, 22. 2. 1975, p. 29. Directive as amended by Directive 92/56/EEC (OJ L 245, 26. 8. 1992, p. 3).

down in Directive 77/187/EEC are complied with irrespective of whether the decision leading to the transfer is taken by the employer or by an undertaking controlling the employer;

(11) Whereas it is appropriate to clarify that, when Member States adopt measures to ensure that the transferee is informed of all the rights and obligations to be transferred, failure to provide that information is not to affect the transfer of the rights and obligations concerned;

(12) Whereas it is necessary to clarify the circumstances in which employees must be informed where there are no employee representatives;

(13) Whereas the Social Charter recognises the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinion and creed,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/187/EEC is hereby amended as follows:

1. the title shall be replaced by the following:

'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 undertakings or businesses';

2. Articles 1 to 7 shall be replaced by the following:

'SECTION I

Scope and definitions

Article 1

1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

2. This Directive shall apply where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.

3. This Directive shall not apply to sea-going vessels.

Article 2

1. For the purposes of this Directive:

(a) 'transferor' shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) 'transferee' shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;

(c) 'representatives of employees' and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States;

(d) 'employee' shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

(a) of the number of working hours performed or to be performed,

(b) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (*), or

(c) they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.