COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 02.05.2000
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2000/0108 (CNS)

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 undertakings or businesses

(codified version)

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. In the context of a people's Europe, the Commission attaches great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him.

   This aim cannot be achieved so long as numerous provisions which have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules.

   For this reason a consolidation of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

2. On 1 April 1987 the Commission therefore decided to instruct its staff that all legislative measures should be codified after no more than ten amendments, stressing that this was a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they were responsible, to ensure that the Community rules were clear and readily understandable.

3. The Conclusions of the Presidency of the Edinburgh European Council (December 1992) confirmed this, stressing the importance of legislative codification as it offers certainty as to the law applicable to a given matter at a given time.

   It must be undertaken in full compliance with the normal Community legislative procedure.

   Given that no changes of substance may be made to the instruments affected by legislative codification, Parliament, the Council and the Commission have agreed, by an interinstitutional agreement dated 20 December 1994, that an accelerated procedure may be used for the fast-track adoption of codification instruments.

4. The purpose of this proposal [1] for the legislative codification 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 undertakings or businesses, is to undertake official codification of this type. The new directive will supersede the various directives incorporated in it [2]; their content is fully preserved, and they are brought together with only such formal amendments as are required by the codification exercise itself.

5. This legislative codification proposal was drawn up on the basis of a preliminary consolidation, in all the official languages, of Directive 77/187/EEC, and the instrument amending it, carried out by the Office for Official Publications of the European Communities, by means of the data-processing system referred to in the conclusions of the European Council meeting at Edinburgh. Although the articles have been given new numbers, the old numbering has been retained in the margin for ease of reference; the correlation between the old and new numbers is shown in a table set out in Annex II to the codified Directive.

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(1) Entered in the legislative programme for 2000.
(2) See Annex I, Part A of this Proposal.

Proposal for a

COUNCIL DIRECTIVE

of

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

98/50/EC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Having regard to the opinion of the Economic and Social Committee (2),

Having regard to the opinion of the Committee of the Regions (3),

Whereas

(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 undertakings or businesses (4) has been substantially amended (5). In the interests of clarity and rationality, should it therefore be codified.

(1) OJ C
(2) OJ C
(3) OJ C
(4) OJ L 61, 5.3.1977, p. 26.
(5) See Annex I, Part A.

(2) Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers.	1.	77/187/EEC (adapted)
(3) It is necessary 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.	
(4) Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced.	3.	
(5) 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'.	1.	98/50/EC
(6) In 1977 the Council adopted Directive 77/187/EEC to promote 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.	2.	(adapted)
(7) That Directive was subsequently amended 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 [1] and the legislation already in force in most Member States.	3.	(adapted)

[1] OJ L 48, 22.2.1975, p. 29. Directive replaced by Directive 98/59/EC (OJ L 225, 12.8.1998, p. 16).

(8) The Social Charter recognises the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinion and creed. (9) This Directive should be without prejudice to the time-limits set out in Annex I Part B within which the Member States are to comply with Directive 77/187/EEC, and the act amending it,	13.	98/50/EC

HAS ADOPTED THIS DIRECTIVE:

98/50/EC Art. 1.2

CHAPTER I

Scope and definitions

Article 1

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

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.

98/50/EC Art. 1.2

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, point 1 of Council Directive 91/383/EEC ([1]), or

(c) they are temporary employment relationships within the meaning of Article 1, point 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.

CHAPTER II

Safeguarding of employees' rights

Article 3

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

([1]) OJ L 206, 29.7.1991, p. 19.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

98/50/EC Art. 1.2

4. (a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

(b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).

Article 4

Article 4

1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. 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 shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

Article 5

Article 4a

1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).

98/50/EC Art. 1.2 (adapted)

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC [1];

and, or alternatively, that

(b) the transferee, transferor, or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, insofar as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph 2(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already existed in national law on 17 July 1998.

The Commission shall present a report on the effects of this provision before 17 July 2003 and shall submit any appropriate proposals to the Council.

4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive.

[1] OJ L 283, 20.10.1980, p. 23. Directive as last amended by the Act of Accession of Austria, Finland and Sweden.

Article 6

1. If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employees' representation are fulfilled.

The first subparagraph shall not apply if, under the laws, regulations, administrative provisions or practice in the Member States, or by agreement with the representatives of the employees, the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled.

Where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority), Member States may take the necessary measures to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees.

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the Member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice.

2. If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.

98/50/EC Art. 1.2

Article 5

CHAPTER III

Information and consultation

Article 7

1. The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:

— 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.

The transferor must give such information to the representatives of his employees in good time before the transfer is carried out.

The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

2. Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement.

3. Member States whose laws, regulations or administrative provisions provide that representatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees may limit the obligations laid down in paragraphs 1 and 2 to cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.

The information and consultations shall cover at least the measures envisaged in relation to the employees.

The information must be provided and consultations taken place in good time before the change in the business as referred to in the first subparagraph is effected.

4. The obligations laid down in this Article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.

In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such a breach occurred because the information was not provided by an undertaking controlling the employer shall not be accepted as an excuse.

98/50/EC Art. 1.2

Article 6

5. Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.

98/50/EC Art. 1.2

6. Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:

— the date or proposed date of the transfer,

— the reason for the transfer,

— the legal, economic and social implications of the transfer for the employees,

— any measures envisaged in relation to the employees.

CHAPTER IV

Final provisions

Article 8

Article 7

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.

Article 9

Article 7a

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

Article 10

Article 7b

The Commission shall submit to the Council an analysis of the effects of the provisions of this Directive before 17 July 2006. It shall propose any amendment which may seem necessary.

Article 11

Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 12

Directive 77/187/EEC, as amended by the Directive referred to in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States concerning the time-limits for implementation set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 13

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities.*

Article 14

This Directive is addressed to the Member States.

Done at Brussels,

For the Council,

The President

77/187/EEC *Article 8*

ANNEX I

PART A

Repealed Directive and its amending Directive
(referred to in Article 12)

Council Directive 77/187/EEC (OJ L 61, 5.3.1977, p. 26)

Council Directive 98/50/EC (OJ L 201, 17.7.1998, p. 88)

PART B

Deadlines for transposition into national law
(referred to in Article 12)

Directive	Deadline for transposition
77/187/EEC	16 February 1979
98/50/EC	17 July 2001

ANNEX II

CORRELATION TABLE

Directive 77/187/EEC	This Directive
Article 1	Article 1
Article 2	Article 2
Article 3	Article 3
Article 4	Article 4
Article 4a	Article 5
Article 5	Article 6
Article 6	Article 7
Article 7	Article 8
Article 7a	Article 9
Article 7b	Article 10
Article 8	Article 11
—	Article 12
—	Article 13
—	Article 14
—	ANNEX I
—	ANNEX II