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COMMISSION OF THE EUROPEAN COMMUNITIES

COM(75) 429 final
Brussels, 25 July 1975

Amended Proposal for a

COUNCIL DIRECTIVE

om harmonization of the legislation of Member States on the safeguarding of employees' right and advantages in the case of mergers, take-overs and amalgamations

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(Amendment presented by the Commission to the Council pursuant to Article 143, second paragraph of the EEC-Treaty)

EXPLANATORY MEMORANDUM

A. INTRODUCTION

1. Developments in the economy are producing a rapid increase in concentrations between undertakings both at national and Community level. The extent of these developments is borne out by the following statistics : between 1962 and 1970, the annual total of amalgamations in the six original Member States rose from 173 to 612, i.e. an increase of three and a half times in nine years. From 1966 to 1970 alone, the rate of increase doubled by comparison with the period 1962 to 1966. In some Member States, the increase in the number of amalgamations has reached the point where 50 % of total industrial turnover is accounted for by one hundred of the largest industrial undertakings.

2. This grouping process is the result of company mergers, transfers of undertakings and of undertakings gaining control of other undertakings.

3. These developments have made it necessary to create appropriate legal framework at Community level. A number of legal instruments have been drafted for this purpose, including the Proposal for a Third Directive on mergers between companies, the preliminary draft Convention on international mergers between companies, the Proposal for a Council Regulation on the control of amalgamations of companies and the Proposal for a Statute for European companies.

The purpose of these legal instruments is to regulate the problems thrown up by this grouping process in the fields of company and competition law.

4. It remains clear, however, that changes in the structure of undertakings caused by this grouping process often have far-reaching effects on the welfare of employees in the undertakings affected. The laws of the Member States, to the extent that they regulate such operations, do not always take sufficient account of the interests of employees. This is particularly true where such changes are carried out in accordance with civil law rules governing transfers which give employees no legal rights vis-à-vis thenew employer as regards maintenance of the employment relationship.

5. These problems and the need to resolve them at Community level have already been recognized. The legal instruments referred to above thus contain provisions safeguarding the interests of employees more effec tively when changes occur in the structure of undertaking. The fact should not be overlooked, however, that these legal instruments, in view of their scope and the particular nature of their social provisions, represent only a partial solution to the problems which employees face when changes in the structure of undertakings occur.

6. In its Resolution of 21 January 1974 concerning a social action programme, the Council voiced the political will to adopt the measures necessary to bring about an improvement in living and working conditions and to harmonize them as the programme progressed, including the protection of employees' interests, particularly as regards the retention of their rights and advantages in the case of amalgamations, business concentrations and rationalization operations.

It should be noted in this connection that the government experts from the six original Member States responsible for drawing up a Preliminary draft Convention on international mergers between companies drew attention in 1972 in a joint declaration on behalf of their governments to the need to protect employees by means of a special comprehensive legal instrument when any kind of business concentration occurred.

7. That is the object of this proposed Directive, which the Commission has undertaken to submit to the Council.

The aim of the proposed Directive is to protect employees from losing acquired and future rights in the event of transfers of undertakings or amalgamations by introducing provisions affording protection and safeguards.

This aim is to be achieved by the following means :

- transfer of the employment relationship from the transferor to the transferee in the event of a change of ownership;
- protection of employees against dismissal on the sole ground of transfer of an undertaking or an amalgamation;
- provision of information, consultation and negotiations with employee representatives regarding the interests of the employees affected.

8. The proposed Directive seeks, in accordance with Article 117 of the EEC Treaty, to promote improved working conditions and an improved standard of living for workers so as to make possible their harmonization while the improvement is being maintained through approximation of provisions laid down by the law, regulation or administrative action of the Member States.

B. COMMENTARY ON THE INDIVIDUAL PROVISIONS

Article 1

This Article lays down the scope of the proposed Directive.

It covers the transfer of undertakings or parts of undertakings to another owner through mergers between or conversion of companies, and other legal transfers.

The proposed Directive does not at this point introduce its own conceptual definitions, leaving this task to the laws, regulations and administrative provisions of the Member States and future Community law. By the latter is meant the Proposal for a Third Directive on mergers between companies and the preliminary draft Convention on international mergers between companies.

All legal transfers are covered, i.e. not only transfers of property but letting, leasing and the granting of beneficial interests. In addition, not only are transfers of whole undertakings covered, but also cases where individual establishments are transferred from one undertaking to another.

With regard to the concept of a company, the proposed Directive refers to the second paragraph of Article 58 of the EEC Treaty and thus covers all companies or firms governed by civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, except for those not operating for gain.

Although all forms of legal transfer of undertakings are characterized by a change of ownership and thus of employer concentrations between undertakings generally take place in such a way that the undertakings remain autonomous legal entities and the identity of the

employer remains the same. All that happens is that one undertaking gains control of others.

Although with such amalgamations the identity of the owner or employer remains the same the controlling undertaking can, by virtue of its rights of control exert considerable influence on the form of the employment relationships in the dependent undertaking, with possible adverse effects on employees' working conditions. Employees are thus in need of protection similar to that needed in the case of transfers of undertakings. Since, however, the legal identity of the employer remains unchanged all legal consequences stemming from a change of employer are ruled out. Paragraph 2 thus provides that only those provisions of the proposed Directive which secure claims under company pension schemes (Article 5), which deal with the protection of employees against unjustified dismissal and where there is a fundamental change in their working conditions (Article 6), which govern transfers of employees (Article 7) and which provide a procedure for consulting employees (Article 9) are to apply by analogy.

With regard to the concept of control, the proposed Directive does not give its own definition, and refers to Article 2 of the Proposal for a Council Regulation on the control of amalgamations of companies.

With regard to the territorial scope of the proposed Directive, it appears necessary to protect the rights of employees not only in cases where the transfer or amalgamation involves establishments or undertakings situated within the territory of a Member State or of several Member States, but also to include transactions involving establishments or undertakings situated in the territory of one or several Member States and in the territory of one or several non-member states.

Since for legal reasons it is impossible to thrust this proposed Community legislation on non-member states, paragraph 3 provides that the Directive shall apply in the latter case only insofar as establishments or undertakings situated within the territory of the EEC are affected by it.

Article 2

The definition of the concepts of "transferor" and "transferee" in paragraph 1 is of legal significance in relation to changes of ownership, and is intended to simplify the language used in the proposed Directive.

Paragraph 2 makes it clear that "employee representatives" means employee representatives as designated by the law of the Member States. The proposed Directive thus does not interfere with the machinery and structural arrangements of employee representation at national level.

Article 3

This Article which provides for automatic transfer of the employment relationship to the transferee, is the core of the proposed Directive. It is designed to prevent the transferee from refusing to retain employees by virtue of civil law provisions governing transfers, and from even agreeing with the transferor that transfer of employment relationships shall be excluded. The transferor would in such a case have no alternative but to dismiss employees excluded from the transfer which would be contrary to the objective of protecting employees.

According to prevailing legal opinion under all national systems of law commercial practice forms part of an employment relationship to the extent that it gives rise to rights and obligations on the part of the contracting parties.

The fact that these rights and obligations are also transferred is made clear in paragraph 1.

Transfer to the transferee of rights and obligations arising out of collective agreements calls for different arrangements to meet the varying cases. Where the transferor has been party to a collective agreement it appears logical that the transferee should automatically assume the transferor's rights and obligations arising out of such an agreement, as stipulated in paragraph 2, until the parties have concluded a fresh collective agreement or agreements.

The legal position is different in the case of collective agreements concluded between trade associations to which the transferor, but not the transferee, is party and which have not been declared generally binding. It would in this case be contrary to the principle of freedom of association as protected under the constitutional law of the Member States to make the transferee party to a collective agreement against his will. In order, however, to prevent employee from losing collectively agreed terms of employment should the transferee be unwilling to become party to the collective agreement, a solution has been sought in paragraph 3 which does not impose the collective agreement upon the transferee but requires him to continue to respect terms of employment already secured under a collective agreement until the parties have concluded a fresh collective agreement or agreements, although for a period not exceeding one year. Where the parties fail to conclude a fresh agreement within this period and the transferee is bound by another collective agreement, the latter applies.

The provisions in paragraphs 2 and 3 on continuation of the validity of collective agreements correspond to a large extent to the views expressed by the Economic and Social Committee on this point.

Article 4

This Article provides that an employee's length of service with the transferor is one of the factors protected under the employment relationship. In this way, the employee is guaranteed continuity of the period of employment, irrespective of whether or not provisions laid down by law, or contained in collective agreements or an individual contract of employment applicable to the employment relationship which is the subject of the transfer call for particular legal consequences according to the length of service in the establishment or undertaking.

Article 5

Employees''acquired and future rights arising out of company or inter-company welfare schemes, whether for pensions or relief in the event of sickness or other circumstances, represent for employees an important part of the employment relationship. However, it is clear that the requirements, forms and nature of such obligations differ so greatly and the ways in which they are organized are so varied, that it is not possible to lay down specific Community rules in this proposed Directive. Nor are these necessary to attainment of the objectives of the Directive. For this reason, the proposed Directive confines itself to requiring Member States to ensure that employees do not lose rights, and leaves to them the choice of ways and means.

Article 6

Protection of the employment relationship which is the purpose of this proposed Directive could be circumvented if the transferor or transferee were to dismiss employees by reason of the transfer. This is already prohibited by law in some Member States.

In others, however, employers are free to dismiss employees in such circumstances. The uniform provision had therefore to be included that dismissals on the occasion of a transfer of an undertaking are permitted only for pressing business reasons.

Economic common sense dictated the latter qualification. It is intended to enable an entrepreneur to carry cut organizational changes, adaptation of production, rationalization measures etc. on the occasion of the transfer of an undertaking. This can be of importance, for example, where a transfer is carried out to restore health to economically weak undertakings. In such circumstances, the employees in the undertakings concerned may be affected both quantitatively and qualitatively and dismissals may even prove unavoidable.

The proposed Directive deliberately refrains from giving a list of business reasons. These can vary so greatly according to the circumstances of each case that to draw up such a list appears impossible, and any attempt to do so in this Directive would only be confusing. It is thus left to the individual Member States to define the concept of "pressing business reasons", either through legislation or by leaving it to be determined in the courts or in collective agreements.

It accords, however, with the objectives of the proposed Directive that reliance on pressing business reasons to carry out dismissals is possible only if all possible solutions within the undertaking such as transfers to another acceptable job, measure for readjustment and retraining have first been exhausted. It is evident that the procedure for informing and consulting employee representatives provided for in Article 9 of the proposed Directive serves as an appropriate framework for those concerned to reach agreement on how the problems arising in this context are to be resolved.

Moreover, in the event of collective redundancies, the Council Directive (1) of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies applies, which provides for consultation of employee representatives, a duty prior notification of collective redundancies, and intervention by public authorities.

Where an employee no longer wishes to continue the employment relationship with the transferee because the transfer of the undertaking has resulted in a fundamental and detrimental change in his working conditions, it would appear justified, as paragraph 2 provides, to treat the employee as though termination of his employment has been due to the action of the employer.

The proposed Directive does not stipulate any legal consequences based on Community law that should follow dismissals of the kind referred to in paragraphs 1 and 2, but provides in paragraph 3 that the legal consequences of such dismissals should be governed by the laws of the Member States.

Article 7

This provision governs cases where employees are transferred to other establishments as a result of the transfer of the undertaking, by making provisions of Article 6 applicable by analogy. This means that transfers of employees are possible only for pressing business reasons and that an employee may terminate the employment relationship as provided in Article 6(2) where such transfer would result in a fundamental and detrimental change in his working conditions.

These provisions cannot apply of course where the employee is bound under his contract of employment to accept a transfer, but only insofar as this could reasonably be expected in the circumstances prevailing when the contract of employment was concluded, even following transfer of the undertaking.

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(1) OJ No L 48, 22 February 1975

Article 8

This provision guarantees that the legal status and function of employee representatives (as defined in Article 2(2) are not affected by transfers of undertakings. Where an undertaking is transferred as a complete entity, employee representatives in office at that time continue to exercise their functions even after completion of the transfer. This is not, however, feasible where only a part of an undertaking is detached from one undertaking and incorporated into another undertaking, the employee representatives in the new undertaking becoming responsible for it at that point.

Provisions in some Member States stipulate that new elections of employee representatives must be held in the event of changes in the composition of the work force. Such circumstances can arise, for example, where a single overall works council has to be formed for the new company when companies merge, each of whom previously had such a works council. Paragraph 2 takes account of this special legal situation.

Article 9

The substantive provisions on the protection of employees' acquired rights need to be supplemented by procedural provisions which ensure that employee representatives are informed of and consulted upon the consequences of the transfer of an undertaking. Such provisions are contained in the Proposal for a Third Directive on mergers between companies in respect of mergers between limited companies within the same Member State.

In order to prevent overlapping between the two directives, paragraph 5 excludes application of this provision to mergers between companies to which the Third Directive applies.

Secondly, in order to avoid in practice the application of a multitude of differently structured and oriented procedural provisions, emphasis has been placed on the form of these provisions being largely identical in both proposed Directives as far as this was possible having regard to the special features of the transactions to be regulated.

The first aim is to require both transferor and transferee to inform their respective employee representatives in detail of the reasons for the transfer of the undertaking, it effects on employees and measures concerning them, and if necesssary to discuss these with the employee representatives. Such information must in principle be provided in the form of a written report two months before completion of the transfer of the undertaking. To render this provision more flexible and to enable it to be applied to all transactions covered by the proposed Directive, provision was made that, by way of exception, both the two month period and the requirement of writing may be dispensed with. In every case, however, information must be given in due time, "due time" being determined according to the circumstances of each individual case. Provision should also be made for cases in which the employees' representatives consider that the proposed transaction will be detrimental to the interests of employees. Employee representatives should in such cases have the right to call for negotiations with a view to reaching agreement on measures to be adopted for the benefit of employees. Lastly, provision must be made for circumstances in which the negotiations requested by employee representatives fail to produce agreement. Each party should in this case have the right to refer the matter to arbitration. The arbitration board gives a binding decision on the measures to be adopted for the benefit of employees.

Rules governing the setting up of arbitration boards cannot be left entirely to the national legislatures. It must at least be guaranteed that the board is composed of persons who are really conversant with the problems to be solved. Half the members must accordingly be appointed by the employer and half by the employee representatives. The chairman is appointed by mutual consent of the parties.

The competent court intervenes only where agreement cannot be reached on this point.

Paragraph 4 provides that the obligation to negotiate pursuant to Paragraph 1 and the negotiation and arbitration procedure pursuant to Paragraph 3 can neither prevent nor postpone completion of the proposed transfer.

Articles 10 to 13

These Articles contain the necessary implementing provisions.

Amended Proposal for a

COUNCIL DIRECTIVE

on harmonization of the legislation of Member States on the safeguarding of employees'rights and advantages in the case of mergers, takeovers and amalgamations

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Proposal from the Commission;

Aftsr consulting the European Parliament;

After consulting the Economic and Social Committee;

Whereas the establishment of a single market for all products and the free movement of persons and means of production in the Community has not only resulted in an enlarged market for European undertakings and keener competition in the markerts of the Member States, but the economic union thus created has compelled undertakings to alter their structures, methods and size, in particular through mergers and amalgamations, in order to adjust to the new demands of the common market.

Whereas under Article 2 of the Treaty the Community has as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities; whereas under the same Article its task is, further, to promote an accelerated raising of the standard of living, whereas moreover, the Member States agreed in Article 117 upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained, in particular through approximation of provisions laid down by law, regulation or administrative action in the Member States;

Whereas the Council not onlyreaffirmes this objective in its Resolution of 21 January 1974 concerning a social action programme (1) but also voiced the political will to adopt the measures necessary to achieve it.

Whereas changes in the structure of undertakings do not always assist the attainment of these objectives, but on the contrary tend to adversely affect employees'living and working conditions, in particular with regard to safeguarding their rights and advantages; whereas the same problems arise irrespective of the way in which the structure of the undertaking is altered.

Whereas action musttherefore be taken at Community level to protect employees in the event of changes in the structure of undertakings so as to ensure as far as possible security of employment, the maintenance of working conditions, the preservation of rights secured under individual contracts of employment or collective agreements, and the retention of generally recognized practices and special arrangements in force in undertakings.

Wheraas employees must likewise be protected in the territory of the Community where a person or undertaking situated in the territory of a third country is involved in the transaction.

(1) OJ No C 13, 12 February 1974

Whereas it is moreover essential that employees of the undertakings in question are informed of and consulted upon the consequences of the transaction insofar as they are affected, and that provision is made for an appropriate negotiating procedure .

Whereas such action can only be taken on the basis of the progressive harmonization of provisions laid down by law, regulation or administrative action in the Member States for theprotection of employees in the event of changes in the structure of undertakings,

HAS ADOPTED THIS DIRECTIVE :

PART I

SCOPE AND DEFINITIONS

Article 1

1) This Directive shall apply to the transfer of undertaking or parts of undertakings to another owner through mergers between or conversion of companies within the meaning of the second paragraph of Article 58 of the Treaty establishing the European Economic Community, or by way of other legal transfers.

2) Artciles 5, 6, 7 and 9 of this Directive shall apply by analogy to concentrations between undertakings within the meaning of Article 2 of Council Regulation No ..... of ..... , where such a concentration has the same effect upon dependent or controlling undertaking as would a transfer within the meaning of paragraph 1.

3) This Directive shall apply where and insofar as the transferring or dependent undertaking is situated in the territory of the Member States of the European Economic Community or the transfer or concentration affects an undertaking within that territory involved in such a transaction.

Article 2

1) For the purposes of this Directive transferor or transferee means any natural or legal person that relinquishes or acquires an interest in an undertaking by reason of a transfer of the kind specified in Article 1.

2) For the purposes of this Directive employee representatives means employee representatives as designated by law or practice in the Member States.

PART II

TRANSFER OF EMPLOYMENT RELATIONSHIP

Article 3

1) The transferor's rights and obligations arising out of the employment relationship entered into by him shall, upon the occasion of a transfer within the meaning of Article 1, be atomatically transferred to the transferee and shall include rights and obligations arising out of commercial practice.

2) The transferor's rights and obligations arising out of collective agreements entered into by him shall, upon the occasion of a transfer within the meaning of Article 1, be automatically transferred to the transferee and shall continue to exist until the parties have concluded a fresh collective agreement or agreements.

3) Conditions of employment agreed under a trade association collective agreement to which the transferor has been party shall continue to be valid following a transfer within the meaning of Article 1 even where the transferee is not bound by the same trade association collective agreement as the transferor, until the parties have concluded a fresh collective agreement or agreements but for a maximum of one year following the transfer. Where no fresh collective agreement is concluded within this period and the transferee is party to a trade association collective agreement, the terms of that agreement shall apply.

4) The legal consequences of paragraphs 1 to 3 cannot be excluded or restricted by declarations on the part of the transferor or transferee.

Article 4

An employee's length of service with an undertaking based on his employment relationship with the transferor shall for all relevant purposes be taken fully into account in his relationship with the transferee.

PART III

CLAIMS ARISING OUT OF COMPANY AND INTER-COMPANY PENSION SCHEMES

Article 5

1) The Member States shall adopt measures necessary to ensure that employees' acquired rights and future rights to payments from company or inter-company pension schemes are not diminished as the result of a transfer within the meaning of Article 1.

2) The Member States shall adopt the same measures in respect of employees so entitled but no longer employed by the undertaking at the time of a transfer within the meaning of Article 1.

PART IV

DISMISSALS AND TRANSFERS

Article 6

1) A transferor or transferee may dismiss employees on the occasion of a transfer within the meaning of Article 1 only for pressing business reasons.

2) Where an employee severs an employment relationship because a transfer within the meaning of Article 1 has resulted in a fundamental and detrimental change in his working conditions, the employer shall be regarded as having been responsible for termination of the employment relationship.

3) The legal requirements and consequences of dismissals prohibited under the terms of paragraph 1, and of severance of employment relationships in the circumstances referred to in paragraph 2, shall be governed by the laws, regulations and administrative provisions of the Member States. The same shall apply in respect of severance payments and compensation payable in the event of termination of an employment relationship.

Article 7

Article 6 shall apply by analogy to transfers of employees from one establishment to another on the occasion of a transfer within the meaning of Article 1. It shall,however, not apply where an employee is bound by his contract of employment to accept transfer to another establishment and where such acceptance could reasonably be expected in the circumstances prevailing when the contract was concluded.

PART V

EMPLOYEE REPRESENTATION AND CONSULTATION

Article 8

1) The legal status and function of employee representatives in undertakings transferred within the meaning of Article 1 shall remain unaffected by such transfer. This shall not apply in the case of transfers of parts of undertakings.

2) The first sentence of paragraph 1 shall not apply where the conditions for new elections are met under the laws, regulations or administrative provisions or according to current practice in the Member States.

Article 9

1) The transferor and transferee shall be required to inform their employee representatives of the reasons for transfers within the meaning of Article 1, of the legal, economic and social consequences for employees and of all intended measures affecting employees. It is requested by the employee representatives that the action to be taken should be negotiated by the parties.

2) Such information shall in general be given not less than 2 months before completion of a transfer within the meaning of Article 1 in the form of a detailed report. In special circumstances and by way of exception, information given orally and in due time prior to completion of a transfer within the meaning of Article 1 shall suffice.

3) Where the employee representatives consider that the interests of employees are adversely affected by a transfer within the meaning of Article 1, the transferor and transferee shall, at the request of their employee representatives, negotiate with them with a view to reaching agreement on measures to be adopted for the benefit of such employees.

If, on completion of such negotiations or within 2 months of their commencement, the parties fail to reach agreement, each of them shall be entitled to refer the matter to an arbitration board, which shall give a binding decision on such measures within one month. The arbitration board shall be composed of arbitrators, equal numbers of whom shall be appointed by each party, and a chairman appointed by mutual consent of the parties. Where one party fails to appoint arbitrators or where no agreement is reached on the appointment of the chairman appointment shall be made by the court.

4) Transfers of undertakings shall not be affected by the necessity of having a negotiation provided for in paragraph 1 and by the negotiation and arbitration procedure provided for in paragraph 3.

5) This Article shall not apply to mergers between companies within the meaning of theThird Council Directive (EEC) No .... of .

PART VI

FINAL PROVISIONS

Article 10

This Directive shall not restrict the right of Member States to apply or to adopt laws, regulations or administrative provisions more favourable to employees.

Article 11

1) Member States shall adopt the laws, regulations ans administrative provisions necessary to comply with this Directive within twelve months of its publication, and shall forthwith inform the Commission thereof.

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

Article 12

Member States shall within twelve months of the expiry of the twelve month period specified in Article 11, forward to the Commission all relevant information to enable the Commission to draw up a report for the Council on the application of this Directive.

Article 13

This Directive is addressed to the Member States.