COMMISSION OF THE EUROPEAN COMMUNITIES

SEC(92) 857 final

Brussels, 2 June 1992

COMMISSION REPORT TO THE COUNCIL

on progress with regard to the implementation of Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses

(Council Directive 77/187/EEC of 14 February 1977)

Contents

INTRODUCTION

On 14 February 1977 the Council of the European Communities adopted 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.

Article 8 of the Directive provides that "Member States shall bring into force the laws, regulations and administrative provisions needed to comply with this Directive" and "shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by the Directive".
The report is divided into three chapters.

- Chapter I describes the general legal situation, i.e. the type of implementing measures taken by the Member States and their scope, and it examines the definitions used, the safeguarding of employees' rights and the information and consultation procedures provided for.

- Chapter II covers the case law of the Court of Justice and Community disputes regarding the application of the Directive, i.e. infringement procedures initiated by the Commission against Member States for failure to comply with provisions of the Directive, and requests for preliminary rulings on the interpretation of the Directive.

- Chapter III assesses the implementation of the Directive in each Member State.

I. DIRECTIVE 77/187/EEC

The main purpose of the Directive is to ensure that employees' rights are safeguarded in the event of a legal transfer or merger involving a change of employer and, at the same time, it also aims to reduce existing differences between the Member States as regards the extent of the protection offered to employees in this field.

The most important aspects, for the purpose of monitoring the application of the Directive in the Member States, are the definition of a transfer given in Article 1 (1), the employees' rights which the Directive is intended to safeguard (the first subparagraph of Article 3 (1), the first subparagraph of Article 3 (2) and Article 5 (1)), and the introduction of information and consultation procedures for the representatives of the employees affected by the transfer (Article 6).

All of these will be examined in the analysis of the national systems in the twelve Member States.

It should be noted that the Directive does not affect the right of Member States to introduce laws, regulations or administrative provisions which are more favourable to employees (Article 7).

II. THE KEY CONCEPT OF "TRANSFER"

An essential factor in assessing the implementation of the Directive is the definition of "transfer", and in particular the type of legal acts or facts on which it is based.

First of all, there are surprising linguistic discrepancies between the various versions of the Directive. In some versions (German, French, Greek, Italian, Dutch) "transfer" covers only operations resulting from a contract, whereas in the English and Danish versions the concept seems much broader. In any event sales ordered by the court as part of bankruptcy proceedings are not covered by the Directive.

Although some national laws are more favourable, the assessment of the current situation showed that the legislation in all the Member States covers the following three aspects at least:

a) transfers of undertakings, businesses or parts of businesses resulting in the economic independence of a place of work;

b) any sort of transfer arrangement involving a change of employer;

c) transfers resulting from a legal transfer or merger.

CHAPTER I. ANALYSIS OF NATIONAL LEGISLATION

SECTION I. SCOPE AND DEFINITIONS

I. SCOPE

Article 1

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

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

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

1. This article provides the information necessary for determining the material and territorial scope of the Directive.

First and foremost it concerns the transfer of undertakings, businesses or parts of businesses to another employer.

This concept incorporates two basic elements identified in the rulings of the Court of Justice (see in particular the Judgement of 18 March 1986 in the case of JMA Spijkers v. Gebroeders Benedik Abattoir c.v.): the permanent identity of the business in question and the

change of employer, with the new employer taking over the running of the same or similar business activities.

But the description of the scope of the Directive also covers another aspect: the origin of the transfer.

The Directive, in effect, applies only to transfers "as a result of a legal transfer or merger".

There are countless legal operations which might be included here, particularly given the number of conceptual differences between the various national systems of commercial and business law. The Directive unquestionably covers several ways in which the employer may change: takeover, sale, merger, divestment.

In terms of territorial scope, the Directive is fairly restricted, applying only "where and in so far as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty" (Article 1 (2)).

This means that only transfers of businesses located in the territory of a Member State are covered by the Directive; it does not apply to transfers of businesses which are located outside the Community but which belong to a company whose head office is in the territory of a Member State.

Finally, Article 1 (3) excludes transfers of sea-going vessels from the scope of the Directive.

In Belgium, Article 1 of Collective agreement No 32 of 28 February 1978 (made compulsory by the Royal Decree of 6 March 1990) lays down that the purpose of the agreement is to "safeguard the rights of employees in all cases of a change of employer as a result of the transfer of an undertaking or a part thereof by agreement".

The rules on transfers apply to a wide range of contractual operations: changing the legal status of an undertaking, forming a company, transfers, mergers and takeovers. They therefore cover all forms of agreement involving the transfer of a business activity from a transferor to a transferee.

Thus the agreement does not apply to cases of regrouping or reorganization which do not involve a change of employer, or to transfers other than by agreement such as those resulting from the death of an employer, bankruptcy, seizure or nationalization.

There is a special collective agreement (No 32 bis of 7 June 1985, as amended by Agreement No 32 ter of 2 December 1986) which governs transfers resulting from bankruptcy; however, in one respect its criteria differ from those of the Directive, in that the transferee is not obliged to take over all the employees affected by the transfer.

There are no express provisions in Collective Agreement No 32 concering its territorial scope; it therefore applies to the whole of Belgian territory in accordance with Article 7 of the Law of 5 December 1968. It appears that this agreement is therefore intended to cover any worker employed in Belgium, regardless of where the head office of the transferor or transferee is situated.

Article 4 of the agreement states that "this collective labour agreement shall not apply in the event of a change of employer resulting from the transfer of sea-going vessels by agreement".

In Danish law, Article 1 (1) of Law No 111 of 21 March 1979 lays down that this law applies to "transfers of undertakings or parts of undertakings within the territorial scope of the Treaty establishing the European Economic Community".

It is clear the work carried out prior to the adoption of this law and from the explanatory memorandum accompanying the draft that:

a) the transfers referred to in Article 1 (1) of Law No 111 are transfers of public or private undertakings, whatever the object of these undertakings or the way in which they are operated, as a result of an agreement; this primarily involves the sale, for example, of an undertaking which forms part ofthe assets in a bankruptcy, a donation (for example a transfer to a fund), certain leases or hire-purchase agreements, if the lessor or person concluding the leasing agreement, as the employer, has the same obligations with regard to the employees as if he were the owner, and of course mergers (under Danish law this concept is no broader than that of transfer by agreement);

b) Law No 111 does not apply to mergers which merely involve a change in the control of undertakings;

c) Article 1 refers only to transfers of "undertakings", since the term "business" is unknown in Danish law (this concept is covered by that of "undertaking");

d) a transfer of part of an undertaking takes place if it seems reasonable that the employees should follow the part being transferred, which must have a distinct identity from a technical, geographical or business point of view and be in operation.

Article 1 (1) of the Law limits its territorial scope to transfers of undertakings situated within the territorial scope of the Treaty establishing the European Economic Community. The Law, in fact, applies mainly to transfers of undertakings situated in Denmark, regardless of whether they are Danish or foreign. Since it lays down no special rules applicable in the event of conflicts of laws, these are dealt with in accordance with the general rules of private international law.

Article 1 (2) lays down that "this Law shall not apply to sea-going vessels".

In Spain, Article 44 (1) of the Estatuto de los Trabajadores (ET) refers in general terms to "a change in the ownership of an undertaking, place of work or independent production unit", without specifying the precise legal procedures involved. Spanish legislation, it therefore seems, draws no distinction between changes of ownership by agreement and those on other grounds. The article provides for changes by "acts inter vivos" and as a result of succession mortis causa, whether based on a will or implemented ex vi legis.

However, the rules governing these two options are not the same. Under the terms of the article, only changes of ownership as a result of acts inter vivos are fully subject to rules similar to those provided for in the Directive. The sale of all or part of the undertaking as part of bankruptcy proceedings is included.

In any event, all of the cases covered by Article 1 (1) of the Directive are included in the scope of Article 44 of the ET; furthermore, the definitions of the object of the transfer given in the Directive ("undertakings, businesses or parts of businesses") and in the Spanish law ("undertaking, place of work or independent production unit") are completely parallel.

As regards territorial scope, Article 44 of the ET covers transfers not only of places of work situated in Spain, but also - and this is important - of businesses located outside the national territory, but belonging to Spanish firms (Article 1 (4) of the ET), thereby establishing the legal status of workers of Spanish nationality. This means that some transfers excluded from the Directive come under the scope of Article 44 of the ET.

Spanish legislation makes no exception for sea-going vessels.

In French law, the main provision is Article L 122-12 of the Labour Code, the second paragraph of which lays down that contracts of employment are automatically transferred in all cases of "changes in the legal status of the employer, particularly by succession, sale, merger, conversion or the formation of a company".

Article L 122-12 (1) (Law No 83-528 of 26 June 1983) lays down rules for transfers in the event of bankruptcy, although not all the rules governing transfers apply: transferor and transferee do not share joint liability.

Under Article L 132-7 of the Labour Code collective agreements are automatically transferred where such agreements are affected, for example, by mergers, transfers, divisions or changes in business activity.

The provisions implementing the second subparagraph of Article 3 (3) of the Directive govern situations arising from mergers, transfers, total or partial incorporation or other operations involving changes in activities.

Following a Judgement delivered by its General Assembly on 15 November 1985, the Court of Cassation tended to the view that, for Article L 122-12 to apply, there must be a "legal relationship" between the successive employers. Although this ruling certainly did not imply (far from it) that the various types of agreement referred to in Article 1 (1) of the Directive were not covered, it nevertheless clashed with recent rulings of the CJEC, which tends to give wider application to the principle of continuity of employment contracts than a strict construction of Article 3 (3) of the Directive would allow. Judgements given by the General Assembly of the Court of Cassation on 16 March 1990 have established the precedent that Article L122-12 applies "even in the absence of a legal relationship between the successive employers" and to "any form of transfer of an economic entity in which the said entity preserves its identity and continues or recommences its activity".

There is nothing in the provisions referred to above which corresponds to Article 1 (2) of the Directive. Their territorial scope is therefore governed by the general rules on the application of laws; they consequently apply to the whole of French territory.

In Greek law, the principle of the automatic transfer of employment contracts in the event of a change in the legal person of the employer following any legal operation is the result of court rulings based on legislation dating back to the 1920s: Article 6 (7) of Law 2112/1920 (on the termination of employees' contracts of employment) and Article 8 of Law 3514/1928 (on workers' rights during military service).

These are very broad provisions, covering any situation likely to arise from a change in the legal person of the employer where the relevant production unit retains its identity.

These concepts were incorporated in Presidential Decree No 572 of 6 December 1988, which was enacted to bring Greek law into line with Directive 77/187/EEC. The Decree applies to all transfers, both legal and by agreement.

The law excludes the transfer of sea-going vessels.

In Ireland, the 1980 Regulations on the safeguarding of employees' rights on transfer of undertakings contain no provision regarding their scope. Regulation 2 (2) merely states that the words and expressions used in the Directive and in the Regulations have the same meaning, unless the context requires otherwise. There is no stipulation that the provisions of the Regulations do not apply to sea-going vessels.

The explanatory note accompanying this Regulation, which has no legal weight, states that "these Regulations safeguard the rights of employees arising from an employment contract or relationship in the event of a transfer of a business in which they are employed, which entails a change of employer".

The scope of these Regulations is therefore unclear; however, it appears to be broader than the Directive, in that transfers other than by agreement are not expressly excluded. Bankruptcy, however, does seem to be excluded: under Irish law the employment relationship ceases when bankruptcy proceedings are opened.

In Italy, Article 2112 of the Civil Code, amended by Article 47 of the Law of 29 December 1990 "Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Communità europee" (Legge communitaria per il 1990), applies to the transfer of an undertaking, business or part thereof to a new employer as a result of a transfer by agreement or a merger.

This Article therefore applies to transfers resulting, for example, from a merger by incorporation, a change in the legal framework of a company, a requisition or a usufructuary or leasing agreement, whereas a regrouping which merely involves a change in the control of an undertaking does not fall within its scope. However, in such cases general legislation applies: the legal provisions covering dismissals, for example, which have been tightened up following the entry into force of Law No. 108 of 1990 and Article 24 of Law No. 223 of 1991 on redundancies caused by reductions in manning levels.

Workers "not transferred simultaneously" under "amministrazione straordinaria" (special receivership) proceedings used to be excluded from the scope of Article 2112 of the Civil Code (Law No. 19 of 6 February 1987). Today it is again necessary to consult the provisions of Article 47 of Law No. 428 of 29 December 1990 (paragraph 5), which allows for exceptions on specific grounds to the guarantees provided for in Article 2112 of the Civil Code unless "more favourable conditions" are provided for by agreement with the unions.

A part of a business means a production unit capable of operating as a complete and viable instrument of production.

The territorial scope of this Article is that of the Civil Code, i.e. the whole territory of the Italian State.

In Luxembourg, Article 36 (2) of the Law of 24 May 1989 governing employment contracts lays down the principle of the automatic transfer of the rights and obligations arising from employment contracts where there is a change in the situation of the employer "in particular through succession, sale, merger, conversion of assets or the formation of a company".

The other provisions of the Directive implemented by the Law of 18 March 1981 apply in general to "transfers of an undertaking as a result of a legal transfer or merger".

The courts have found that the protective provisions applicable to staff in the event of a change in the situation of the employer are intended to safeguard the employees' jobs; the application of these provisions presupposes that the same undertaking will continue to operate under a new management.

Since the above-mentioned provisions contain no express reference to their territorial scope, it appears that this must be governed by the general rules on the application of laws and is therefore limited to the territory of Luxembourg.

In the Netherlands, the Law of 5 May 1981, the Law on collective agreements and the Law relating to the declaration of whether or not the provisions of collective agreements have a binding effect apply to

transfers of undertakings or parts thereof as a result of an agreement, particularly a sales, leasing, land renting or usufruct agreement. Mergers are covered as agreements.

The concepts "undertaking and part thereof" are defined in the explanatory memorandum accompanying the law implementing the Directive.

The territorial scope of the legislation introduced by the Law of 5 May 1981 appears to be governed by the general provisions applicable in this connection and is therefore limited to the territory of the Netherlands.

Article 1639 aa paragraph 2 of the Civil Code excludes the crews of sea-going vessels from the scope of the Law of May 1981.

In Portuguese law, the main provision is Article 37 (1) of the Law on employment contracts (LEC), contained in Decree-Law 49408 of 24 November 1969. This covers purchases of businesses on any legal grounds, and "the transfer of the operation of the business" as a result of any type of legal act or fact.

The fact that Article 37 focuses solely on "businesses", which is the same concept in Portuguese legal terminology as in French law, for example, means that it covers all the possibilities referred to in the Directive, given that the transfer of "part of a business" would certainly be regarded in law as equivalent to the transfer of a business.

There is therefore no doubt that the scope of the Portuguese law extends well beyond "legal transfers" and "mergers".

As regards territorial scope, Article 37 of the LEC covers transfers of existing "businesses" in the national territory, even if the head offices of the undertakings or companies in question are located outside Portugal.

Generally speaking, the LEC does not apply to sea-going vessels (Article 8 of Decree-Law 49408 referred to above). However, it should be added that:

a) the main thrust of Article 37 (and of the Directive) is repeated in a special law on the work of crews of sea-going vessels, not only for transfers of the owning company (Article 23 of Decree-Law 74/73 of 1 March), but also for transfers of the vessels themselves (Article 96 (2) of Decree-Law 74/73);

b) the LEC also does not apply directly to dockworkers (Article 6 of Decree-Law 49408); however, the special law governing dock workers lays down (Article 29 of Decree-Law 151/90 of 15 May) that the general rules governing employment contracts apply to all aspects of their work not covered by the same law; the outcome of all this is that Article 37 applies to all dock workers.

In the Federal Republic of Germany, the provisions implementing the Directive apply to any transfer of a business or part thereof to another employer.

The concept of transfer covers any change of employer resulting from any legal act, i.e.:

- any conversion within the meaning of Article 1 of the Law on the conversion of companies and Articles 362 et seq. of the Law on limited companies and any merger within the meaning of Articles 339 et seq. of the Law on limited companies;

- any transfer effected by any form of agreement including an agreement which is invalid but has been executed and agreements relating to temporary transfer, particularly leasing agreements.

Under German case law the rules on transfers also apply to bankruptcy proceedings.

The territorial scope of the above-mentioned provisions appears to be determined by the general rules applicable in this connection.

Finally, it should be noted that the protection for workers in the event of a transfer afforded by Article 613 a of the Civil Code applies to seamen.

In the United Kingdom Regulation 3 of SI 1981/1794 on the transfer of undertakings applies to the transfer:

a) of an undertaking or part thereof situated immediately before the transfer in the United Kingdom, notwithstanding that the transfer is governed or effected by the law of a country or territory outside the United Kingdom or that the persons employed ordinarily work outside the United Kingdom under the law of a country or territory outside the United Kingdom (Regulation 3 paragraphs 1 and 3) or that their contract of employment is governed by such law;

b) effected by sale or some other disposition or by operation of law in one or a series of transactions (Regulation 3 paragraphs 2 and 4).

The Regulation therefore applies to all categories of possible transfers, including donations, livery of seisin by the executor of a will and the legal transfer of a public undertaking to a private owner, but not including transfers by share takeover.

The rules on transfers also apply in bankruptcy proceedings.

With regard to the application of Article 1 (3) of the Directive ("this Directive shall not apply to sea-going vessels"), under Regulation 2 (2) of the SI in question transfers of vessels per se do not come within by the scope of the law.

II. DEFINITIONS

Article 2

For the purposes of this Directive:

a) "transferor" means 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 business;

b) "transferee" means 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 business;

c) "representatives of the employees" means the representatives of the employees provided for by the laws or practice of the Member States, with the exception of members of administrative, governing or supervisory bodies of companies who represent employees on such bodies in certain Member States.

1. The text of this article of the Directive has a dual function: it is obviously intended to harmonize concepts and terminology in a field where there are many national differences (even if at the cost of some imprecision): in many Member States "transfer" is a specific, clearly defined concept) and, at the same time, it serves to define the "subjective" or "personal" scope of the Directive.

With reference to this second function, the definitions of transferor and transferee are clearly intended to cover profit-making and non-profit-making natural or legal persons under both private and public law.

As regards the concept of "representatives of the employees", it should be stressed that, unlike the parallel definition in Directive No 75/129/EEC on collective redundancies, this article specifically excludes members of certain joint bodies in undertakings - a typical aspect of co-management - who, although "representatives of the employees", are to some extent involved in the decision-making process. Only "representatives" who can act as a counterbalance to the employer in decision-making are covered by the definition given in the Directive.

Another problem is whether the Directive requires Member States to introduce legislation on which the representative structures described in the definition can be based.

This problem will be examined later in the section on Article 6.

2. In Belgium, Article 2 of Collective Labour Agreement No 32 defines the concepts of transferor and transferee as follows:

> transferor: any natural or legal person who, by reason of a transfer within the meaning of the agreement, ceases to be the employer in respect of the employees of the undertaking or part thereof transferred;

transferee: any natural or legal person who, by reason of a transfer within the meaning of the agreement, becomes the employer in respect of the employees of the undertaking or part thereof transferred.

In Denmark, the concepts of transferor, transferee and employer are not defined in Law No 111 of 1979. The Danish Government did not consider it necessary to include them, since these three concepts are well established in law. It is clear from the notes on the terms "undertaking" and "transfer" contained in the explanatory memorandum accompanying the draft law that these definitions are identical to those in Article 2 of the Directive.

In Spanish law, the main provision on this subject is again Article 44 of the ET, which does not contain any definition of the concepts referred to in Article 2 of the Directive.

Nevertheless the scope of the concept of "a change in the ownership of the undertaking or place of work or of an independent production unit belonging to the undertaking" is much broader than that of a "transfer" within the meaning of the Directive; the definitions contained in the Directive therefore have less weight than the Spanish provisions.

Under Articles 62 and 63 of the ET the "legal representatives of the employees" are shop stewards or the works committee, in other words representative bodies which have nothing to do with the "administrative, governing or supervisory bodies of companies" referred to in Article 2 of the Directive.

In France, Article L 122-12 of the Labour Code applies to cases where "there is a change in the legal status of the employer .....", when employment contracts continue to exist between the new employer and the workforce. The article makes no reference to the terms "transferor" and "transferee".

The fact that the article does not incorporate the definitions given in the Directive does not affect the application of the Directive. Article L 122-12 covers a wider range of concepts than Article 1 of the Directive, and including the concepts of "transferor" and "transferee" would simply limit the scope of the former.

The "representatives of the employees" here are the works committee, thus fulfilling the requirements of the Directive.

The concepts of transferor and transferee are incorporated in Greek law. The "representatives of the employees" are those referred to in the Law on works councils. Presidential Decree No 572, referredto earlier, excludes members of administrative, governing or supervisory bodies who represent the employees on these bodies. In the case of companies with less than 50 workers which do not have any representative bodies the law now provides for the establishment of a three-man committee elected by the workforce.

In Ireland, Regulation 2 (2) lays down that the terms and expressions used in the Directive and in the Regulations have the same meaning in both texts.

However, the effect of this provision is not clear when it comes to determining who are the representatives of the employees. Irish law gives employers the right to choose whether or not to recognize workers' representatives (independent trade unions), and as a result, where there are no workers' representatives, the provisions of the Directive are not applied.

Following the changes introduced by the Law of 29 December 1990, Italian law refers to union representatives appointed in accordance with the provisions of Article 19 of Law No. 30 of 20 May 1970 in the production units affected, in the absence of trade-unions affiliated to the most representative national organizations.

There is no legal definition of the terms used in the Directive in Luxembourg or Netherlands legislation.

Portuguese law also does not include any such definition. However, account must be taken of the scope of Article 37 of the LEC, which covers all types of transfer, whether or not the ownership of the business is affected (even transfers of operating rights are included); this means that the deciding factor is the transfer of "the status of employer in respect of the undertaking, business or part thereof".

For the purposes of information and consultation as referred to in Article 6 of the Directive, the "representatives of the employees" here are the "works committees" (Article 23 (1) j) of Law No 46/79 of 12 September), which are internal representative bodies comprising a number of members elected from the workforce by the workforce.

In the Federal Republic of Germany, the concepts of transferor and transferee are not used in Article 613a of the Civil Code, since they are restricted to transfers of rights in rem and to rights relating to commercial transactions. This article uses the concepts of "another or new employer" and "former employer", which are not expressly defined by the Law of 13 August 1980. Nevertheless, it is clear from Article 613a that the "new employer" is the natural or legal person or group of natural and/or legal persons, such as the "Offene Handelsgesellschaft", to which the business or part thereof is transferred and which therefore legally replaces the "former employer".

Furthermore, the question of who represents of the employees is determined by Articles 111 and 112 of the Law on labour/management relations (Betriebsverfassungsgesetz), which lay down that transfers come within the ambit of the works committees.

In the United Kingdom, the 1981 Regulations (1794) do not expressly define the concepts of transferor and transferee.

Regulation 2 explains what is meant by "employee" and "relevant transfer" and states that the term "employer" should be construed with reference to the definition of "employee" and the terms "transferor" and "transferee" with reference to the definition of "relevant transfer".

The representatives of the employees must be representatives of an independent trade union of the workers involved in the transfer, which is recognized by the employers as a negotiating partner (Article 10 (5) of the 1981 Regulations). This means that the employer can refuse to recognize a union or withdraw recognition from a union with which he has held negotiations.

SECTION II. SAFEGUARDING OF EMPLOYEES' RIGHTS

I. TRANSFER OF THE EMPLOYER'S RIGHTS AND OBLIGATIONS

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 within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1 (1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1 (1), 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.

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

3. Paragraphs 1 and 2 shall not cover 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.

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 within the meaning of Article 1 (1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.

1. This article covers three different areas which may be affected by the transfer of an undertaking or business.

First, the contents of employment contracts between the original employer and the workers in the undertaking or business concerned. The Directive follows the general tradition in most national legislative systems in providing that the contractual position of the original employer must be transferred to the transferee. In technical terms this means subrogating the rights and obligations of the transferor to the transferee.

The fact that paragraph 1 of this article refers to rights and obligations "arising from a contract of employment" is not intended to be restrictive and does not exclude rights and obligations founded on laws, regulations or agreements, for example. Every aspect of the employer's contractual status, irrespective of origin, is thus transferred to the transferee. Contracts of employment keep their original contents, or rather their contents at the time of the

transfer. Furthermore, the transfer also incorporates the original employer's obligations dating from before the transfer, i.e. the transferor's debts.

Paragraph 1 also provides for better protection for employees' rights by making the transferor jointly liable for obligations arising for the transferee after the date of the transfer. This provision may be adopted by the Member States. The Directive does not indicate what type of liability is intended (joint and several or other).

The second subrogatory aspect covered by the Directive concerns "the terms and conditions agreed in any collective agreement" (Article 3 (2)).

The Directive thus also guarantees that the collective agreement to which the transferor and the employees were party before the transfer is automatically transferred.

Strictly speaking, at least according to the thinking behind some national systems, this is merely a technical collary of contractual subrogation, given that in most systems the conditions of employment established by collective agreement are automatically incorporated in individual contracts.

What is important in paragraph 2 of this article is that it fixes a period for which undertakings are obliged to observe the collective agreement, and that it leaves Member States the scope to "limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year".

The first subparagraph of Article 3 (2) gives the final date for observing the terms and conditions agreed in any collective agreement as "the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement".

The possibility provided for in the second subparagraph is therefore simply an extension of the rule contained in the first subparagraph, as a concession to the certainty of the law.

There are some types of transfer in particular, such as mergers and incorporations, where it is especially important for there to be a gradual, careful transition from one or more agreements to another.

The third aspect covered by Article 3 concerns supplementary company or inter-company pension schemes. Under the Directive employees' rights to old-age, invalidity or survivors' benefits under such schemes (Article 3 (3)) are not automatically transferred.

On the other hand, the same paragraph requires the Member States to adopt "the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business (...) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits", under such supplementary schemes.

The transferor's obligations arising from these schemes are therefore not transferred, but each Member State is obliged to introduce measures to protect the rights in question (except those to invalidity benefits), and in particular to lay down rules on pension funds etc.

2. Under Belgian law, the principle of maintaining employees' rights and obligations arising from a contract of employment existing on the date of a transfer is laid down in Article 5 (1) of Collective Labour Agreement No 32 of 28 February 1978. Under Article 3 (3) of this Agreement the expression "contract of employment" also covers an employment relationship between a person who, other than under a contract of employment, carries out work under another's authority, and the person who employs him.

Furthermore, it is accepted under Belgian law that the rights and obligations arising from a contract of employment are not limited to those expressly stipulated in the contract, but include all those resulting from the existence and performance of such a contract.

The principle of shared liability between transferor and transferee in respect of the obligations arising from an employment contract or relationship has not been introduced in Belgium.

Article 20 of the Law of 5 December 1968 on collective labour agreements and joint committees contains provisions similar to those contained in the first subparagraph of Article 3 (2) of the Directive. It stipulates that:

> "where a business has been partially or wholly transferred, the new employer shall observe the agreement binding by the former employer until such time as the agreement ceases to have effect".

The Belgian government has not availed itself of the possibility provided for in the second subparagraph of Article 3 (2) of the Directive.

Furthermore, Article 5 (2) of Collective Agreement No 32 stipulates that:

- the Agreement does not cover the transfer of employees' rights to old-age, survivors' and invalidity benefits under supplementary pension schemes;

- it does not affect special schemes deriving from law or other collective agreements.

This latter provision takes account of the following:

a) The bridging pension scheme (régime de prépension) provided for in the Law of 22 December 1977 (Articles 68-80), which affords supplementary compensation to unemployed persons who have retired voluntarily in the five years preceding normal retirement age. The beneficiary retains this protection if the firm he leaves or has left is transferred.

b) Other supplementary schemes set up under agreements concluded within the National Labour Council (such as Agreement No 17 of 19 December 1974, which set up the first form of bridging pension scheme, the contractual or compulsory scheme). The provisions of such agreements make it perfectly clear that the right to benefits does not depend on whether a worker is employed by a given firm and that the recipient retains his entitlement to such benefits no matter what happens to his firm.

No particular provision has been made to implement the second subparagraph of Article 3 (3). The existing instruments, particularly

the Law of 9 July 1975 on the control of insurance companies, provide for the safeguarding of employees' immediate or prospective entitlement to old-age benefits at the time of the transfer, whether or not they have left the firm.

However, the rights in question would not appear to be safeguarded if they form part of arrangements under a collective agreement and if, as a result of the transfer, the company is no longer operating in the sector of activity covered by that agreement.

In Denmark, Article 2 (1) of the Law of 21 March 1979 incorporates into Danish law the principle laid down in the first subparagraph of Article 3 (1) of the Directive.

The optional principle that the transferor and transferee should share joint liability, the adoption of which by the Member States is provided for in the second subparagraph of Article 3 (1), has not been incorporated into Danish law.

Article 2 (1) of the Law of 21 March 1979 provides that, in the event of a transfer of a business or part thereof, the rights and obligations deriving, at the time of the transfer, from a collective agreement on pay or terms and conditions of employment shall devolve immediately upon the transferee.

The Danish Government has not availed itself of the possibility provided for in the second subparagraph of Article 3 (2) of the Directive to limit the period for observing the terms and conditions of employment.

Article 2 (3) of the Law of 21 March 1979 reproduces the wording of the first subparagraph of Article 3 (3) of the Directive.

Immediate or prospective entitlement to old-age benefits, including survivors' benefits, with respect to employees remaining with or leaving the firm at the time of the transfer is safeguarded by the Law governing pensions funds. This act guarantees, among other things, that contributions paid to a pension fund shall remain intact even if the employee transfers to another company.

In Spain, Article 44 (1) of the ET provides that "a change in the ownership of an undertaking, place of work or independent production unit shall not constitute grounds for terminating an employment relationship, since the new employer remains bound by the same rights and obligations as the previous employer".

This paragraph also lays down that the transferor and transferee share joint and several liability for three years in respect of obligations dating from before the transfer (taking up the option provided for in the second subparagraph of Article 3 (1) of the Directive).

Article 97 (2) of the Ley General de la Seguridad Social (General Law on social security: Decree 2065/1974 of 30 May) on liability for social security benefits, provides that:

"In the event of succession to the ownership of an undertaking, industry or business, the new owner shares joint and several liability with the previous owner or his heirs in respect of the payment of benefits entitlement to which dates from before the succession (...)".

Obviously this rule applies only to benefits paid by the employer under the statutory social security system, whereas the Directive covers "supplementary company or inter-company pension schemes".

Under the General Law the statutory social security system provides a "minimum compulsory" degree of protection, although it is expressly stipulated that "better protection may be provided on a voluntary basis" (Article 21 (1) and (2)). Voluntary improvements are covered by a series of provisions in the same Law (Articles 181-185); they may be "direct", i.e. decided on and implemented by the employer himself (Article 182), or they may take the form of "additional contributions" authorized by the Ministry of Labour.

Article 182 (2) provides for the protection of employees' rights acquired on the basis of these "direct" schemes; such rights can be terminated or limited only in accordance with the rules under which they were created.

Furthermore, the system of additional contributions (Articles 184 and 185) is clearly based on the need to ensure that the rights involved are safeguarded unchanged.

These rights may therefore be regarded as falling well within the scope of Article 44 (1), and as such they must be included among the rights and obligations by which the new owner is bound.

Spanish law thus complies with the Directive, and may even be regarded as more favourable.

In France, Article L 122-12 (2) of the Labour Code lays down that where a change occurs in the legal situation of the employer, all contracts of employment existing on the date of the change continue to apply between the new employer and the employees of the undertaking.

The courts interpret the concept of "existing contract of employment" in the broadest possible manner. Article L 122-12 (2) covers all contracts of employment without exception (common law contracts or special types); in the case of an employee dismissed by the transferor, the contract continues in effect until the end of the period of notice, whether or not the employee continues to work during this period.

Employees taken on by the transferee retain the seniority acquired before the change of employer and all the benefits they enjoyed under their contract. They also have the same obligations towards the transferee as they had towards the transferor.

As regards the second subparagraph of Article 3 (1) of the Directive, Law 83-528 of 28 June 1983 implementing the Directive added an Article 122-12.1 to the Labour Code after Article 122-12.

Under this new article, where contracts of employment are transferred pursuant to Article L 122-12, the new employer becomes responsible for the previous employer's obligations on the date of the transfer.

On the other hand, the transferor remains liable for debts vis-à-vis the employees dating from before the transfer and he must reimburse the sums paid on his behalf by the new employer, unless the agreement between the two employers provides otherwise.

As regards Article 3 (2) of the Directive, the seventh subparagraph of Article L 132-8 of the Labour Code states that, in the event of a merger, transfer or division of a business, or a change in its activities, the collective agreement which originally applied shall continue to apply until it is replaced by a new agreement or, in the absence of such an agreement, for one year from the date on which the legal status of the employer changes. In this latter case, the employees keep any individual benefits which they have already acquired under the agreement.

Collective agreements concluded at levels other than company level (sector, occupation or multi-occupation) continue to apply to the company provided that the new employer is a signatory or member of the signatory bodies to the agreement, or if the agreement is covered by an extension order.

The provisions of the Labour Code which implement the Directive do not specifically guarantee to protect employees' immediate or prospective rights under supplementary schemes. However, under Article L 132-8 employees retain any "individual benefits" which they have already acquired under the previous collective agreement - after the period of one year has elapsed or once a new agreement has been signed.

The concept of "acquired benefits" has not yet been clearly defined, but as a general rule the courts tend to regard them as entitlements from which the employee has already benefited and which he has therefore acquired.

Rights under supplementary pension schemes in the event of a transfer are safeguarded:

1. in the case of non-manual supervisory staff

   - by Articles 57-58 of Annex I to the national collective agreement on pensions and social security of 14 March 1977;
   - by supplementary agreement A.3 of 27 December 1961;

2. in the case of non-supervisory staff

   - by the national inter-occupational agreement on pensions of 8 December 1961;
   - by the protocol of 1 October 1976 and Article 35 of the rules of procedure of the ARRCO.

These provisions guarantee the rights of former employees to old-age benefits no matter what becomes of the firm employing them (closure, merger, incorporation, transfer).

As described earlier, in Greece the safeguarding of rights and obligations arising from a contract of employment is enshrined in Laws 2112/1920 and 3514/1928. The same principle was later laid down in a law specifically on the Directive, Presidential Decree No 572 of 6 December 1988.

In line with Article 472 of the Greek Civil Code (although this is restricted to company transfer contracts), the Decree stipulates that the transferor and transferee are jointly liable for debts dating from before the transfer.

Again following earlier legal guidelines, the transferee is required to observe the conditions of employment laid down in a collective agreement.

Greek law does not appear to contain any provisions on safeguarding rights under supplementary insurance schemes.

Under Irish law, Regulation 3 of the 1980 Regulations on the safeguarding of employees' rights on transfer of undertakings reproduces the wording of Article 3 (1) of the Directive.

The principle that transferor and transferee should share joint liability for obligations arising from an employment contract has not been incorporated into Irish law.

On the subject of conditions of employment laid down in collective agreements, Article 4 (1) of the 1980 Regulations reproduces the wording of the first subparagraph of Article 3 (2) of the Directive.

The Irish government has not availed itself of the possibility provided for in the second subparagraph of Article 3 (2) of the Directive to limit the period for observing terms and conditions contained in a collective agreement.

On the subject of Article 3 (3) of the Directive, Article 4 (2) of the Regulation implementing the Directive states that it shall not apply, in relation to employees' rights, to old-age, invalidity or survivors' benefits under supplementary schemes outside the statutory social security schemes.

The second sentence of Article 4 (2) of the 1980 Regulations stipulates that the transferee shall 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 pension schemes outside the statutory social security scheme.

It should be stressed that whilst the Regulation provides for the possibility of criminal prosecution of a transferee who fails to comply with the requirement of Article 4 (2), it makes no provision for civil action.

In Italy, Article 47 of Law No. 428 of 29 December 1990 concerning "disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Communità europee (legge comunitaria per il 1990) amended the provisions of Article 2112 of the Civil Code, which largely governed the rights of employees in the event of the transfer of an undertaking. On the other hand, Article 1 of Law No. 215 of 26 April 1978 lays down the principle that the rights and obligations of employees arising from a contract of employment existing on the date of the transfer should be maintained.

However, if the undertaking is declared to be in a state of crisis in accordance with the provisions of Article 2 (5) (c) of Law No 675 of 12 August 1977, Article 1 of Law No 215 of 1978 allows the rights of employees regarding seniority arising from a contract of employment to be set aside in the event of a transfer if an agreement has been concluded to this effect between the most representative trade unions and the transferee.

Article 2112 of the Civil Code lays down that the transferee is jointly liable with the transferor for all claims arising from work carried out by the employee up to the date of the transfer.

However, this applies only if the transferee was aware of these debts at the time of the transfer or if they are shown in the records of the undertaking transferred or in the employment register.

The above-mentioned Article 47 provides that conditions of employment settled by collective agreement may be automatically maintained after the transfer by the transferee.

There also appear to be no laws, regulations or administrative or contractual provisions applying to supplementary company or inter-company pension schemes outside the statutory social security schemes.

There are no laws, regulations or administrative or contractual provisions ensuring the implementation of the second subparagraph of Article 3 (3) of the Directive.

In Luxembourg, Article 36 of the Law of 24 May 1989 governing employment contracts lays down the principle that the rights of workers arising from a contract of employment should be maintained in the event of changes in the situation of the employer, particularly through succession, sale, merger or conversion of assets.

The cases of transfer defined in Article 1 (1) of the Directive fall within the scope of these articles.

The joint liability of the transferor and the transferee in respect of obligations arising from a contract of employment has not been introduced in Luxembourg.

The Law of 18 March 1981 enunciates the principle that on the transfer of a business the transferee must observe terms and conditions of employment and pay contained in a collective agreement to the extent that these were binding on the transferor, until such time as the collective agreement is terminated or expires or a new collective agreement applies or enters into force.

Under existing laws and practice, the concept of rights deriving from a contract of employment embraces employees' entitlement to benefits under supplementary pension schemes. These rights are therefore transferred to the transferee pursuant to Article 36 of the Law of 24 May 1989 governing employment contracts.

It would appear that the rights of persons no longer employed by a firm at the time of its transfer in respect of old-age benefits are not guaranteed.

The second subparagraph of Article 3 (3) would therefore seem to apply only to workers still in the firm's employ.

In the Netherlands, Article 1639 bb of the Civil Code lays down that by reason of the transfer of an undertaking, the rights and obligations arising from a contract of employment concluded between the head of that undertaking and a worker employed there are automatically transferred to the transferee.

Under the same article the previous employer remains jointly liable with the transferee for a period of one year after the transfer in respect of obligations arising from the contract of employment before the date of the transfer.

Under the terms of Article 14 (a) of the Law on collective agreements and Article 2 (a) of the Law on the statement of the obligatory or non-obligatory nature of the provisions of collective agreements, the rights and obligations of the head of an establishment deriving, when the transfer takes place, from a collective agreement between the head of an establishment and the employees shall be transferred automatically to the transferee.

The old collective agreement shall cease to be operative when the transferee becomes party to a new collective agreement or has to apply the provisions of another collective agreement in pursuance of a decision making such provisions generally compulsory. The same rule applies on the expiry of the old collective agreement.

The Dutch Government has not availed itself of the possibility of limiting the period of validity of an earlier collective agreement to one year as provided for in the second subparagraph of Article 3 (2) of the Directive.

On the subject of supplementary pension schemes, Article 1639 cc of the Civil Code states that pension commitments within the meaning of Article 2 (1) of the Law on pension and savings funds, or savings schemes within the meaning of Article 3 (1) of that Law, are not covered by the provisions of the Law of 14 May 1981.

Article 1 (1) (a) of the Law on pension and savings funds applies to old-age, invalidity or survivors' pensions, whilst Article 3 (1) applies to retirement pensions paid out of funds built up by the employers under an occupational pension scheme.

The Law on pension and savings funds provides for the protection of the interests of employees and persons no longer working for the firm at the time of its transfer in respect of their rights as referred to in the second subparagraph of Article 3 (3) of the Directive. However, certain types of supplementary pensions do not benefit from the protection afforded by this Law.

Paragraph 2 of Article 1639 cc of the Law of 14 May 1981 therefore provides that the transferee and the transferor are jointly responsible with respect to obligations incumbent on the latter on the date of the transfer by virtue of pension commitments not guaranteed by the Law on pension and savings funds. This applies equally to pensions to which entitlement is still being built up at the time of the transfer and to pensions already being paid by the transferor. This responsibility applies solely to obligations subsisting at the time of the transfer. The new employer is thus not automatically bound to continue paying into an employees' pension fund. It should be noted that the joint responsibility of the transferor and transferee provided for in the second paragraph of Article 1639 cc also extends to invalidity pensions.

In addition, a special scheme exists in respect of pension commitments vis-à-vis employees who occupy a "position of strength in the firm". Since 1 March 1981, owners of shares representing at least one tenth of the firm's issued capital may, under certain conditions, be exempt from the guarantee provided for in Article 2 (1) of the Law

on pension and savings funds. Under Article 29 of that Law workers who indirectly own shares may also be exempt from the guarantee. This exemption is justified by the fact that these employees, by virtue of their position in the firm, are sufficiently well placed to safeguard pension rights already built up.

In Portugal, Article 37 (1) of the LEC provides that:

"Whatever form the transfer should take, the legal situation of the employer resulting from contracts of employment shall be transferred to the transferee of the undertaking in which the workers are employed, except where the contract of employment has terminated prior to the transfer, or where the original employer and the transferee have agreed that the original employer will continue to employ the workers in another undertaking..."

This makes it clear that the principle of transferring the rights and obligations of the employer applies only if an employment relationship currently exists between employer and workers.

It should be added, however, that Article 37 (2) also protects workers whose contracts have terminated before the transfer and who have outstanding claims vis-à-vis the original employer.

However, Article 37 (2) lays down that "the transferee of the business shall be jointly liable for any of the original employer's obligations which fall due in the six months preceding the transfer, even if such obligations relate to workers whose contracts have terminated, provided that those concerned submit claims in this respect before the date of the transfer".

This limitation on the transferee's liability for debts that have fallen due in the six months preceding the transfer and the fact that workers to whom money is due have only a very short time within which to submit their claims raise serious doubts about the extent to which the Portuguese law complies with the provisions of the Directive, which provides for the automatic transfer to the transferee of all the rights and obligations of the transferor.

With regard to the collective aspects of the problem, Article 9 of Decree-Law 519-C1/79 of 29 December (statutory rules on collective bargaining) lays down that in the event of the transfer of all or part of an undertaking or business, the transferee must observe any collective agreement or other collective instrument binding on the transferor until its expiry.

It should be pointed out that under Portuguese law there are two types of collective instruments: collective agreements and administrative regulations (portarias).

The Decree-Law makes no provision for exceptions as regards the nature of the rights guaranteed. In principle entitlements deriving from supplementary pension schemes are also transferred to the transferee (provided that the transferee already has obligations in respect of such rights).

It should be stressed, however, that under the Law on collective bargaining (Decree-Law 519-C1/79 referred to earlier) supplementary benefits in addition to those provided by the statutory social security schemes may not be introduced or regulated by collective agreement (Article 6 (1)).

The effect of this should have been to rule out any such supplementary schemes; however, this was far from true in practice (many agreements, whether formal or informal, contain provisions on this type of scheme). Today Portuguese legislation (Decree-Law 221/89) allows for the setting-up of supplementary pension schemes by agreement between an undertaking or a group of undertakings and their employees.

In the Federal Republic of Germany Article 613 a.1., first sentence, of the Civil Code provides for the transfer to the transferee of employment relationships existing on the date of the transfer of an establishment or part thereof without the need for a special legal act.

Under Article 613 a.2. of the Civil Code the transferor and the transferee are jointly liable in respect of debts arising from the employment relationship before the date of the transfer which fall due within twelve months of the transfer. Where such debts fall due after the transfer, the previous employer is responsible only for the period up to the date of the transfer.

Pursuant to the second sentence of Article 613 a of the Civil Code, rights and obligations governed by the provisions of a collective agreement or plant agreement shall become an integral part of the employment relationship between the new employer and the employee. They may not be modified to the detriment of the employee before the expiry of the year following the date of the transfer. The third sentence of this same article provides that the rule described above shall not apply when the rights and obligations are governed in the transferee's firm or establishment by the provisions of another collective agreement or plant agreement.

Finally, the fourth sentence of this article states that rights and obligations governed by the provisions of a collective agreement or plant agreement may be modified before the expiry of the time limit referred to in the second sentence only if the collective agreement or plant agreement concluded by the transferor has expired or if, in the absence of a collective agreement binding the two parties, the new employer and employees agree to conclude a new collective agreement.

Pursuant to case law developed by the Federal Labour Court, under the terms of the first paragraph of Article 613 a of the Civil Code the transferee is bound to honour old-age pension rights acquired or in the process of being acquired.

The transferee is thus obliged to take the place of the transferor as regards such rights in respect of pension or provident funds afforded by the transferor. The same applies to prospective pension rights under inter-company schemes.

The interests of employees and persons no longer working for the transferor's firm at the time of the transfer as regards the rights referred to in the second subparagraph of Article 3 (2) are safeguarded in various ways under German law. As mentioned earlier, the Federal Labour Court has ruled that the transferee is obliged under Article 613 (1) of the Civil Code to honour immediate or prospective entitlement to old-age benefits.

The transferor, for his part, must honour rights conferring on employees who no longer work for the firm immediate or prospective entitlement to benefits at the time of the transfer. In the event of the transferor's insolvency, liability is transferred to the body providing insurance against insolvency. However, under Article 7 (3) of the Law on the improvement of occupational retirement pensions, current benefits for which the insurers are liable are limited to an amount equal to three times the maximum monthly wages taken into consideration in calculating employees' contributions to statutory insurance schemes.

In the United Kingdom, Regulation 5(1) of S.I. 1981/1794 lays down the principle that in the event of a transfer the rights and obligations of employees arising from a contract of employment existing on the date of the transfer are maintained. Under Regulations 5 (2) and 2 (1), however, it appears that all rights and obligations arising directly or indirectly from a contract of employment are transferred.

The joint liability of the transferor and the transferee in respect of obligations arising from a contract of employment has not specifically been introduced in the United Kingdom.

Furthermore, Regulation 6 of S.I. 1981/1794 is intended to guarantee that any right or advantage conferred on an employee or arising directly or indirectly from a collective agreement ismaintained after the transfer, whether or not it forms part of his contract of employment, and to ensure that it is therefore transferred in accordance with the provisions of Regulation 5 of the same instrument.

The collective provisions of collective agreements (such as those on membership of trade unions, disciplinary procedures and complaint, recognition and negotiation procedures) are not all regarded as conditions of employment and are not normally included in individual employment contracts. Regulation 6 ensures that these rights and advantages are transferred together with the other employment conditions.

Regulation 6 does not overrule Section 18 of the 1974 Trade Union and Labour Relations Act, which states that collective agreements are in general not legally binding.

This means that collective agreements continue to be legally unenforceable unless the parties stipulate otherwise; the transferee may therefore reject or simply overrule the terms of a collective agreement concluded by the transferor of the undertaking.

Regulation 7 of the 1981 Regulations states that the provisions of the instrument do not apply to employees' rights under occupational pension schemes within the meaning of the 1975 Social Security Pensions Act or the Social Security Pensions (Northern Ireland) Order. It is felt in the United Kingdom that the provisions of the Social Security Act 1973 and the Social Security Pensions Act 1975 are sufficient to comply with the requirements of Article 3 (3) of the Directive and that no other measures are necessary.

Non-statutory pension schemes in the United Kingdom are covered by a special law, the Trust Law. Contributions to such schemes are paid into a different account from the employer's other assets, and he cannot use this money for any other purpose. Pension funds are administered by trustees who very often include representatives of the workers'. Under the Social Security Act 1973 it is compulsory to maintain the pension rights of employees with at least two years' service who leave their employer before retirement age. Employees who do not fulfil these conditions usually have their pension contributions reimbursed. Additional protection is provided by the Employment Protection (Consolidation) Act 1978, under which contributions (up to a certain limit) which remain unpaid by an insolvent employer are paid by the Redundancy Fund.

Finally, under the 1975 Policyholders Protection Act, workers whose pension rights are directly or indirectly protected under an insurance policy have 90% of their entitlement guaranteed if the original insurance company cannot honour its commitments. Where this is the case there are provisions for arranging a new policy or, in exceptional cases, for paying future benefits in cash.

II. PROTECTION AGAINST DISMISSAL

Article 4

1. **The transfer of an undertaking, business or part of a 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 organizational 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 within the meaning of Article 1 (1) 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.**

1. There is a clear link between the principles enshrined in this article and in Article 3, but not such as to make either redundant.

After the transfer, and without prejudice to the automatic transfer of employment relationships described in Article 3, the new employer may well find it necessary or convenient to dismiss some of the workers he employed before the transfer. The transferor himself, having disposed of part of his business, may well decide the same.

A transfer cannot in principle constitute grounds for dismissal. However, this principle has limited application; it does not cover situations where there is a staff surplus, and where the employer (transferor or transferee) can always dismiss individual workers or introduce collective redundancies on economic grounds.

It should be pointed out that the second subparagraph of Article 4 (1) excludes only those "specific categories of employees" who are not covered by other more general provisions on protection against dismissal.

Paragraph 2 defines "indirect dismissal", i.e. the termination of the contract of employment by the employee, but on grounds such that the employer is regarded as responsible for the termination.

The provisions of Article 3 (1) and (2) indicate that the Directive here refers only to "normal" changes in working conditions decided on and implemented by the employer; there is no need for more specific rules on this point, provided that the general provisions of the contract of employment incorporate the basic idea contained in Article 4 (2).

In Belgium, under Article 6 of Collective Agreement No 32 a change of employer does not constitute grounds for dismissal. This Article should be seen in the light of Article 1 of the same Agreement, which limits the scope of this text, stipulating that the Agreement is designed to safeguard employees' rights in all cases involving a change of employer as a result of the contractual transfer of a business of part thereof. Article 6 does not therefore apply to changes of employer which are not of a contractual nature.

Article 6 (2) of the Agreement states that workers who change their employer may be dismissed on serious grounds or for economic reasons. It should also be pointed out that Article 37 of the Law of 3 July 1978 allows an employer to dismiss an employee without stating the grounds, provided formal notice is given as required by the said article. Subparagraph 1 of Article 4 (1) of the Directive implies that grounds should be given for dismissal if it is to be considered valid. Collective Agreement No 32 contains no clear provision to this effect.

Moreover, Article 7 of Collective Agreement No 32 excludes three categories of employers from the provisions of Article 6 above:

1. employees who are engaged subject to a probationary period;
2. employees nearing the age of retirement;
3. persons bound by a student's contract of employment pursuant to the Law of 3 July 1978 on employment contracts.

Under Belgian law, these three categories of employees are protected against dismissal by Articles 48, 81, 83, and 130 of the Law of 3 July 1978 on employment contracts. Under subparagraph 2 of Article 4 (1) of the Directive only employees not covered by the "laws or practice of the Member States in respect of protection against dismissal" may be excluded from the benefit of the provisions of the first subparagraph of Article 4 (1), which are embodied in Article 6 of Collective Agreement No 32.

Under Article 8 of Collective Agreement No 32, the termination of a contract of employment on the grounds that a transfer entails a substantial change in the conditions of employment to the detriment of the employee is tantamount to a unilateral repudiation of the contract on the part of the employer.

It should be noted that the courts in Belgium have long recognized the concept of "an act equivalent to termination". They hold that if one of the parties modifies a key element of the contract of employment without the agreement of the other party, that party thereby assumes responsibility for breaking the contract.

In Danish law, Article 3 (1) of Law No 111 of 21 March 1979 provides that dismissal in connection with the transfer of a business or part thereof shall be deemed unfair unless economic, technical or organizational reasons necessitating changes in the workforce apply. All categories of workers are covered by this rule.

It is a key principle of Danish labour law that the employer has the right to decide on the size of the workforce to be employed in the undertaking. There are therefore no laws or general practice in respect of protection against dismissal on unspecified grounds. The principal agreement between the main union organizations contains provisions on the grounds for payment of compensation to workers employed for at least nine months in an undertaking who have been dismissed unfairly or on grounds not relating to the situation of the employer or the undertaking.

The law contains similar rules on legal relations between employers and employees, but the principle is more widely applied outside rather than in the field covered directly by the trade unions' principal agreement and the Law on employees.

Article 3 (2) of Law No 111 of 21 March 1979 stipulates that with regard to the legal relations between employer and employee, termination of an employment contract on the grounds that the transfer entails a substantial change in working conditions to the detriment of the employee is deemed to be equivalent to dismissal.

In Spain, Article 44(1) of the ET lays down that a change in ownership of an undertaking, place of work or independent production unit shall not terminate the employment relationship. It is therefore clear that under the Spanish system a transfer cannot be the cause of the automatic termination of a contract of employment.

However, this does not solve the question of whether a transfer can constitute grounds for dismissal by the employer (transferor or transferee).

There is no question that the rule that the new employer takes over the rights and obligations of the former owner clearly indicates the intention of the Directive.

Under Article 50(1)(a) of the ET "substantial changes in working conditions which are not in keeping with the employee's skills or dignity" are deemed to be fair grounds for the employee to request the termination of his contract.

Paragraph 2 of the same article provides that, in such cases, the employee shall be entitled to compensation for unfair dismissal, i.e. for the irregular termination of his contract by the employer.

Spanish law is therefore broadly in line with the Directive on this subject.

In French law, a transferor or transferee may not cite the transfer of a business as grounds for dismissal.

Firstly, as far as the transferor is concerned, the second subparagraph of Article L 122-12, referred to above, prohibits him from using the impending transfer of his business as a pretext for dismissing certain employees. The courts have ruled that dismissals announced by the transferor before the transfer and resulting in the loss of rights to which employees are entitled under Article L 122- 12 should be regarded as unfair.

Secondly, and more generally, any employee dismissed - and therefore any employee who may be dismissed by the transferor or transferee in connection with the transfer - may avail himself of the provisions referred to above which afford legal protection against dismissals.

Articles L 122-14-2 and L 122-14-3 concern the repudiation by an employer of an unlimited employment contract, whilst Articles L 321-3 to L 321-12 concern individual or collective dismissals for economic reasons. These texts allow the judge responsible for determining the effect of the contract in the first place and the administration, subject to a review by an administrative judge, in the second case to ascertain whether the grounds cited are well-founded.

In French law there are no laws, regulations or administrative provisions laying down a rule corresponding to that in Article 4(2) of the Directive.

However, on the basis of Articles L 122-4 and 14 of the Labour Code (termination of unlimited employment contracts), case law developed by the Cour de Cassation (appeals court) attributes termination of the contract of employment to the employer where he has decided, following a transfer, to carry out changes affecting key elements of the contract, such as the nature of the job or place of employment, and where these changes are rejected by the employee. In such cases the employer must then observe the period of notice and indemnify the employee for dismissal as provided for by law, collective agreement or the individual employment contract.

In Greece, the Presidential Decree referred to earlier incorporates the provisions of Article 4 of the Directive into national law: a transfer cannot constitute grounds for dismissal, but cannot prevent dismissal if the technical or economic conditions change; if there is a change in working conditions to the detriment of the employee, the employer is regarded as responsible for terminating the contract.

In Ireland, Article 5(1) of the 1980 Regulation reproduces the wording of the first subparagraph of Article 4(1) of the Directive. All categories of workers benefit from the terms of this provision in the event of a transfer.

It should be stressed that the Regulation does not define the concepts "economic, technical or organizational reasons entailing changes in the workforce", which it introduces into Irish law.

Article 5(2) of the 1980 Regulation transposes the provisions of Article 4(2) of the Directive into Irish law.

An employee may bring his case before the Rights Commissioner Service or the Employment Appeals Tribunal to seek redress for the termination of his employment contract. These bodies interpret the notion of "substantial change in an employment contract" according to the merits of each case.

In Italian law, under the terms of Article 2112(1) of the Civil Code, the transfer of a business used to be sufficient grounds for dismissal provided the transferor gave reasonable notice to the employees affected by this measure. However, in Judgement No. 5255 of 14 November 1978, the Court of Cassation ruled that the provisions of Article 2112(1) of the Civil Code no longer applied to groundless dismissals. Thus, in accordance with Law No. 606 of 15 July 1966 on individual redundancies, only where structural considerations necessitated changes in managing levels were there grounds for dismissing employees on the occasion of a transfer of ownership.

Article 47(4) of the Law of 29 December 1990 now expressly states that the transfer of an undertaking is not grounds for dismissal per se.

On the other hand, the Court of Cassation has ruled that the categories of employee not protected against dismissal by Law No. 604 could be excluded from the scope of Article 4(1) of the Directive. However, protection against individual and mass redundancy is now strengthened by Law No. 108 of 11 May 1990 on individual dismissals, both as regards generally applicable regulations (obligation at the employee's request to give notice of and reasons for dismissal in writing) and the extension of the scope of the compulsory guarantee (up to 15 employees in the establishment) and the real guarantee (over 115 employees in the establishment or more than 160 workers in total in the employer's service).

These categories include:

- employees engaged subject to a probationary period (6 months or longer);

- supervisory staff;

- male employees meeting the conditions required by law for entitlement to an old-age pension and female employees who, having opted to continue working in accordance with the provisions of Article 4 of Law No 903 of 9 December 1977, have reached the age limit applying to men;

- employees of firms with only one establishment or several establishments in the same municipality and whose total workforce does not exceed 15 persons in the industrial or commercial sectors or 5 persons in agriculture.

There appear to be no rules of a general nature making the employer responsible for termination of an employment contract where it is ended because a transfer entails a substantial change in conditions of employment to the detriment of the employee concerned.

In Luxembourg, the Law of 18 March 1981 states that the transfer of a business resulting from a contractual transfer or a merger does not in itself constitute grounds for dismissal for the transferor or the transferee. This protection is afforded to all categories of employee.

The explanatory memorandum adds, moreover, that "the new employer should not be deprived in any way, even temporarily, of his right to organize or reorganize the firm by doing away with jobs which seem to him superfluous" and that "the provision does not affect the right of successive employers to break the contract of employment unilaterally".

The Law of 18 March 1981 stipulates that where a contract of service is terminated on the grounds that the transfer entails a substantial change in conditions of employment to the detriment of the employee, the employer shall be regarded as having been responsible for such termination.

A "substantial change in conditions of employment to the detriment of the employee" is deemed to have been effected "in particular where, despite the retention of skills and remuneration, the change profoundly affects the importance of the employee's function" or "where the transfer of the employee brings about a change the nature of the job, the skills involved and the place where the work is carried out".

In the Netherlands, the general directives adopted on the basis of Article 6 of the Special Decree on labour relations (1945) concerning the approval of applications for dismissal submitted by an employer to the director of the Regional Employment Office expressly stipulate that the transfer of a business never constitutes valid grounds for dismissal.

The director of the Regional Employment Office may authorize dismissals in the event of a transfer of a business only if economic, technical or organizational reasons necessitate staff reductions.

However, probationary employees engaged for a period not exceeding two months may be dismissed in the event of a transfer.

In pursuance of the second subparagraph of Article 4 (1) of the Directive, such employees may be dismissed without taking account of the provisions on the repudiation of employment contracts contained in Article 1639 n of the Civil Code.

Article 1639 dd of the Civil Code stipulates that if the transfer of a business entails a change in conditions of employment to the detriment of the employee and if, as a result, the employment contract is terminated for substantial reasons pursuant to that same article, the employer shall be regarded as having been responsible for terminating the contract.

It is the task of the courts to decide whether the change in "conditions of employment" constitutes a "substantial reason for terminating the contract of employment" within the meaning of Article 1639 w of the Civil Code.

The explanatory memorandum to the Law of May 1981 incorporating a new Article 1639 dd into the Civil Code stipulates that circumstances constituting a "serious reason" are those defined in Article 1639 q of the Civil Code as "circumstances in which the worker cannot reasonably be to continue the employment relationship".

Portuguese legislation does not contain any provisions which directly correspond to Article 4 (1) of the Directive. However, the rule that a transfer "shall not in itself constitute grounds for dismissal" is deemed to be implied in Article 37 (1) of the LEC.

Moreover, Article 6 of Decree-Law 64-A/89 of 27 February (statutory rules governing the termination of employment contracts and fixed-period employment contracts) stipulates quite clearly that, in the event of the transfer of a business following the loss of the employer, whether individual or corporate, contracts of employment may not be terminated.

This means that, under the Portuguese system, the rules governing transfers system first and foremost enshrine the principle that employment contracts are bound to the production unit (undertaking), and secondly lay down that such contracts are not affected by a change of employer; it is thus impossible to use a transfer as grounds for dismissal.

Provided that the transfer itself is not used as grounds for dismissal, the law does not prohibit the usual measures for dealing with imbalances in the workforce: collective redundancies (Article 16 of Decree-Law 64-A/89 referred to earlier) and individual dismissals (Article 26) on economic, market-related, technological or structural grounds are possible at the time of the transfer.

On the basis of the final subparagraph of Article 4 (1) certain types of work can be excluded from the scope of Decree-Law 64-A/89 (home workers, dockworkers, staff of social security institutions, ships' crews).

Under Portuguese legislation "a substantial change in working conditions to the detriment of the employee" always constitutes fair grounds for the employee to terminate his contract.

If the change entails a wrongful infringement of the employee's rights on the part of the employer, the employee repudiating his contract is entitled to compensation equivalent to that paid in cases of wrongful dismissal (Article 36 of Decree-Law 64-A/89).

On the other hand, if the change is the result of "the lawful exercise of his rights by the employer", the employee may still repudiate his contract, but without being entitled to compensation.

In the Federal Republic of Germany, pursuant to the fourth paragraph of Article 613 a of the Civil Code, the repudiation of any employment relationship by the old or new employer in the event of a transfer of an establishment or part thereof is null and void. The second sentence of this article states that the preceding provision shall not affect the employer's right to repudiate an employment relationship for other reasons. In practice, these other reasons are confined to economic, technical or organizational factors necessitating changes in the workforce. The courts put a very narrow interpretation on this article.

As regards Article 4 (2) of the Directive, it should be pointed out that, under German labour law, the employer may not make substantial changes to the conditions of employment to the detriment of the employee. In order to change the conditions of employment in any way, the employer must either obtain the employee's agreement, or apply the procedure whereby the employee is dismissed and immediately reemployed under different conditions (if the employee refuses to carry on working under the new conditions, it is up to the employer to terminate the employment relationship).

However, if one of the employers involved, i.e. the transferor or transferee of the business of part of the business wishes to bring about substantial changes in the conditions of employment to the detriment of the employee at the time of the transfer, and if the employee refuses to carry on working under the new conditions, and if the employer does not wish to maintain the employment relationship under the earlier conditions, he can either try to terminate the relationship by mutual consent with the employee, or terminate the

employment contract. In the first case the employer is deemed to be solely responsible for terminating the relationship and the employee's legal situation is the same as if the employer himself had terminated it. In the second case, the employment relationship is terminated by the employer. In both cases the aim of Article 4 (2) of the Directive is achieved without the need for any special legal provisions.

However, despite the fact that German law makes no provision for the employee to terminate the employment relationship in the situations described in Article 4 (2) of the Directive, if the employee should (for example, because he is not familiar with the law) terminate the employment relationship either in agreement with the employer or on his own initiative, under German law he is legally still in the same position as if the employer had terminated the relationship.

In the United Kingdom, Regulation 8(1) of the 1981 Regulations implementing the Directive states that any employee dismissed where the transfer of a business constitutes the sole or principle reason for dismissal shall be treated as having been unfairly dismissed. Regulation 8 (2) of this instrument states that the preceding provision does not prevent dismissals taking place for economic, technical or organizational reasons entailing changes in the workforce. Such dismissals must be regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held (Regulation 8 (2) (b)).

The above-mentioned provisions do not apply to the following categories of worker:

a) employees who, under their contract of employment, ordinarily work outside the United Kingdom (Regulation 13(1));

b) workers whose dismissal is obligatory under section 5 of the Aliens Restriction (Amendment) Act of 1919.

Under the terms of Section 55 (2) (c) of the Employment Protection (Consolidation) Act 1978, an employee shall be deemed to have been dismissed by his employer if the former terminates the contract, with or without notice, in circumstances under which he is entitled to terminate it without notice owing to the conduct of the employer (constructive dismissal).

On the basis of this section, the industrial tribunals impute responsibility for termination of the contract of employment to the employer where he has effected changes which concern key elements of the contract or where his conduct implies that he no longer considers himself bound by one or more such elements.

III. SAFEGUARDING OF THE STATUS AND FUNCTION OF WORKERS' REPRESENTATIVES

Article 5

1. If the business preserves its autonomy, the status and function, as laid down by the laws, regulations or administrative provisions of the Member States, of the representatives or of the representation of the employees affected by the transfer within the meaning of Article 1 (1) shall be preserved.

The first subparagraph shall not apply if, under the laws, regulations, administrative provisions or practice of the Member States, the conditions necessary for the re-appointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled.

2. If the term of office of the representatives of the employees affected by a transfer within the meaning of Article 1 (1) 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.

1. The aim of this article of the Directive is to safeguard the status and function of the representatives of workers affected by the transfer of an undertaking or business, as defined in Article 2 (c).

However, Article 5 contains a number of criteria to fulfilled in this connection.

The first relates to the "autonomy" of the business, which must continue to be a unit capable of operating independently, i.e. the plant and equipment must not be absorbed by a larger and more complex operating unit.

The second condition is negative: if "the conditions necessary for the re-appointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled" the status and function of the original representatives will not be preserved. This can happen, for example, where the transfer results in an increase in the workforce necessitating a change in the number of representatives or in the structure of the representation.

It should be stressed that despite the fact that so much depends on how national legislation defines the status and function of the representatives and on what the conditions are for appointing or constituting the representation, Article 5 (1) still enshrines a vital principle: that of the continuity of the status and function of the representatives concerned.

Paragraph 2, taken together with the second subparagraph of paragraph 1, provides a guarantee for representatives whose term of office expires as a result of the transfer. They continue to enjoy the protection afforded by legislation in most Member States - particularly following ILO Convention No 135 and Recommendation 143 - to cover the possibility that employers might take action to the detriment of the socio-professional situation of such former representatives.

In Belgian law, the new Article 21 (10) of the Law of 20 September 1948, introduced by Royal Decree No 4 of 11 October 1978, lays down that:

a) In the event of a contractual transfer of one or more firms:

- the existing works councils shall continue to function if the undertakings in question retain the character of an operating unit;
- in other cases, the works council of the new undertaking shall be made up - until the next election - of all the members of the works councils elected previously in the undertakings concerned, unless the parties concerned decide otherwise. This works council shall act on behalf of all the staff of the undertakings concerned.

b) In the event of a contractual transfer of part of an undertaking to another undertaking, which - like the first - has a works council:

- if the operating units remain unchanged, the existing works council shall continue to function;
- if the character of the operating units is changed, the existing works council shall continue to function in the undertaking of which a part was transferred, the staff representatives on the works council who work in the transferred part of the undertaking being assigned to the works council of the undertaking to which the part in question was transferred.

c) In the event of a contractual transfer of part of an undertaking which has a works council to an undertaking which has no such council:

- the existing works council shall continue to function if the character of an operating unit is maintained;
- if the character of the operating unit is changed, the works council of the undertaking of which a part is transferred shall continue to function with the staff representatives who did not work in the part of the undertaking which was transferred;
- in addition, a works council made up of staff representatives working in the transferred part shall be set up until the next elections in the undertaking to which part of another undertaking was transferred, unless the parties concerned decide otherwise.

d) Where an operating unit is split up into several legal entities without its character as an operating unit being changed, the existing works council shall be maintained until the next elections. If several operating units are created and works council shall continue to function on behalf of all these units until the next election, unless the parties concerned decide otherwise.

e) In all cases of contractual transfer of an undertaking or of part of an undertaking and of its division into several legal entities, the members who represented the employees and the candidates shall continue to enjoy the protective measures provided for under paragraphs 2 to 8 of this article.

Article 10 (10) of Royal Decree No 4 of 11 October 1978 introduces into the Law of 10 June 1952 provisions identical to those of Article 21 (10) of the Law of September 1948 for the maintenance of the committees on safety and health at work and the improvement of the working environment in the event of a transfer.

These provisions thus provide protection for the members of works councils and of the safety committees until the election of new workers' representatives, since the transfer of an undertaking may in no case interrupt the term of office of worker representatives even if the new employer employs fewer workers than the minimum stipulated for a mandatory works council.

In Denmark, Article 4 (1) of Law No 111 of 21 March 1979 lays down that workers' representatives shall retain their status and function in the event of transfers under which the undertaking or that part thereof which is transferred is not essentially affected in its functioning by the transfer.

Article 4 (2) deals with cases in which the functions of worker representatives cease in the event of a transfer; the explanatory memorandum includes as an example of this a case of an undertaking's no longer having the number of employees required as the minimum justifying the election of workers' representatives. This article lays down that workers' representatives shall continue to be protected in their employment in accordance with the provisions of the convention or collective agreement applicable to them. This protection is extended to them for a period beginning with the date on which their function as representatives ended and corresponding to the longest period of notice to which workers' representatives are entitled.

Article 4 covers shop stewards and members of cooperation committees who are covered by collective agreements, workers' representatives on safety and health committees as defined in the Law on labour protection, and (notwithstanding Article 2 of the Directive) representatives on the boards of companies covered by laws on stock companies, etc. On the subject of protection against dismissal, the laws refer to the rules on shop stewards.

Spanish legislation does not contain any specific provisions on the status of workers' representatives in the event of the transfer of their firm or business. Some authors regard the reference to "rights and obligations of employment (laborales)" as sufficiently broad to cover the substance of Article 5 of the Directive. However, this interpretation is extremely doubtful.

In France, as part of the reform of staff representative bodies, the Parliament has adopted the following measures to safeguard the continuation of the term of office of workers' representatives where the business preserves its autonomy, in compliance with the provisions of Article 5 (1) of the Directive.

- Article L 412-16 of the Labour Code, on union representatives;
- Article L 423-16 on shop stewards;
- Article L 433-14 on members of works councils;
- Article L 435-5 on the representation of the business transferred on the central works council of the takeover firm.

As for the protection of workers' representatives whose term of office expires because of the transfer (e.g. the legal requirements regarding the number of staff are no longer met), the courts have taken the view that elected representatives continue to enjoy special protection against dismissal after the premature expiry of their terms of office because of the transfer, although the law envisaged only the case of normal expiry, i.e. when the term of office had been served to its end.

Under Greek law, Presidential Decree No 572 of 6 December 1988 incorporates the provisions of Article 5 of the Directive: workers' representatives continue their term of office if the business preserves its autonomy, and they continue to enjoy the protection provided for such representatives; if their term of office expires as a result of the transfer, they continue to enjoy this protection for as long as as they would have done so had the transfer not taken place.

In Ireland, Article 6 of the Regulation of 1980, which is identical with the first subparagraph of Article 5 (1) of the Directive, lays down that if the business preserves its autonomy, the status and function, as laid down by the laws, regulations or administrative provisions of the Member States, of the representatives or representation of the employees affected by the transfer shall be preserved.

Since, under Irish law, the status and function of the representatives or representation of the employees are governed by collective agreements, which are not legally enforceable, the legal effect of Article 6 appears uncertain.

In Italy, under Law No 300 of 20 May 1970 (known as the workers' statute) the status and function of the representatives and the representation of the workers is preserved if the establishment retains its autonomy.

As regards Article 5 (2) of the Directive, the system which is now customary in Italy provides the broadest possible protection for the trade unions and their representatives in all situations affecting undertakings. Moreover, in substantive law, such protection is expressly provided for in Article 28 of Law No 300/1970, referred to earlier, the aim of which is to discourage anti-union behaviour by means of certain special procedures. The specific case referred to in Article 5 (2) of the Directive also appears to be covered by Article 28, which has enormous scope.

In Luxembourg, Article 18 (5) of the Law of 8 May 1979 reforming the staff delegations representing the workers in any establishment employing at least 15 workers provides that "in the event of a transfer of a firm ... as the result of a contractual transfer, merger or division, the status and function of the staff delegations shall be preserved, if the firm retains its autonomy". The law adds, however, that this does not apply "where the conditions pertain which require the appointment of new staff delegates". The law lays down that in such a case the provisions regarding special protection against dismissal of staff delegates shall be applicable to former members of the delegation up until the date when their term of office would normally have expired, if they are not re-appointed.

In the Netherlands, Article 1 (1) (c) of the Law on works councils of 28 January 1971 defines an undertaking as "any organized body functioning in society as an autonomous unit where employment is provided by virtue of a contract". Thus, if the establishment transferred retains its autonomy, the transfer does not create a new undertaking within the meaning of the Law on works councils and the status and function of the members of the works council are therefore preserved.However, if the term of office of the members of the works council expires because of the transfer (e.g. if the staff requirement set out in Article 2 (2) of the Law on works councils is no longer met) or the establishment loses its autonomy, there is no provision under which these worker representatives continue to enjoy the protection provided by the Law of 28 January 1971.

In Portuguese legislation, Article 34 of the Law on trade unions (Decree-Law 215-B/75 of 30 April) lays down that "trades union delegates may not be transferred to another place of work without their consent and without prior notification of the governing body of their union".

Furthermore, the general rules contained in Article 37 of the LEC provide for the maintenance of the representational structure which existed before the transfer. In the same way as employment contracts are bound to the firm concerned, representatives are bound to the production units to which they belong.

Workers' representatives continue to enjoy protection irrespective of the situation which results in the expiry of their term of office.

This protection is now enshrined in the Law on the termination of contracts of employment (Decree-Law 64-A/89 referred to earlier) and in certain other provisions of the Law on trade unions (Decree-Law 215-B/75, in particular Article 35) and the Law on works committees (Law 46/79 of 12 September, Article 16).

In the Federal Republic of Germany, under the Law on labour relations at the workplace the status and function of works councils elected by all the workers in undertakings employing at least five workers are not affected by the transfer of an establishment, where that establishment retains its autonomy.

No new provisions have been adopted to protect the members of works councils and other worker representatives in the event of their loss of office as a result of the transfer of an establishment.

The Federal Labour Court has found that the protection extended to workers' representatives by Article 37 (4) and (5) and Article 38 of the Law on labour relations at the workplace and by Article 15 of the Law on protection against dismissal when their term of office comes to an end is enjoyed by members of works councils whose term of office expires as a result of the transfer.

No matter when the term of office of a member of a works council expires, he is afforded protection for one year, or two in certain cases (cf. Article 38 (3) of the Law on labour relations at the workplace).

In the United Kingdom, Regulation No 9 of S.I. 1981/1794 lays down the principle that if a trade union is recognized as representing the workers by the transferor, it must be so recognized by the transferee in the event of a transfer of an undertaking which retains its legal identity.

Furthermore it should be pointed out that under the British system of "voluntary" recognition of trade unions by the employer, the employer can withdraw recognition at any time.

SECTION III - INFORMATION AND CONSULTATION

Article 6

1. The transferor and the transferee shall be required to inform the representatives of their respective employees affected by a transfer within the meaning of Article 1 (1) of the following:

- the reasons for the transfer,

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

- 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. If the transferor or the transferee envisages measures in relation to his employees, he shall consult his representatives of the employees in good time on such measures with a view to seeking 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 employees.

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

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

4. Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in respect of the number of employees, fulfil the conditions for the election or designation of a collegiate body representing the employees.

5. Member States may provide that where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed in advance when a transfer within the meaning of Article 1 (1) is about to take place.

1. This article lays down the conditions under which national legislation must guarantee workers and their representatives a certain level of participation in the form of information and consultation. Both the transferor and the transferee have certain obligations vis-à-vis their employees in this respect.

Both the transferor and the transferee are required to provide information of a general nature, i.e. not relating to the consequences of the transfer for the workers, and both must inform the representatives of their workers about the transfer "in good time", in other words well in advance of the transfer.

The Directive specifies what the information should contain: the reasons for the transfer, the legal, economic and social implications for the employees and the measures envisaged in relation to them. This is designed to cover a number of aspects for the protection of workers' interests in the event of a transfer: the aim of the Directive is to ensure that workers receive a certain amount of information in advance to prevent them from being taken by surprise by the practical consequences of the transfer, and to enable their representatives to intervene in the transfer process or to examine the reasons for and implications of the transfer.

The obligation to consult the workers applies only "if the transferor or the transferee envisages measures in relation to his employees", such as a reduction in the workforce or the introduction of new working methods or wage systems.

The right to consultation applies both to workers who remain in the transferor's employ after the transfer and to those who were in the transferee's employ before the transfer - in other words, workers whose employment contracts are not directly affected by the transfer.

The consultation need only cover the measures envisaged, with the aim of reaching agreement on them.

The scope of the two requirements laid down in this article may be much more limited.

This may be the case if the transfer gives rise to a change likely to entail disadvantages for the employees, provided that national legislation provides for the possibility of "recourse to an arbitration board" to obtain a decision on the measures to be taken in relation to the employees (paragraph 3).

In addition, paragraph 4 stipulates that national legislation may make the requirement to inform and consult employees and the need for an arbitration board conditional on fulfilment of the conditions for setting up a "collegiate body" representing the employees.

This article also raises a very important problem: Member States are required to make provision for organized representation of employees as defined in Article 2 (c).

Under Article 6 (5) Member States may allow firms themselves to inform the workers themselves "when a transfer is about to take place", in cases where "there are no representatives of the employees in an undertaking or business".

It appears that the aim of Article 6 (5) the aim of Article 6 (5) is merely to provide a means of recourse where an undertaking or an establishment has no representation in a national system which generally provides for adequate representation.

Moreover, this interpretation is borne out by the scope given to Member States in Article 6 (4) to limit obligations.

Consequently, the Member States must be regarded as having an implicit obligation to create the conditions, whether statutory or otherwise, for such representation.

2. In Belgium, Article 11 of Collective Agreement No 9 of 9 March 1972, which coordinates the national and other agreements relating to works councils, as amended by Collective Agreement No 15 of 24 July 1974, requires transferors and transferees to inform and consult the works council in the event of a merger, concentration, resumption of activities, shut-down or other major changes in the structure of undertakings.

This article lays down that this information shall cover, in particular, the effects of the transfer on employment prospects, the organization of work and employment policy in general.

Collective Agreement No 9 likewise lays down that the information must be given by the transferor and the transferee to the works council in good time, i.e. before the transfer and before information on this matter has been widely disseminated. The transferee's works council is thus informed before the workers are directly affected in their conditions of employment and of work by the transfer.

There is no equivalent in Belgian law to the provisions of paragraphs 3 and 5 of Article 6 of the Directive:

- under Article 1678 of the Judicial Code an arbitration agreement concluded before a dispute on a matter which falls within the field of competence of the industrial tribunal is ipso jure null and void. An arbitration agreement can thus be valid only if it is concluded after a dispute arises. However,

Belgian legislation contains no specific provisions on arbitration in disputes on transfers of undertakings, which would be covered by Articles 1676 et seq. of the Judicial Code;

- there is no obligation to inform or consult the employees in undertakings where there are no workers' representatives.

In Denmark, the provisions of paragraphs 1 and 2 of Article 6 of the Directive have been been incorporated in Articles 5 and 6 of Law No 111 of 21 March 1979. These cover all the measures affecting the workers about which they should be informed and which should be examined together with the workers or their representatives. The overall aim of the law is to maintain the previous status of employees after the transfer.

Moreover, Articles 5 and 6 of Law No 111 provide that, where there are no elected or appointed workers' representatives, the workers affected by a transfer, or some of them, shall be directly informed and consulted by the head of the undertaking on the same terms as workers' representatives.

Danish law has no provisions for implementing Article 6 (3) of the Directive.

In Spain, Article 44 (1) of the ET contains specific provisions on the obligation to inform the representatives of employees affected by a transfer: either the transferor or the transferee is required to "notify" the representatives of workers directly affected. There is no provision for informing the representatives of the transferee's workers.

The law does not require the notification to contain the information given in Article 6 (1) of the Directive; it merely states that the employees must be notified through their representatives of the transfer, and does not even require that the workers be notified before the transfer takes place.

In relation to Article 6 (2) of the Directive, Article 64 (1.4) of the ET stipulates that it is one of the responsibilities of the works council to "issue an opinion when a merger, incorporation or change in the legal status of the undertaking is likely to have some effect on the size of the workforce".

However, the responsibilities of the works council do not include - except in the event of dismissal on economic or technical grounds (Articles 9 et seq. of Decree 696/1980 of 14 April) - negotiation with the employer on the effects of a decision he has taken or plans to take.

The council can act only in a consultative capacity; the most serious consequence a transfer can have in terms of the size of the workforce is a reduction in manpower through collective redundancy, i.e. using the procedure laid down in Decree 696/1980, the most important aspect of which is that workers' representatives must be consulted with a view to seeking agreement.

As regards Article 6 (3) of the Directive, Spanish legislation creates considerable scope for amending the content of contractual relationships: Articles 39-41 of the ET lay down the conditions governing job flexibility, geographical mobility and changes in conditions of employment on organizational grounds.

Geographical mobility and changes in conditions of employment - probably the most serious consequences of a transfer - are subject to certain authorization procedures (Article 40 (1), Article 41 (1)) which are the similar in their effect to the "recourse to an arbitration board", referred to in Article 6 (3) of the Directive.

Article 62 of the ET provides for two different types of "collective representation" within an undertaking: the works council and shop stewards. Shop stewards may be elected by a workforce of six or more and they have the same responsibilities as works councils (paragraphs 1 and 2 of Article 62).

There are no provisions in the Spanish system corresponding to Article 6 (4) of the Directive.

There are also no provisions to cover situations where the workers have no representatives. Article 44 of the ET requires only that the workers' legal representatives be notified, and it is clear that no allowance has been made for the situation described in Article 6 (5) of the Directive.

In France, under Article L 432-1 of the Labour Code on the functions of works councils, the works council must be informed and consulted if the economic organization or legal status of the undertaking is changed, particularly in the event of a merger or transfer. The employer is required to give reasons for the changes planned and to consult the works council about the measures to be taken with respect to the employees if they are affected by the changes.

The courts have extended the scope of this requirement and have ruled that works councils must be consulted about any operation leading to the implementation of Article L 122-12. The consultation process also involves information as required by law.

On the other hand, French legislation does not require the new employer to inform or consult any of the workers.

In Greece, Presidential Decree No 572 of 6 December 1988 stipulates that workers' representatives must be informed and consulted in the event of a transfer. For undertakings or businesses with less than 50 employees which have no representative bodies - i.e. those covered by Article 6 (4) of the Directive - the law provides that the workers may elect an ad hoc committee of three members.

In Ireland, paragraphs 1 and 2 of Article 7 of the 1980 Regulation implementing the Directive are identical with paragraphs 1 and 2 of the Directive. The provisions of this Article apply to all representatives and forms of representation; the Irish Government has not availed itself of the opportunity extended to the Member States by Article 6 (4) of the Directive. Furthermore, Article 7 (3) of the Regulation lays down that, where there are no representatives of the workers in an undertaking, the transferor or transferee shall cause:

1. a statement in writing containing the particulars specified in paragraph 1 to be given in good time to each employee, and
2. notices containing the particulars aforesaid to be displayed at various places in the undertaking where they can conveniently be read by the employees.

Furthermore, no advantage has been taken in Ireland of the opportunities extended to the Member States by Article 6 (3) of the Directive: there is no provision for recourse to an arbitration board in the event of a transfer.

In Italy, Article 47(1-2) of the Law of 29 December 1990 provides that the transferor and the transferee have a duty to inform and consult the representatives of workers affected by a transfer.

In particular, the information must cover:

- the reasons for the transfer;
- the legal, economic and social implications for the workers;
- what measures, if any, are envisaged in relation to the workers.

In Luxembourg, Article 9 of the Law of 6 May 1974 setting up joint committees in private-sector undertakings employing at least 150 persons and dealing with the representation of workers in limited companies (sociétés anonymes) lays down that there must be prior information and consultation on all decisions of an economic or financial nature which could have a decisive effect on the structure of an undertaking or the number of its staff. The article includes among such decisions "plans for closures or transfers of undertakings or parts of undertakings, plans for mergers and changes in the organization of undertakings". Furthermore, it specifies the content of such information and consultation, which must cover the following points:

- the effects of the measures envisaged on the number and structure of staff and on the conditions of work and employment of the undertaking's workforce;
- social measures, particularly those relating to vocational training or retraining, taken or envisaged by the head of the undertaking.

The law likewise provides that, in general, worker representatives must be informed and consulted prior to the decision envisaged

The Law of 18 March 1981 specifies that "without prejudice to the provisions of Article 9 of the Law of 6 May 1974 setting up joint committees in private-sector undertakings and dealing with the representation of workers in limited companies, the transferor and the transferee are required to inform the labour inspectorate and the staff delegations (which are to be found in all establishments employing at least 15 persons) concerned by the transfer and, in the case of undertakings bound by collective agreements, the trade unions which signed the agreements, about the following points:

- the reasons for the transfer;
- the legal, economic and social implications of the transfer for the employees;
- the measures envisaged in relation to the employees.

The transferor is then required to inform the workers' representatives in good time before the transfer is carried out.

The transferee is required to inform the workers' representatives in good time and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

Furthermore, the Law of 18 March 1981 provides that in undertakings or establishments with no staff delegation the workers affected must be informed in advance of the imminence of the transfer. It must be stressed that where the parties concerned fail to agree on the measures in respect of which the law urges them to seek agreement, the collective litigation which ensues can be submitted to conciliation procedures with the national conciliation office. If this procedure fails, the law provides for recourse either to an arbitration board, whose decision is not binding, or to standard judicial arbitration procedures.

In the Netherlands, Article 25 of the Law on works councils requires all employers to inform and consult the works council, particularly where a transfer is involved, on all the reasons for the decision in question, the consequences which may be expected to ensue for the undertaking's employees and the measures envisaged in relation to the workers.

Paragraph 2 of the same article specifies that the works council's opinion must be sought at a time when it may still have a decisive influence on the decision to be taken.

The statutory requirement that representatives of workers affected by a transfer must be informed and consulted applies at present only to works councils and, consequently, to undertakings employing at least 100 persons, or at least 35 persons for more than one third of the normal working hours, where the election of a works council is mandatory. However, consultation of the trade unions is likewise considered highly important. Article 18 of the decree of the Economic Economic and Social Council (CES) on the code of conduct relating to mergers (1975) stipulates that when talks on a merger have reached a point where an agreement might reasonably be expected to be concluded, the unions must be informed immediately. Furthermore, the unions must be given a report on the grounds for the merger, the probable legal, economic and social implications and the measures envisaged.

The unions then give their opinion regarding the merger, and are given the opportunity during discussions to put the employees' point of view. The Economic and Social Council's decree applies in principle to all mergers involving at least one undertaking established in the

Netherlands and regularly employing more than 100 persons or when one of the undertakings involved in the merger is part of a group of undertakings regularly employing 100 or more persons.

In Portugal, the special rules governing transfers (given in Article 37 of the LEC referred to earlier) do not make it compulsory for workers' representatives to be informed or consulted.
Under Article 37 (3) the transferee is required to inform the workers only as part of the procedure for making the transfer jointly liable in respect of the latter's earlier debts (paragraph 2 of the same article).

Looking beyond the specific question of transfers, consideration must also be given to the measures open to works committees under Law No 46/79 of 12 September.

Under Article 23 (1) of this Law the committees have the right to be informed about work organization and its implications in terms of the use of workforce and equipment, and any plans for changing the purpose of the undertaking, its registered capital or its production activity.Furthermore, the employer must consult the works committee in advance about certain actions and decisions (Article 24), such as those involving a considerable reduction in the workforce or a substantial change in working conditions and changes in the location of the undertaking or business.

This is a fairly general provision, but it would be in line with common business practice for the situations which it covers to be part of a transfer scenario.

In the Federal Republic of Germany, pursuant to paragraphs 2 and 3 of Article 106 of the Law on labour relations at the workplace, the business committee (Wirtschaftausschuss), an organ of the works council existing in all undertakings regularly employing more than 100 persons, must be informed in good time by the head of the undertaking about economic questions relating to the undertaking and the consequences which might ensue for its employees. Furthermore, Article 111 of the same Law provides for information for the works council itself, which may be set up in any undertaking employing at least five persons.

This article lays down that the head of any undertaking regularly employing more than 20 persons must provide the works council with full information in good time on any planned changes likely to entail substantial disadvantages for the staff or a major portion thereof. He must also consult the works council about such changes.

Article 112 (1) of the Law on labour relations at the workplace provides that the works council and the head of the undertaking may agree on a social plan intended to compensate for or mitigate the detrimental economic consequences which the workers might suffer as a result of the envisaged change. In the event of disagreement on the social plan, either of the two sides may bring the matter before the conciliation committee, an arbitration body, which is made up of an equal number of members appointed by the head of the firm and the works council, with a chairman acceptable to both sides.

The decision of this body, which can deal only with social measures to alleviate the consequences of measures taken because of the transfer, is binding.

In the United Kingdom, Regulation 10 (2) of SI 1981/1794 lays down that the employer must inform the workers' representatives long enough before a transfer to enable consultations to take place about the following matters:

- the reasons for the transfer and its approximate date;
- the legal, economic and social implications of the transfer for the employees;
- any measures envisaged in relation to the employees.

In addition the transferee must inform the transferor as to whether or not he proposes to take any measures in relation to the transferor's employees. The transferee must give this information to the transferor in good time so that he can pass it on to his employees.

Regulation 10 (5) of this instrument lays down that employers must enter into consultations with the representatives of the employees (from an independent trade union representing employees affected by the transfer and recognized by them) if they plan to take measures in relation to their employees.

Moreover, the regulations guarantee genuine consultations, which in practice involves all employees, whether or not they belong to the organizations recognized as representing the workers.

- Regulation 10 (6) provides that in the course of these consultations the employer must consider any representations made by the trade union representatives and, if he rejects any of those representations, state his reasons.
- The British Government has not taken advantage of the facilities extended to the Member States by paragraphs 3, 4 and

- Regulation 10 (7) states that if there are special circumstances which render it not reasonably practicable for an employer to perform the obligations imposed on him by the foregoing paragraphs of the Regulation, he shall take all such steps towards performing those obligations as are reasonably practicable in the circumstances. The British Government stresses that an extremely stringent interpretation of the term "special circumstances" in case law limits this clause to cases of force majeure.

Finally, Regulation 13 (1) lays down that Regulations 10 and 11 (the obligation to inform and consult union representatives and right of action in the event of the non-fulfilment of this obligation) do not apply to employment where, under his contract of employment, the employee ordinarily works outside the United Kingdom.

CHAPTER II. CASE LAW OF THE EUROPEAN COURT OF JUSTICE

Of the three employment directives, it is this directive which has, by far, engendered the most litigation before the European Court of Justice. A total of 12 judgments have been handed down, and these are examined below.

7. Abels v. Bedrijfsvereniging voor de Metaalindustrie en de Electronische Industrie Case 135/83 1985 ECR 469.

7.1. This was the first case in a long series of preliminary rulings seeking clarification of essential provisions of Directive 77/187. Abels raised the important question of the scope of the Directive: what constitutes a transfer?

7.2. The case came to the Court of Justice by way of a reference for a preliminary ruling from the Raad van Beroep, Zwolle. The facts were as follows.

7.3. Mr Abels was employed by Machinefabriek Thole B.V. (hereinafter "Thole") which was granted a "surséance van betaling" [judicial leave to suspend payment of debts] provisionally on 2 September 1981 and then definitively on 17 March 1982 before being put into liquidation on 9 June 1982. During liquidation proceedings the business was transferred to Transport Toepassing en Produktie B.V. (hereinafter referred to as TPP) which continued to operate the undertaking and took over most of its workforce, including Mr Abels.

7.4. Mr Abels did not receive his salary from 9 June 1982 from either Thole or TPP nor any of his holiday entitlement or a proportion of his end-of-year allowance. Accordingly, he sought payment of these sums from the Bedrijfsvereniging, which in his view was liable to pay them. His application was rejected on the ground that TPP was required to fulfil Thole's obligations towards its workers under their contract of employment and it was inappropriate, therefore, for the Bedrijfsvereniging to intervene.

7.5. Mr Abels appealed against this decision to the Raad van Beroep, Zwolle, which decided to refer two questions to the Court:

(1) Does the scope of Article 1 (1) of Directive No 77/187/EEC extend to a situation in which the transferor of an undertaking is adjudged insolvent or is granted a "surséance van betaling"?

(2) If the answer to Question 1 is in the affirmative, must Article 3 (1) of Directive No 77/187/EEC be interpreted as meaning that the transferor's obligations which are assigned to the transferee by reason of the transfer of the undertaking also include the debts which arose from the contract of employment or the employment relationship before the date of the transfer within the meaning of Article 1 (1)?

7.6. The Court held, with respect to the first question, that the scope of the Directive must be appraised in the light of the scheme of the Directive, its place in the system of Community law in relation to the rules on insolvency, and its purpose.

7.7. Directive 77/187 was intended to protect workers in order to safeguard their rights when an undertaking is transferred. The rules governing insolvency, at both national and Community level, must be regarded as being of a special nature:

"Insolvency law is characterized by special procedures intended to weigh up the various interests involved, in particular those of the various classes of creditors; consequently, in all the Member States there are specific rules which may derogate, at least partially, from other provisions of a general nature, including provisions of social law."

7.8. The special nature of insolvency law encountered in all the legal systems is confirmed by Community law. The Collective Redundancies Directive expressly excluded from its scope "workers affected by the termination of an establishment's activities" where that "is the result of a judicial decision". The Insolvency Directive created a system to ensure the payment of outstanding claims relating to pay which applied to undertakings adjudged insolvent.

7.9. These considerations, plus the fact that the rules on liquidation proceedings varied between the Member States, led the Court to conclude that if the Directive had been intended to extend to transfers of undertakings in the context of such proceedings an express provision would have been included for that purpose.

7.10. The Court found further support for its view that the Directive did not apply to transfers arising out of insolvency from the general purpose of the Directive, which was to ensure that the restructuring of undertakings within the common market did not adversely affect the workers in the undertakings concerned.

7.11. It found from the submissions before it that considerable uncertainty existed regarding the impact on the labour market of transfers of undertakings in the event of an employer's insolvency and the appropriate measures to be taken in order to ensure the best protection of the worker's interests, with the result that a serious risk of general deterioration in working and living conditions of workers could not be ruled out. Consequently, the Court ruled that transfers of the kind in question did not fall within the scope of the Directive, but the Member States were at liberty independently to apply the principles of the Directive wholly or in part to such transfers on the basis of their national law alone.

7.12. The Court then turned to the question of whether the directive applied to cases of "surséance van betaling" (judicial leave to suspend payment of debts). It held that the Directive did apply to such a situation. Proceedings such as "surséance van betaling" and liquidation proceedings have common procedures; however, their objectives differ. Proceedings relating to a "surséance van betaling" have as their primary aim the safeguarding of the assets of the insolvent undertaking and, where possible, the continuation of the business of the undertaking by means of a collective suspension of the payment of debts with a view to reaching a settlement which will ensure that the undertaking is able to continue operating. If no such settlement is reached liquidation of the business may ensue. It followed, therefore, that the reasons for not applying the Directive to transfers of undertakings which take place in liquidation proceedings are not applicable to proceedings which take place at an earlier stage.

7.13. With respect to the second question, the Court ruled that Article 3 (1) must be interpreted as covering obligations of the transferor resulting from the contract of employment or an employment relationship and arising before the date of the transfer. Article 3 (1) referred in general terms to the "transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer". Article 3 (2) authorized the Member States to provide for the transferor's liability to continue after the date of the transfer in addition to that of the transferee, indicating that it was the transferee who was liable for bearing the burdens resulting from the employees' rights existing at the time of the transfer.

8. **Industrieband F.N.V. and Federatie Nederlandse Vakbeweging (FNV) v. The Netherlands** case 179/83 1985 ECR 511.

8.1. In this case the Court of Justice was asked by the Arrondissementsrechtbank of The Hague whether Directive 77/187 extended to a situation in which the transferor of an undertaking is adjudged insolvent or is granted a "surséance van betaling".

8.2. This question was identical to the first question referred by the Raad van Beroep Zwolle in Abels.

8.3. The Court followed its ruling in Abels which is discussed above in paras 7.4. et seq.

9. Arie Botzen and Others v. Rotterdamsche Droogdok Maatschappij B.V. Case 186/83 1985 ECR p. 519

9.1. This case came to the Court by way of a reference for a preliminary ruling from the Kantonrechter, Rotterdam. The facts were as follows.

The plaintiffs in the main proceedings were employees of Rotterdamsche Droogdok Maatschappij Heijplaat B.V. (hereinafter referred to as the old RDM) which was declared insolvent on 6 April 1983. In order to avoid total liquidation of that undertaking, and with a view to saving as many jobs as possible, a new company Rotterdamsche Droogdok Maatschappij B.V. (hereinafter referred to as the new RDM) was constituted on 30 March 1983.

9.2. On 7 April 1983 an agreement was concluded between the old RDM and the new RDM that the new RDM took over certain departments of the old RDM and all the staff employed there and, in addition, took over a number of employees of the departments not transferred to it, namely the general and administrative departments. However, the other workers, including the plaintiffs, were dismissed by the liquidators of the old RDM.

9.3. The plaintiffs considered that their dismissal was unlawful in that they had ipso jure entered the service of the new RDM on the date of the transfer. Accordingly, they brought an action against the new RDM seeking payment of their salary due from 7 April 1983 until such time as their employment relationship might have been lawfully terminated. They also requested, as an interim measure, that the new RDM should be ordered to pay them as from 7 April 1983, or alternatively from the date of the decision, a monthly equivalent to their salary, and to allow them to carry out their normal work. In support of their action, they claimed that the transaction at issue was a transfer of a business or part of a business within the meaning of the Dutch law adopted to implement Directive 77/187.

9.4. The Kantonrechter, Rotterdam considered that the matter before it involved questions of Community law, and accordingly suspended proceedings and referred two questions to the Court. The first question was identical to that raised in Abels, considered above, and the Court answered it by reference to that case.

9.5. The second and third questions were essentially intended to ascertain whether Article 3 (1) of Directive 77/187 must be interpreted as extending to a transferor's rights and obligations arising from a contract of employment or employment relationship existing on the date of the transfer and entered into with employees who, although not belonging to the part of the undertaking which was transferred, carry on certain activities using the assets assigned to the transferred part, or who, being assigned to an administrative department of the undertaking which was not itself transferred, carried out certain duties for the benefit of the transferred part of the undertaking.

9.6. The Court held, adopting the interpretation of Article 3 (1) of the Directive put forward by the Commission, that Article 3 (1) of the Directive must be interpreted as not covering the situation referred to in those questions. The Court held:

"An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive No 77/187 by reason of a transfer within the meaning of Article 1 (1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.

The answer to the second and third questions must therefore be that Article 3 (1) of Directive No 77/187 must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred".

10. **Case 19/83 Wendelboe and others v. L. J. Music ApS 1985 ECR p. 457**

10.1 This case came to the Court by way of a reference for a preliminary ruling from the Vestre Landsret [Western Division of the Danish High Court].

10.2. The questions were raised in the course of proceedings brought by the plaintiffs in the main action against L.J. Music ApS, a company in liquidation. The facts were as follows: Messrs Wendelboe, Jensen and Jeppesen were employed by LP Music ApS, whose business was that of making cassette recordings. On 28 February 1980, faced with impending insolvency, LP Music ApS

ceased production and dismissed the majority of its workforce, including the plaintiffs. By order of 4 March 1980 the Skifteret [Bankruptcy Court] Hjørring declared L.J. Music ApS insolvent. On the same day, in the course of the hearing at which the company was declared insolvent, the Skifteret, having notice of an offer to the company by another company, authorized that company to use the insolvent undertaking's premises and equipment as from 5 March 1980. The final agreement on the transfer was concluded on 27 March 1980, but in that agreement it was stated that the company's business was deemed to have been carried on on behalf and at the risk of the transferee as from 4 March 1980.

10.3. On 6 March Messrs Wendelboe, Jensen and Jeppesen were engaged by the new company. They then brought an action against L.J. Music ApS before the Skifteret for a declaration that they were entitled, as preferential creditors, to compensation for unlawful dismissal and holiday pay.

10.4. The Skifteret dismissed the claim for compensation for unlawful dismissal on the ground that the transferor of the undertaking was discharged after the transfer from obligations towards his employees since those obligations had been transferred to the transferee pursuant to Article 2 (1) of Danish Law No 111 of 21 March 1979 on the rights of employees on the transfer of undertakings. That law had been adopted in order to implement Directive 77/187.

10.5. The plaintiffs appealed against this decision to the Vestre Landsret which referred the following question to the Court of Justice:

"Does the Council Directive 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 businesses require the Member States to enact provisions in

accordance with which the transferee of an undertaking becomes liable in respect of obligations concerning holiday pay and compensation to employees who are not employed in the undertaking on the date of transfer"?

10.6. The Court began by recalling its ruling in Abels in which it held that Article 3 (1) of Directive 77/187 did not apply to the transfer of an undertaking where the transferor had been adjudged insolvent and the undertaking formed part of the assets of the insolvent transferor, although Member States themselves were at liberty to apply the provisions of the Directive to such a transfer.

10.7. The Court then proceeded to answer the question referred to it in order to enable the national court to apply the Directive where national law had made it applicable to cases of insolvency.

The Court held that Directive 77/187 did not require the Member States to enact provisions under which the transferee of an undertaking becomes liable in respect of obligations concerning holiday pay and compensation to employees who were not employed in the undertaking on the date of the transfer. It came to this conclusion by examining the provisions of Article 3 of the Directive, and the scheme and purpose of the Directive as a whole. Article 3 (3) which relates to old age, invalidity and survivors' benefits makes an express distinction between

"employees" and "persons no longer employed in the transferor's business at the time of the transfer". The fact that no such distinction is drawn in Article 3 (1) indicates that former employees are excluded from the scope of the Directive. This interpretation was in conformity with the scheme and purpose of the Directive, which was intended to ensure, as far as possible, that the employment relationship continued unchanged with the transferee, in particular by obliging the transferee to continue

to observe the terms and conditions of any collective agreement (Article 3 (2)) and by protecting workers against dismissals resulting solely from the transfer (Article 4 (1)). Those provisions related only to employees in the service of the undertaking on the date of the transfer, to the exclusion of those who had already left the undertaking on that date. The existence or otherwise of a contract of employment or an employment relationship on the date of the transfer must be established on the basis of the rules of national law subject to the mandatory provision of the Directive.

10.8. It was, therefore, for the national court to decide on the basis of those factors whether or not, on the date of the transfer, the employees in question were linked to the undertaking by virtue of a contract of employment or employment relationship.

11. Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar, in liquidation Case 105/84 1985 ECR p. 2639

11.1. This case came to the Court by way of a reference for a preliminary ruling from the Vestre Landsret [Western Division of the Danish High Court]. The Court was concerned with proceedings instituted by the Foreningen af Arbejdsledere i Danmark acting on behalf of Hans Erik Mikkelsen against Danmols Inventar A/S, a company in liquidation.

11.2. Mr Mikkelsen was employed by Danmols Inventar A/S as a works foreman. On 3 September 1981 that company announced that it was suspending payment of its debts and dismissed Mr Mikkelsen as from 31 December 1981. With effect from 19 October 1981, the undertaking was transferred to Danmols Inventar og Møbelfabrik A/S, a company in formation, of which Mr Mikkelsen became co-owner, acquiring a 33% shareholding and 55% of the voting rights at the general meeting. In addition he was appointed Chairman of the Board of Directors. He continued to carry out his duties as works foreman in the new company, doing the same work and receiving the same salary as he had before the transfer.

11.3 In December 1981, Danmols Inventar A/S was declared insolvent. Mr Mikkelsen filed a claim against the company for compensation of two months pay for the premature termination of his employment contract and for certain holiday pay. The bankruptcy court dismissed this claim and Mr Mikkelsen appealed to the Vestre Landsret, which asked the Court of Justice:

"Must the expression "employee" in Council Directive No 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 businesses be interpreted to mean that it is sufficient for the person concerned to have been an employee of the transferor or must he also occupy a position as employee with the transferee?

If the Court takes the view that the person concerned must also be an employee of the transferee, does the expression "employee" contained in the Directive cover a person who has a 50% interest in the company in question?"

11.4. The Court held, in reply to the first question, that Article 3 (1) of Directive 77/187 must be considered as not covering the transfer of the rights and obligations of persons who were employed by the transferor on the date of the transfer, but who, by their own decision, do not continue to work as employees of the transferee.

11.5. The Directive, the Court held, was intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. However, this protection was redundant where the person concerned decided of his own accord not to continue the employment relationship with the new employer after the transfer. This was the case where the employee in question terminated the employment contract or

employment relationship of his own free will with effect from the date of transfer. It was also the case where the contract of employment or employment relationship was terminated with effect from the date of the transfer by virtue of an agreement voluntarily concluded between the worker, the transferor and the transferee of the undertaking.

11.6. The second question concerned the meaning of the term "employee" in the Directive. The Court refused to formulate a Community definition of the term "employee" as it had been urged to do by the Commission, ruling instead that an employee was any person who, in the Member State concerned, is protected as an employee under national employment law.

11.7. The Court came to the view that the term "employee" was a national law rather than a Community law concept by examining the purpose and provisions of the Directive. It is clear, it said, that Directive 77/187 intended to achieve only partial harmonization essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. Itsaim was therefore to ensure, as far as possible, that the contract of employment or the employment relationship continued unchanged with the transferee so that the employees affected by the transfer of the undertaking were not placed in a less favourable position solely as a result of the transfer. It was not however intended to establish a uniform level of protection throughout the Community on the basis of common cirteria.

It followed that Directive No 77/187 may be relied upon only by persons who were, in one way or another, protected as employees under the law of the Member State concerned. If they were so protected, the Directive ensured that their rights arising from a contract of employment or an employment relationship were not diminished as a result of the transfer.

12. **Case 24/85 Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen VB 1986 ECR 1119**

This case came to the Court by way of a reference for a preliminary ruling from the Dutch Supreme Court. The facts as found by that Court were as follows.

12.1 Mr Spijkers was employed as an assistant manager by Gebroeders Colaris Abattoir ("Colaris"), which was a slaughter-house. On 27 December 1982, when the business activities of Colaris had entirely ceased and there was no longer any goodwill in the business, the entire slaughter-house, with various rooms and offices, the land and other specified goods, were purchased by Benedik Abattoir. Since 7 February 1983 Benedik Abattoir had operated a slaughter-house. All the employees of Colaris were taken over by Benedik Abattoir, apart from Mr Spijkers and one other employee. The business activity of Benedik Abattoir was the same as that of Colaris and it appeared that the transfer of the business assets enabled Benedik Abattoir to continue theactivities of Colaris although Benedik Abattoir did not take over Colaris' customers.

12.2 Mr Spijkers argued that there had been a transfer of an undertaking within the meaning of the Netherlands legislation enacted in order to implement directive 77/187 and that this constituted a transfer to Benedik Abattoir of the rights and obligations arising from his contract of employment with Colaris when the matter came before the Dutch Supreme Court. Three questions were referred by it to the Court of Justice;

(1) Is there a transfer within the meaning of Article 1 (1) of Directive 77/187 where buildings and stock are taken over and the transferee is thereby enabled to continue the business activities of the transferor and does in fact subsequently carry on business activities of the same kind in the buildings in question?

(2) Does the fact that at the time when the buildings and stock were sold the business activities of the vendor had entirely ceased and that in particular there was no longer any goodwill in the business prevent there being a "transfer" as defined in Question 1?

(3) Does the fact that the circle of customers is not taken over prevent there being such a transfer?

12.3 The Court held in reply to these questions that the essential criterion in determining whether a transfer has taken place was whether the transferee has acquired a going concern and was able to continue its activities or at least activities of the same kind. It was clear from the scheme of Directive 77/187 that it was intended to ensure the continuity of employment relationships existing within a business, irrespective of any change in ownership. It followed therefore that the decisive criterion forestablishing whether there was a transfer for the purpose of the Directive was whether the business had retained its identity.

> "Consequently, a transfer of a business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by a new employer with the same or similar activities".

12.4. Whether a transfer had taken place was a matter of fact to be decided by the national court. However, the Court gave an indication of the facts with should be taken into consideration by a national court in coming to its decision:

- the type of undertaking or business;
- whether or not the business' tangible assets, such as buildings and moveable assets, are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of the employees are taken over by the new employer;
- whether or not its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period, if any, for which activities were suspended.

The Court emphasised that the facts constituted only part of an overall assessment and should not be considered in isolation.

13. **Case 237/84 Commission v. Belgium 1986 ECR p.1247**

The Commission brought proceedings against the Belgian government alleging failure to transpose Article 4 (1) of the Directive into Belgian law.

13.1. On 19 April 1978 Belgium adopted, for the purposes of implementing Article 4 (1) of the Directive, a Royal Decree making obligatory Collective Bargaining Agreement No 32 (the Agreement) on the safeguarding of employees' rights in the event of a change of employer as a result of an agreed transfer of an undertaking concluded within the National Labour Council. Article 6 of that Agreement provides that "a change of employer shall not in itself constitute grounds for dismissal". However, Article 7 of the Agreement provided as follows:

"the following persons shall not be covered by the provisions of Article 6:

(1) employees undergoing a trial period;

(2) employees dismissed at the approach of pensionable age;

(3) persons bound by a student's employment contract pursuant to the Law of 9 June 1970 on the employment of students".

13.2. The Commission argued that the scope of these exclusions was wider than those permitted under Article 4 (1). Only employees who had no protection under national law against dismissal could be excluded from the scope of the Directive. That was not the case with the employees listed in Article 7 of the Agreement since each of the three categories of employees was protected by some period of notice.

13.3. The Belgian Government argued that protection against dismissal within the meaning of the second sub-paragraph of Article 4 (1) means a measure to dissuade employers from dismissing employeesso that employees do not suffer an interruption in their working life. However, in its view no such dissuasive effect exists in the case of the categories of workers excluded by Belgian legislation.

13.4. The Court dismissed this argument, holding that it was clear both from the wording of Article 4 (1) and the general scheme of the Directive that the provision in question was designed to ensure that employees' rights were maintained by extending the protection afforded by national law against dismissal by the employer to cover the case in which a change of employer occurs upon the transfer of an undertaking. Consequently, Article 4 (1) applies to any situation in which employees affected by a transfer enjoy some, albeit limited, protection against dismissal under national law, with the result that, under the Directive, that protection may not be taken away from them or curtailed solely because of the transfer.

13.5. The Court similarly dismissed claims made on the part of the Belgian Government justifying the exclusion of the two categories of workers in question, on the basis of notifications made to the Commission in August 1977 in accordance with a statement to that effect inserted in the Council minutes of the meeting at which the Directive was adopted. The Court held that the true meaning of rules of Community law can be derived only from those rules themselves, having regard to their context. That meaning could not be derived from statements made in the Council.

13.6. In conclusion, the Court held that Belgium had failed to fulfil its obligations under Directive 77/187.

14. Case 235/84 Commission v. Italy 1986 ECR p. 2291

The Commission alleged in this case that Italian legislation did not satisfy the requirements of Directive 77/187 in two respects. First, the legislation in force in Italy did not ensure protection of the rights of employees and former employees to old age benefits under supplementary social security schemes pursuant to Article 3 (3) of the Directive; secondly, the duty imposed on transferors and transferees to inform and consult employees' representatives did not satisfy the requirements of Article 6 (1) and (2) of the Directive.

14.1. The Court rejected the first of these complaints, finding that Articles 2112 and 2117 of the Italian Civil Code, as interpreted by the Italian Courts, guaranteed employees protection at least equal to that required by the Directive.

14.2. With respect to the second complaint, the Court found that although Italian law prescribed certain procedures for informing and consulting employees' representatives in the event of the transfer of an undertaking, these were not an adequate

implementation of the provisions of the Directive. The procedures in question were laid down on the one hand by collective agreements and on the other by Law No 215 of 26 May 1978 on rules to facilitate the mobility of workers and rules concerning unemployment funds.

14.3. The scope of the collective agreements, the Commission argued, was limited to specific economic sectors and to employers' associations or undertakings and trade unions which were parties to the agreement. Law No 215 of 26 May 1978 laid down special rules to cover particular circumstances and was, therefore, of limited scope.

14.4. The Italian Government did not deny these facts but it emphasised in the proceedings before the Court that the most important and most widespread collective agreements had for many yearsrecognized the right of workers to information and laid down appropriate procedures for the workers concerned.

14.5. The Court held that whilst it was true that Member States could leave the implementation of the social policy objectives pursued by a Directive to management and labour, that possibility did not discharge them from the obligation of ensuring that all the workers in the Community were afforded the full protection provided for in the Directive. However widespread and important collective agreements might be, they covered only specific economic sectors and, owing to their contractual nature, created obligations only between members of the trade union in question and employers or undertakings bound by the agreements. Consequently, by failing to adopt all the measures needed to comply fully with Article 6 (1) and (2) of Directive 77/187, Italy had failed to fulfil its obligations under the Treaty.

14.6. Italy has again been taken before the European Court of Justice by the Commission for failure to comply with the Judgment of 10 July 1986 (Case C-77/90).

15. **Landsorganisationen i Danmark v. Ny Mølle Kro Case 287/86 1987 ECR p.5465**

This case came to the Court by way of a reference for a preliminary ruling from the Arbejdsretten, Copenhagen.

15.1. The facts were as follows.

In 1980 Mrs Hannibalsen leased the Ny Mølle Kro tavern to Inger Larsen, who on 1 October 1980 concluded an agreement with the Hotel-09 - Restaurationspersonlets Samvirke (Association of Hotel and Restaurant Employees). Under the agreement, Mrs Larsen was to comply with any collective agreement concluded by that association. In January 1981 Mrs Hannibalsen rescinded the lease and took over the operation of the tavern herself on the ground that Mrs Larsen had failed to comply with the terms of the lease. The tavern remained closed until the end of March 1981.It had been managed by Mrs Hannibalsen since that date. It appeared that the tavern operated on a regular basis as a restaurant only during the summer season; outside that period it could be hired for private parties but did not operate as a tavern.

15.2. The proceedings arose out of a dispute over arrears of salary due to Mrs Hansen who worked as a waitress in the tavern from 12 May to 19 August 1983, i.e. when the tavern was being run by Mrs Hannibalsen. It appeared that the remuneration paid to Mrs Hansen was lower than that required to be paid under the collective agreement with which Mrs Larsen had agreed to comply. The question arose as to whether Mrs Hannibalsen was bound by this agreement.

15.3. The Arbejdsretten referred a series of questions to the Court, the first of which sought to ascertain whether Directive 77/187 applied where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee.

The Court answered this question in the affirmative. It arrived at this conclusion by reasoning as follows:

"Employees of an undertaking whose employer changes without any change in ownership are in a situation comparable to that of employees of an undertaking which is sold, and require equivalent protection. It follows that so far as the lessee, by virtue of the lease, becomes the employer in the sense set out above, the transfer must be regarded as a transfer of an undertaking to another employer as a result of a legal transfer within the meaning of Article 1 (1) of the Directive. Similar considerations apply where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee. Such a takeover also occurs on the basis of the lease. Consequently, in so far as its effect is that the lessee ceases to be the employer and the owner reacquires that status, it must also be regarded as a transfer of the undertaking to another employer as a result of a legal transfer".

15.4. The second and third questions put to the Court sought to ascertain whether Directive 77/187 covered the situation where at the time of the transfer the undertaking transferred is temporarily closed and has no employees.

15.5. Following Spijkers, the Court held that Directive 77/187 applied where a business is transferred as a going concern and retains its identity, which will be the case when the business is continued or resumed by the new employer carrying on the same or similar activities. Whether a business is transferred as a going concern or not is a matter of fact to be determined by the national court, taking into account all the factual circumstances surrounding the transaction in question:

"The fact that the undertaking in question was temporarily closed at the time of the transfer and therefore had no employees certainly constitutes one factor to be taken into account in determining whether a business was transferred as a going concern ... That is true in particular in the case of a seasonal business, especially where, as in this case, the transfer takes place during the season when it is closed. As a general rule such closure does not mean that the undertaking has ceased to be a going concern.

15.6. The fourth question of the Arbejdsretten asked whether Article 3 (2) of Directive 77/187 must be interpreted as obliging the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who are not employed by the undertaking at the time of the transfer.

15.7. The Court, following its decision in Mikkelsen, held that the Directive could be relied upon solely by workers whose contract of employment or employment relationship was in existence at the time of the transfer, subject however to compliance with the mandatory provisions of the Directive concerning the protection of employees from dismissal as a result of a transfer.

16. **Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S Case 324/86. Judgment of 10 February 1988 1988 ECR p.739.**

16.1. This case arose out of litigation before the Højesteret (Danish Supreme Court) between the Foreningen of Arbejdsledere i Danmark (Danish Association of Supervisory Staff), acting on behalf of Mr Tellerup, and Daddy's Dance Hall A/S.

16.2. Mr Tellerup was employed as a manager by Irma Catering A/S, which had taken a non-transferable lease of restaurants and bars belonging to A/S Palads Teatret. The lease was subsequently terminated and on 28 January 1983 Irma Catering dismissed its staff, including Mr Tellerup, with statutory notice which, in the ase of Mr Tellerup, expired on 30 April 1983. Irma Catering continued to run the business in question with the same staff until 25 February 1983.

16.3. With effect from 25 February 1983, a new lease was concluded between A/S Palads Teatret and Daddy's Dance Hall. Daddy's Dance Hall immediately re-employed the employees of the former lessee, including Mr Tellerup, to do the same job as before. Mr Tellerup was subsequently dismissed. The question arose as to what period of notice Mr Tellerup was entitled to. In order to answer this question it was necessary firstly to determine whether Directive 77/187 was applicable in the circumstances of the case.

16.4. The Court held that the Directive was applicable in the situation in question, i.e. where, upon the expiry of a non-transferable lease, the lessee ceases to be an employer and a third party becomes the employer under a new lease concluded with the owner. The fact that the transfer was effected in two stages (the retransfer of the undertaking from the original lessee to the owner and the subsequent transfer from the owner to the new lessee) did not prevent the Directive from applying provided that the economic unit in question retained its identity. This would be the case where the business was carried on without interruption by the new lessee with the same staff as were employed in the business before the transfer.

16.5. The Court, in reaching its conclusion, had regard to the general purpose of the Directive, which was to safeguard the rights of employees in the event of a change of employer. The Directive was therefore applicable where there was a change in the natural or legal person responsible for carrying on the business, regardless of whether or not ownership of the undertaking was transferred.

16.6. The second question put to the Court of Justice concerned the right of an employee to waive rights conferred on him by Directive 77/187, if the disadvantages resulting from his waiver are offset by such benefits that, overall, he was not placed in a worse position by such waiver.

16.7. The Court held quite firmly that an employee could not waive rights accorded to him under the Directive and those rights could not be restricted even with his consent.

> "... the purpose of Directive 77/187 is to ensure that the rights resulting from a contract of employment or employment relationship of employees affected by the transfer of the undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of thewill of the parties to the contract of employment, the rules of the Directive, in particular those concerning the protection of workers against dismissal, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees".

16.8. However, the Directive was intended only to achieve partial harmonization, and not to establish a uniform level of protection throughout the Community on the basis of common criteria. Consequently, it could be relied on only to ensure that the employee was protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member States concerned.

17. **Joined Cases 144 and 145/87. Judgment of the Court of 5 May 1988 - Harry Berg v. Ivo Martin Besselsen** 1988 ECR p.2559

This case concerned a dispute between Mr Berg and Mr Busschers and their former employer who operated a bar-discotheque known as "Besi-mill".

17.1. In February 1980 a commecial partnership took over the operation of the Besi-Mill from Mr Besselsen under a lease purchase agreement within the meaning of Article 1576 of the Netherlands Civil Code. According to that provision:

"lease-purchase is a purchase and sale on deferred payment, by which the parties agree that the object sold shall not become the property of the purchaser by mere transfer".

17.2. Mr Berg and Mr Busschers continued to work at the Besi-Mill following the transfer. The lease-purchase agreement was terminated by a judicial decision in November 1983 and the undertaking was again managed by Mr Besselsen. Mr Berg andMr Busschers claimed from Mr Besselsen arrears of salary due to them for the period in which the Besi-Mill was operated under the lease-purchase agreement by the commercial partnership, arguing, inter alia, that the transfer of an undertaking could not have the effect of extinguishing the transferor's liability regarding the obligations deriving from a contract of employment without the consent of the employees concerned.

17.3. Faced with these arguments, the Netherlands Supreme Court referred two questions to the Court of Justice.

17.4. The first question asked whether Article 3 (1) of Directive 77/187 must be interpreted as meaning that after the date of the transfer, the transferor was released from his obligations under the contract of employment or the employment relationship solely by reason of the transfer, even where the employees of the undertaking did not consent to that effect or did not oppose it.

17.5. The Court held, in reply to this question, that Article 3 (1) entails the automatic transfer from the transferor to the transferee of the employer's obligation arising from a contract of employment or an employment relationship subject only to the right of Member States to provide for the joint liability of the transferor and the transferee following the transfer.

17.6. Consequently, except in the latter case, the transferor is released from his obligation as an employer solely by reason of the transfer and this release is not conditional on the consent of the employees concerned.

17.7. The purpose of the Directive, the Court held, is to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the terms and conditions of employment agreed with thetransferor. The Directive was not designed to ensure that the contract of employment or the employment relationship with the transferor was continued where the undertakings' employees did not wish to remain in the employment of the transferee.

17.8. The second question referred to the Court concerned the scope of the Directive: did it apply to the transfer of an undertaking under a lease-purchase agreement and to the re-transfer of the undertaking following the termination of the lease-purchase agreement by judicial decision? Following its ruling in Ny Mølle Kro, the Court held that the Directive applied to the transfer of a lease-purchase agreement of the kind available under Netherlands law even though the purchaser acquires ownership of the undertaking only when the full purchase price has been paid. Similarly the directive applies to the re-transfer of the undertaking upon termination of the lease-purchase agreement by a judicial decision since the re-transfer deprives the purchaser of his status as employer and restores the vendor to his status as employer.

18. **Bork International A/S v. Foreningen af Arbejdsledere i Danmark, J. Olsen v. Junckers Industrier A/S, Hansen and Others v. Junckers Industrier A/S, Handels -of Kontorfunktionaerernes Forbund i Danmark v. Junckers Industrier A/S - Case 101/87 - Judgment of the Court of 15 June 1988, 1988 ECR p.3057**

18.1. This case came to the Court by way of a reference for a preliminary ruling by the Danish Supreme Court. It involved a dispute between the Danish Association of Supervisory Staff and P. Bork International (PBI), in liquidation, and between a number of workers and the Danish Union of Commercial and Clerical Staff acting on their behalf on the one hand, and Junckers Industrier (JI) on the other.

18.2. In April 1980 PBI pleased a beechwood veneer factory from Orehoved Trae- og Finerindustri A/S (OTF) and at the same time took over its staff. The lease expired on 22 December 1981. On 30 December 1981 it purchased the factory in question from OTF. JI took possession of the factory on 4 January 1982 and brought it back into operation keeping on over half of the staff previously employed but not taking on any new staff. The disputes raised the question of whether PBI's obligations towards the workers employed in the undertaking with respect in particular to salaries and paid holidays were transferred to JI in its capacity as the new employer.

18.3. The question submitted to the Court sought in essence to ascertain whether the Directive applied to a situation in which, after he had given notice terminating a lease or after forfeiture thereof, the owner of the undertaking retook possession of the undertaking and thereafter sold it to a third party who shortly afterwards brought it back into operation with some of the staff employed in the undertaking by the former lessee.

18.4. The Court held that the Directive applied whenever a change occurred in the context of the contractual relations involving the natural or legal person responsible for operating the undertaking who had assumed the obligations of an employer towards the undertaking's employees.

19. **Case 362/89 D'Urso and Others v. Ercole Marelli**

19.1. By order dated 23 October 1989, received by the Court on 30 November 1989, the Pretura di Milano referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions as to the interpretation of Articles 3 (1) and 1 (1) ofCouncil 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 businesses (Official Journal L 61, 1977, p. 26).

19.2. Those questions were raised in proceedings instituted by Giuseppe D'Urso, Adriana Ventadori and others against Ercole Marelli Elettromeccanica Generale Spa under "amministrazione straordinaria".

19.3. The plaintiffs in the main proceedings were employed by EMG, a business placed, together with other businesses belonging to the Marelli group, under the "amministrazione straordinaria" proceedings instituted by the Decree of the Ministry of Industry of 26 May 1981, which allowed the undertakings concerned to continue their activities.

19.4. In September 1985 EMG, which was the only associated undertaking remaining under "amministrazione straordinaria", was transferred to Nuovo EMG, a company incorporated for this purpose. The transfer was authorized by the Department of Industry.

19.5. However, 518 employees of EMG were not transferred to the new undertaking and remained covered by the CIGM scheme (Cassa Integrazione Guadagni), their contracts of employment with the

transferor (EMG) being suspended. This was allowed under Article 3 of Act 19 of 6 February 1987 which derogates from the general rule laid down in Article 2112(*) of the Civil Code. The plaintiffs claimed before the Pretura di Milano to be employees of the transferee in accordance with Article 2112 of the above-mentioned Code.

19.6. Considering that the judgment to be given depended on the interpretation of certain provisions of Directive 77/187/EEC, the Italian Court stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

> "(1) Does the first subparagraph of Article 3 (1) of Directive 77/187/EEC provide for the automatic transfer to the transferee of such employment relationships within an undertaking that has been transferred as are in existence at the time of the transfer?
>
> (2) Is the Directive applicable to transfers of businesses made by undertakings under "amministrazione straordinaria" (special receivership)?"

19.7. The Commission's Memorandum took the view that Directive 77/187/EEC applies to transfers of undertakings, businesses or parts of businesses effected by undertakings placed in "amministrazione straordinaria" inasmuch as the continuation of business is authorized. However, the Directive does not apply when there is no authorization to continue activities or the authorization has expired or been withdrawn. The European Court of Justice confirmed the Commission's view. (Judgment of 26 July 1991)

(*) Art. 2112 of the Civil Code rules that:

"Article 2112. Transfers of undertakings. Where an undertaking is transferred, contracts of employment will continue to be valid as against the transferee unless the transferor has given the required notice and employees retain the rights deriving from the seniority [illegible] the transferor."

Conclusion

The requests for preliminary rulings on the meaning to be given to the Transfers Directive have all come from courts in the Netherlands, Denmark and, lately, Italy.

They mainly concern the scope of the Directive: what types of transactions will be deemed to be transfers for the purpose of the Directive and national implementing legislation and to what obligations the Directive extends.

From this case law the following principles emerge:

1. The Directive does not apply to insolvency proceedings but may extend to other similar types of proceedings which are not designed to liquidate the undertaking but to safeguard its continued existence.

The Court in Abels, FNV and Botzen, the first cases concerning this Directive, ruled that it did not apply to insolvency proceedings since these were characterized by special procedures in all the Member States. The rules relating to liquidation proceedings varied from Member State to Member State. Consequently it was unlikely that the Member States intended to include such proceedings in a harmonization Directive. However, proceedings akin to insolvency proceedings which are designed to safeguard the assets of an undertaking and ensure its continuation were within the scope of the Directive.

2. When a transfer falls within the scope of the Directive, only those obligations existing on the date of the transfer with respect to the employees whose employment relationship was transferred to the transferee are the responsibility of the transferee. The Directive does not cover obligations

arising after the date of the transfer or concerning employees who were not transferred with the undertaking but who retain a relationship - but not an employment relationship - with the new undertaking (Abels, Botzen Wendelboe). Similarly, the employment relationship out of which the obligations claimed arose must not have expired at the time of the transfer (Mikkelsen).

3. The transferee must acquire a going concern for the transaction to be considered a transfer for the purposes of the Directive (Spijkers).

Whether a business is transferred as a going concern or not is a matter of fact to be decided by the national courts (Ny Mølle Kro).

4. The Directive can extend to a transfer taking place in two stages. The entire transfer does not have to take place by means of one transaction concluded at the same point in time. However, the undertaking must retain its identity (Daddy's Dance Hall).

5. Employees may not contract out of the rights accorded to them by the Directive as implemented by national law (Berg and Bork).

However much employees may wish to waive their rights on a transfer, and even though they may be equally or better protected even after such a waiver, they cannot contract out of rights given under the Directive.

CHAPTER III

C O N C L U S I O N S

BELGIUM

There is a broad degree of harmonization between Belgian law and the main provisions of the Directive.

However, there are a number of points where Belgian law does not follow the scheme of the Directive, particularly as regards the optional aspects:

a) Belgian law does not clearly incorporate the (optional) principle that the transferor and the transferee should have joint liability;

b) the safeguarding of employees' rights also extends to certain supplementary pension schemes, in particular bridging pensions and other legal benefits (more favourable conditions than those provided for in the Directive);

c) there are no legal or contractual provisions corresponding to the second subparagraph of Article 3 (3) of the Directive; instead, protection is provided only for rights arising from collective agreements, which are therefore covered by the rules on the maintenance of collective agreements; this would seem to exclude rights acquired by former employees of an undertaking;

d) under Belgian law employees who have no representation do not have to be informed or consulted (Article 6 (5) of the

DENMARK

Danish legislation incoprorates almost all the provisions of the Directive.

However, there are certain discrepancies.

a) There are no express definitions corresponding to those in Article 2, but the Danish concepts are broader than those in the Directive.

b) There are no provisions on the joint liability of the transferor and transferee (second subparagraph of Article 3 (1)).

SPAIN

The Estatuto de los Trabajadores (ET) contains specific provisions on the subject matter of the Directive (Article 44).

It should be pointed out that the scope of the provisions of this article is broader, and therefore more favourable, than that of the Directive: transfers other than by agreement, particularly those resulting from succession mortis causa, are also covered.

On the other hand, the article is by no means as detailed as the Directive.

a) The provisions of the second subparagraph of Article 3 (3) are not specifically covered in the ET.

b) The law does not require the information described in Article 6 (1) to be provided prior to the transfer, only that the representatives of the workers concerned should be notified of it.

c) The special rules governing transfers do not impose the same duty of consultation as the Directive; although the general description of the responsibilities of the works committee may be interpreted as indirectly covering transfers, there are still doubts that this may not be enough in practice.

FRANCE

Under French law the basic principles of the rules governing transfers also apply to non-contractual operations, making the rules generally more favourable than those of the Directive.

On the other hand, French law does not define the concepts of transferor and transferee or employees' representatives, and this tends to widen the field covered.

There are no specific provisions to the effect that a transfer may not be used as grounds for dismissal (first subparagraph of Article 4 (1) of the Directive), but the provisions on the automatic transfer ofcontracts of employment are so comprehensive that this aspect of the Directive may be regarded as implicitly adopted.

The principle of "indirect dismissal" described in Article 4 (2) has also not been incorporated into French law; however, the courts have accepted the implications of the concept.

The rules governing transfers do not expressly require information or consultation as laid down in Article 6 of the Directive. However, these requirements are, apparently, covered by a number of other statutory provisions and legal precedents.

On the other hand, there are no provisions on the new employer's obligation to inform and consult his employees.

GREECE

The publication of Presidential Decree No 572 of 6 December 1988 brought Greek law, which already incorporated the main principles of the Directive, much more closley into line with it.

Greek legislation also covers transfers other than by agreement, making it more favourable than the Directive.

On the other hand it does not appear to incorporate the second subparagraph of Article 3 (3) of the Directive (protection of acquired rights to old age benefits, etc.)

IRELAND

It should be noted that the manner in which Irish law handles the question of the recognition of employees' representatives for the purposes of information and consultation is unsatisfactory. The duty to inform and consult can become meaningless and ineffective if the employer should decide not to recognize the workers' representatives. However, it should be stressed that Irish legislation states that workers who have no representatives must be informed by the transferor or the transferee.

ITALY

The Directive was recently incorporated into Italian law by Article 47 of the Law of 29 December 1990 "Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee (Legge comunitaria per il 1990). Paragraph 3 of this Article amends the first three paragraphs of Article 2112 of the Civil Code, which already enshrined some of the basic principles of the Directive (e.g. the continuity of employment contracts in the event of a change of ownership).

Article 47 now gives legal expression to the duty to inform and consult (Article 6 of the Directive).

Article 47(3) states the principle of the continuity (on a provisional basis) of existing collective agreements (Article 3(2) of the Directive).

In accordance with Article 4(1) of the Directive, Article 47(4) provides that the transfer of the undertaking does not constitute grounds for dismissal per se.

Article 47(5) of Community Law No. 428 of 27 December 1990 provides for exceptions to Article 2112 of the Civil Code where a number of factors concur (the enterprise has been declared by the CIPI to be in a state of crisis or it has initiated bankruptcy proceedings, obtained judicial confirmation of a composition with creditors, is undergoing compulsory liquidation, has been placed in receivership or there has been a union agreement on retaining at least some of the jobs): this Article permits a reduction in existing wage rates in order to safeguard at least some of the jobs for the workers of the firm transferred.

Article 47(5) weighs wage reductions against the safeguarding of jobs. The exception may be brought into play where union agreements do not contain more favourable conditions.
As the Court has frequently ruled, this provision appears to be contrary to Article 3 of the Directive.

However, the problems of supplementary pension schemes (Article 3(3) of the Directive) are not expressly dealt with by the Italian Law.

LUXEMBOURG

There is also a broad degree of harmonization between the Luxembourg system and the Directive.

However:

a) the definitions given in Article 3 have not been adopted;

b) no provision is made for the joint liability of the transferor and the transferee (possibility provided for in the second subparagraph of Article 3 (1));

c) as regards supplementary pension schemes, there is no protection for the rights of former employees of the undertaking or business transferred (second subparagraph of Article 3 (3)).

NETHERLANDS

The definitions given in Article 2 have not been incorporated into Dutch law.

Furthermore:

a) the transfer of collective agreements is permitted only under certain limited conditions;

b) the rights safeguarded in the event of a transfer also include supplementary pension benefits;

c) there are no provisions for cases where workers have no representation (Article 6 (5)).

PORTUGAL

Portuguese legislation on transfers predates the Directive, but its basic principles are broadly in line with the Community instrument.

The main reservation about the application of the Directive in Portuguese national law concerns the limitations on the transfer of all claims arising from employment contracts, especially those which have fallen due before the transfer of the establishment. To bring Portuguese legislation into line with the Directive, there would need to be a system of automatic transfer (i.e. that did not require the express request of the workers prior to the transfer) of all the transferor's debts vis-à-vis the workers without limit in time.

Transfers other than by agreement are covered by the laws on maintaining contracts of employment.

There are no specific provisions on certain points which are regarded as implicitly adopted (the fact that the transfer cannot in itself constitute grounds for dismissal (Article 4 (1)).

Finally, there are no specific provisions on the obligations to inform and consult the workers laid down in Article 6 of the Directive. There is some question as to whether transfer situations come under the general responsibilities of works committees (information and consultation). In this respect the application of the Directive could be improved, following the example of the systems governing lay-offs and collective redundancies, for example.

FEDERAL REPUBLIC OF GERMANY

German legislation almost entirely corresponds to the aims of the Directive.

However:

a) the definitions given in Article 2 have not been adopted;

b) only the courts can guarantee the permanence or safeguarding of supplementary pension rights;

c) there are only very general provisions on the obligations to inform and consult employees in case of transfer of undertakings (Article 6 of the Directive) about "changes" which may occur in the undertaking.

UNITED KINGDOM

United Kingdom legislation does not conform adequately with the Directive. The main problems are as follows:

- The system for appointing workers' representatives is not compatible with the aims of the Directive: the employer has enormous scope for avoiding the duty to inform and consult the workers by refusing to recognize the union as their representative. There is also no legal provision for cases where there is no "institutional" representation.

- United Kingdom legislation does not state that consultation must take place "with a view to seeking agreement" (Article 6 (2)).

- The British courts have ruled that the transferor must be the owner of the undertaking to be transferred.

- Any undertaking or part thereof "which is not in the nature of a commercial venture" is excluded from the scope of the Directive.

- The sanctions provided for in order to ensure that the provisions of the Directive are implemented do not appear to conform with the principles of effective application laid down by the Court of Justice of the European Communities.

In 1989 the Commission sent the UK authorities a formal notice of complaint concerning the above-mentioned points. In March 1990, the Government replied acknowledging that the aim of consultation should be to reach an agreement (Article 6 (2)), but rejecting the Commission's other criticisms. In April 1991, the Commission sent the UK authorities a reasoned opinion. In July 1991, they accepted all the above-mentioned points raised by the Commision with the exception of the question of workers' representation.