



## SUNICOP

European Labour Law

Transfer of undertakings

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# Restructuring of enterprises

**The 70's: the golden age** of European labour law

Legislation on „restructuring of enterprises”

What does „**restructuring**” mean?

**Second half of the 70's :**

- Directive 75/129/EEC on collective redundancies
- Directive 77/187/EEC on transfer of undertakings
- Directive 80/987/EEC on the protection of employees in the event of the insolvency of the employers

# Restructuring of enterprises

## **Main idea:**

Common market: easier restructuring, BUT: serious disadvantages for the workers

Protect workers against the social consequences of the common market

## **Legal sources:**

**Directive 77/187/EEC - ,Business Transfers Directive'**

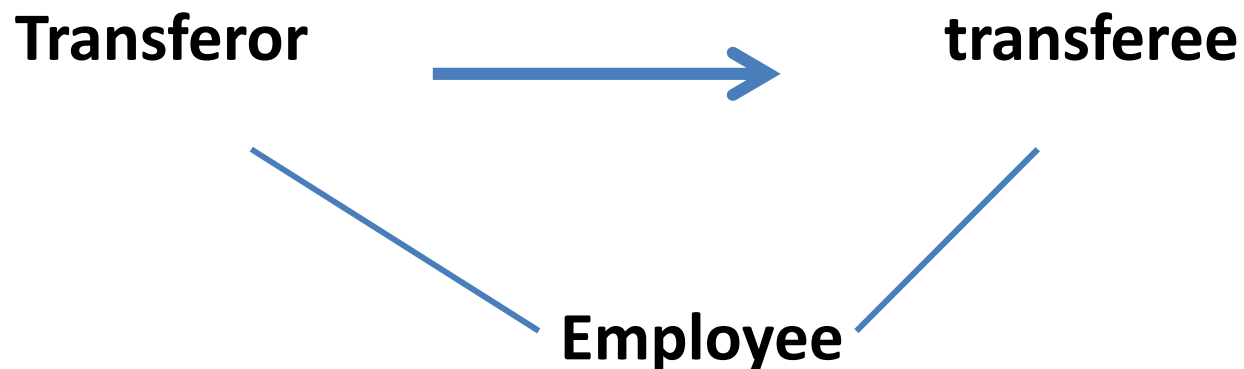
Case law of the Court of Justice

Amendments: Directive 98/50/EC

**Recent: Directive 2001/23/EC**

# The personal scope of the Directive

**Main actors:**



**Employee:** definition of the national law

- Also:**
- part-time employment contract
  - fixed-term employment contract
  - temporary employment

# The scope of the Directive

## Personal scope:

*„(...) public and private undertakings engaged in economic activities whether or not they are operating for gain.”*

**Transfer of solely administrative functions** between public authorities is not a „transfer” within the meaning of the Dir.

**BUT: transfer of duties of economic nature is transfer of undertaking**

e.g. Collino und Chiappero judgment, C-343/98.

Transferor: State body responsible for operating certain telecommunications services for public use

# The scope of the Directive

## Territorial scope:

The **transferor** shall be in the **territory of the EU**

No application to seagoing vessels

# The material scope of the Directive

## Transfer of undertaking:

*„ (...) a change in the legal or natural person who is responsible for the economic activity of the entity transferred and who, in that capacity, establishes working relations as employer with the staff of that entity (...)” Albron case, C-242/09. No. 28.*

**Key element:** not the economic ownership is decisive, but the **change of the employer**

e.g. merger of undertakings, acquisition of one undertaking by another, division or splitting up

BUT: purchase of shares is not transfer

# The material scope of the Directive

## Transfer of undertaking:

*„(...) a transfer of an economic entity which retains its identity, meaning an **organised grouping of resources** which has the objective of pursuing an **economic activity**, whether or not that activity is central or ancillary.” Art. 1. 1. (b)*

## Retains its identity: overall assessment of all factors, e.g.:

- **takeover of resources** (employees, managerial staff, buildings, movable property, machines, operating methods, organisation of work, procedures, clients, know-how, softwares etc.)
- the **degree of similarity between the activities** carried on before and after the transfer

# Christel Schmidt case - C-392/92.

Discussion based on the extract

Was it a transfer of undertaking?

Points pro and contra

# Christel Schmidt case - C-392/92.

## **Decisive factors:**

1. The undertaking entrusted by contract the responsibility for operating the cleaning to another undertaking
2. Actual continuation of the same activity
3. Offer to re-engage the same employee

## **Not relevant:**

1. One single employee is sufficient for application
2. Absence of any transfer of tangible assets
3. the activity transferred is for the transferor merely an ancillary activity

# Individual rights

## Main consequence of the transfer (Art. 3.)



- **Automatic** transfer
- **All rights and obligations** of the employee
- Contract of employment **or** employment relationship

# Individual rights

## Main consequence of the transfer (Art. 3.)



- Employment relationships **in force at the date of the transfer**
- **Employee's right to refuse the transfer** of her/his employment relationship (different national solutions)
- **Both employers joint and several liability** (Art. 3. par. 1.)

# Individual rights set in a collective agreement

## What happens with the collective agreement? (Art. 3.)

**Terms and conditions of any collective agreement shall be observed**

**Until:**

- Termination of the collective agreement
- Expiry of the collective agreement
- Entry into force of a new collective agreement (e.g. transferor concludes a new one)
- Application of a new collective agreement (e.g. the transferor joins an employer's association)

**MSs may limit the application in 1 year (e.g. Hungary)**



## Protection against dismissal (Art. 4.)

- **Dismissal on the grounds of the transfer is not allowed**
- Transfer must not be the **sole** reason of dismissal

**BUT: Dismissals based on economic, technical or organisational reasons** arising from the changes are **lawful**

- All circumstances shall be considered

## Protection against dismissal (Art. 4. par. 2)

Special case:

**If the transfer causes a substantial change in working conditions to the detriment of the employee**

Employee terminates the employment

**Reverse consequences:** as if the employer had terminated

Employee is entitled to e.g. notice period, severance pay

# Protection of employees' representatives (Art. 6.)

**Aim:**

**To guarantee the appropriate representation of employees**

**2 situations:**

**1. The undertaking preserves its autonomy**

- a) Status and function of the representatives shall be preserved on the same terms, OR
- b) Conditions necessary for the reappointment of the representatives are fulfilled

**(continuation OR reappointment)**

# Protection of employees' representatives (Art. 6.)

## 2. The undertaking does not preserve its autonomy

### Proper representation for the transition period:

MSs shall take necessary measures to guarantee proper representation during the period necessary for the reconstitution of the representation

### Individual protection of representatives:

Protection of the representatives shall continue, if her/his term expires as a result of the transfer (e.g. protection against dismissal of trade union officials in Hungary)

# Information and consultation (Art. 7.)

## **Obligation to inform the representatives on:**

- **date** of the transfer
- **reasons** of the transfer
- Legal, economic and social **implications** of the transfer for the employees
- **Any measures** envisaged **in relation to the employees**

## **Information „in good time”**

**Obligation to consult:** Measures in relation to the employees consultation with a view to reaching an agreement

# Information and consultation (Art. 7.)

If there are **no representatives** of the employees in the undertaking

**through no fault of the employees**

**1. Direct information of the employees**

**2. No obligation to consult**

# Albron Catering BV v FNV Bondgenoten, John Roest case (C-242/09.)

Discussion of the case

The special feature of Mr Roest's employment :

- ,Contractual employer'
- ,Non-contractual' employer

Was it a transfer of undertaking?

# Dietmar Klarenberg v Ferrotron Technologies GmbH (Case C-466/07)

Discussion of the case

Is a part of an undertaking only transferred to another employer if, under the new employer, that part of the undertaking continues to operate as an organisationally autonomous part of an undertaking?