



**PROTECTION OF
EMPLOYEES
IN CASE OF
TRANSFER OF
UNDERTAKINGS**

Legal Context



- ❖ EU Directive 2001 /23/EC

 - ❖ Directive 77/187/EEC

 - ❖ Directive 98/50/EC

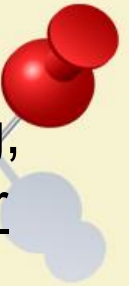
In GREECE : P.D. 178/2002

PROTECTION offered by the Directive



1. An automatic transfer of the employment relationship between the previous employer (*transferor*) and the new employer (*transferee*).
2. Both transferor and transferee are required to **inform** and **consult** employee representatives.
3. **Dismissals** effected in order to avoid the directive are **prohibited**, except where they are for economic, technical or organisational reasons entailing workforce changes.

Article 1 Dir. 2001/23



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

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

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

When an economic entity has been transferred?



Relevant factors will include:

- ❖ type of undertaking or business
- ❖ whether or not tangible assets such as buildings & movable property have changed hands
- ❖ the value of intangible assets at the time of transfer
- ❖ whether or not the majority of employees are taken over by the new employer
- ❖ whether customers & suppliers are being taken over
- ❖ the degree of similarity between the activities carried on before and after the transfer
- ❖ the period, if any, for which those activities were suspended

Article 2 Dir. 2001/23

Definitions

1. For the purposes of this Directive:

- (a) **"transferor"** shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;
- (b) **"transferee"** shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;
- (c) **"representatives of employees"** and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States;
- (d) **"employee"** shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

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



Article 3 Dir. 2001/23



Transfer of rights & obligations to the transferee

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

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

★ Except where national legislation provides for joint liability of the transferor & the transferee after the transfer, **the consequence of transfer is to release transferor from their obligations.**



Transfer of undertaking & collective agreement applicable

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

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

Does the protection given by the Directive apply to benefits under non-statutory social security schemes? (Art. 3 para. 4)



- No. The transfer of rights and obligations arising from an employment contract or employment relationship does not cover employees' rights to old-age, invalidity or survivor benefits under supplementary company or inter-company pension schemes outside statutory social security schemes in Member States.
- However, Member States may adopt the measures necessary to protect the rights acquired or being acquired by employees and persons no longer employed in the business at the time of transfer.

Article 4 Dir. 2001/23



Protection against dismissal

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

May employees waive the rights accorded by the Directive?



- ★ No. Employees may not waive the rights conferred on them by the Directive and those rights may not be restricted even with their consent and even if the disadvantages resulting from their waiver are offset by similar benefits.

Article 5 Dir. 2001/23

Transfer operations associated with insolvency proceedings



1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of **bankruptcy proceedings** or any analogous **insolvency proceedings** which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).
- Employees do not keep their rights and obligations when the transfer is undertaken as part of insolvency or bankruptcy proceedings.
- National governments may take action to prevent the misuse of insolvency proceedings to deprive employees of their rights.

Article 6 Dir. 2001/23

Protection of the function of the employees' representatives



1. If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on **the same terms** and subject to **the same conditions as existed before the date of the transfer** by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.
2. If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall **continue to enjoy the protection** provided by the laws, regulations, administrative provisions or practice of the Member States.

Article 7 Dir. 2001/23

Information & Consultation



1. The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:
 - the date or proposed date of the transfer,
 - the reasons for the transfer,
 - the legal, economic and social implications of the transfer for the employees,
 - any measures envisaged in relation to the employees.

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

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



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

(...)

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.



➤ Are the obligations to inform & consult employees' representatives binding?

- National Law must provide for effective sanctions in the event of the employer's failure to inform and consult employees' representatives

Article 8 Dir. 2001/23



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

General Observations



- ❖ The Directive was quite radical in imposing obligations on the parties to commercial transactions

- ❖ Member States were given some discretion applying the Directive, particularly with regard to:
 - ✓ the definition of dismissal
 - ✓ the consequences of a refusal by employees to be transferred
 - ✓ the sanctions imposed for failure to inform & consult & for dismissing on transfer

- ❖ Different countries took different approaches in implementing the Directive

