

SOME SOCIAL AND PRIORITY ASPECTS UNDER EUROPEAN UNION LAW – BELGIAN LAW

A. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies **Collective Industrial Agreement # 24 – Belgian law**

Conforming article 66 of the Belgian law of 13 February 1998 (the so called Law Renault) (after Renault, the French car maker who closed his factory in Vilvoorde, near Brussels) the employer who intends to proceed to a collective redundancy has to comply with certain rules laid down in the Collective Industrial Agreement # 24 and which had its roots in Directive 75/129/EEC (then : European Economic Community).

Directive 75/129/EEC was amended by Directive 98/59/EEC on 20 July 1998 which states i.a. the following :

Section I
Definitions and scope

Article 1

1. For the purposes of this Directive :
 - (a) ‘collective redundancies’ means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is :
 - (i) either, over a period of 30 days :
 - at least 10 in establishments normally employing more than 20 and less than 100 workers
 - at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers
 - at least 30 in establishments normally employing 300 workers or more
 - (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;
 - (b) ‘workers’ representatives’, means that workers’ representatives provided for by the laws or practices of the Member States.
For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer’s initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

2. This Directive shall not apply to :

- (a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts.
- (b) Workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies);
- (c) The crews of seagoing vessels.

Section II

Information and consultation

Article 2

1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.
2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retaining workers made redundant.
Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.
3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:
 - (a) supply them with all relevant information and
 - (b) in any event notify them in writing of :
 - (i) the reasons for the projected redundancies
 - (ii) the number of categories of workers to be made redundant
 - (iii) the number and categories of workers normally employed;
 - (iv) the period over which the projected redundancies are to be effected;
 - (v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;
 - (vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).

4. The obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.
In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information

has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.

Section III Procedure for collective redundancies

Article 3

1. Employers shall notify the competent public authority in writing of any projected collective redundancies.
However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests.
This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.
2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.
The workers' representatives may send any comments they may have to the competent public authority.

Article 4

1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3 (1) without prejudice to any provisions governing individual rights with regard to notice of dismissal. Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.
2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.
3. Where the initial period for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.
4. Member States need to apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision.

Section IV Final provisions

Article 5

This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.

B. Council Directive 2001/23/EC of 12 March 2001 Safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or business
Collective Industrial Agreement # 32quinquies of 13 March 2002 – Belgian law

Collective Industrial Agreement # 32quinquies, 13 March 2002

Originally Collective Industrial Agreement # 32bis 7th of June 1985 has been agreed in Belgium between the social partners (employer-employees-unions) through the National Labor Council to comply with the Council Directive 77/187/EEC of the 14 February 1997 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of business (no longer in force).

Since 1985 the Collective Industrial Agreement #32bis has been altered to comply with European Union Directives.

Directive 2001/23/EC (now : European Community), 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or business, inspired the new Collective Industrial Agreement # 32quinquies 13 March 2002.

The Community Charter of the Fundamental Social Rights of Workers adopted on 0 December 1989 ("Social Charter") states, in points 7, 17 and 18 in particular that : "The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practice in force in the various Member States. Such information, consultation and participation must be implemented in due time, particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers".

In 1977 the Council adopted Directive 77/187/EEC to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time.

That Directive was subsequently amended in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of undertakings in economic difficulties, the case-law of the Court of Justice of the European Communities, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies and the legislation already in force in most Member States.

Considerations of legal security and transparency required that the legal concept of transfers be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive 77/187EEC as interpreted by the Court of Justice.

We can more specifically refer to the following articles of the Directive :

Article 6

1.

If the undertaking, business of 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.

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

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

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

2.

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

Article 7

1.

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

- the date of 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 these employees in good time on such measures with a view to reaching an agreement.

3.

Member States whose laws, regulations or administrative provisions provide that representatives of the employees may have recourse to an arbitration board to obtain a decision of 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 the considerable number of the employees.

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

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

4.

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

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

5.

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

6.

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

- the date or proposed date in the transfer
- the reason for the transfer
- the legal, economic and social implications of the transfer for the employees
- any measures envisaged in relation to the employees.

One should also take into consideration Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation.

Because, there is a need to strengthen dialogue and promote mutual trust within undertakings and in particular, to promote and enhance information and consultation.

Again this Directive is without prejudice to national systems regarding the exercise of this right in practice where those entitled to exercise it are required to indicate their wished collectively.

The purpose of this general framework is also to avoid any administrative, financial or legal onstraints which would hinder the creation and development of small and medium-sized undertakings. To this end, the scope of this Directive should be restricted, according to the choice made by Member States, to undertakings with at least 50 employees or establishments employing at least 20 employees.

The following articles of this Directive inter alia :

Article 3

Scope

1. This Directive shall apply, according to the choice made by Member States to :
 - (a) undertakings employing at least 50 employees in any one Member State, or
 - (b) establishments employing at least 20 employees in any one Member State.
 Member States shall determine the method for calculating the thresholds of employees employed.
2. In conformity with the principles and objectives of this Directive, Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.
3. Member States may derogate from this Directive through particular provisions applicable to the crews of vessels plying in high seas.

Article 4

Practical arrangements for information and consultation

1. In accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements of exercising the right to

information and consultation at the appropriate level in accordance with this Article.

2. Information and consultation shall cover :
 - (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
 - (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
 - (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9 (1).

3. Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

4. Consultation shall take place :
 - (a) while ensuring that the timing, method and content thereof are appropriate;
 - (b) at the relevant level of management and representation, depending on the subject under discussion;
 - (c) on the basis of information supplied by the employer in accordance with Article 2 (f) and of the opinion which the employees' representatives are entitled to formulate;
 - (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
 - (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2 ©

Article 5

Information and consultation deriving from an agreement

Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.

Article 6

Confidential information

1. Member States shall provide that, within the conditions and limits laid down by national legislation, the employees' representatives, and any experts who assist them, are not authorised to reveal to employees or to third parties, any information which, in the legitimate interest of the undertaking or establishment, has expressly been provided to them in confidence. This obligation shall continue to

apply, wherever the said representatives or experts are, even after expiry of their terms of office.

However, a Member State may authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and to third parties bound by an obligation of confidentiality.

2. Member States shall provide, in specific cases and within the conditions and limits laid down by national legislation, that the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation is such that, according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it.
3. Without prejudice to existing national procedures, Member States shall provide for administrative or judicial review procedures for the case where the employer requires confidentially or does not provide the information in accordance with paragraphs 1 and 2. They may also provide for procedures intended to safeguard the confidentiality of the information in question.

Article 7

Protection of employees' representatives

Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them.

C. Generation Pact – 23 December 2005 (Belgian law Official Gazette 30 December 2005, 2nd ed) **Royal Degree on active management when restructuring, 9 March 2006 (Belgian law – Official Gazette 31 March 2006)**

When restructuring also implies a collective redundancy, older employees must be able to obtain a "second chance" and may not become inactive by putting them on "bridge pension".

Therefore Belgian law now provides that employees who are at least 45 years old and with a minimum of one year anciennity in the firm, and who are made redundant by a collective redundancy, can benefit from the legal duties attributed to an "employment cell (tewerkstellingscel) which will guard the execution of the measures taken to support reemployment.

D. Some notes on claims-priorities-protection of employees in bankruptcy matters **Title XVIII, Priorities and hypothecs (Belgian Civil Code)** **Belgian Sea Law**

The rights of the employees when their contract is terminated

According to article 46 of the Belgian bankruptcy law, the trustees in bankruptcy notify the termination of the labour agreement with the employees, what they normally do, but they can also

keep the employees under the already existing labour agreement for a certain period of time, mostly when they try to sell the company as a going concern.

Normally, the trustees in bankruptcy terminate the labour agreements as soon as possible.

The bankruptcy law provides that the party concerned can summon the trustee in bankruptcy to take a decision within 15 days after notification.

If the trustee in bankruptcy takes no decision, the law considers that the agreements are terminated by the trustee in bankruptcy.

After notifying the termination of the labour agreement, the trustees in bankruptcy provide the employees as soon as possible with the legally required documents which must enable the employees to apply for state aid (stempelgeld-chômage), if needed.

These documents are well known as document C4 and document BC901A.

Which priority is given to the claims of the employees ?

Title XVIII of the Belgian Civil Code provides for most of the priorities and hypothecs.

The following 4 categories of priorities are :

1. priorities on the total estate (general priority)
2. priorities on all the movable goods (general priority)
3. priorities on the some movable goods (special privilege)
4. priorities on some real estate (special privilege)

Article 19.3°bis of Title XVIII till 4°septies are the so called social priorities (the wages and social security claims including the claims of the Fund of Indemnification).

According to the Belgian Sea Law (Zeewet) the privileges depend on the quality of the debt claim; they always have priority over the mortgages (art. 19).

Are solely privileged to the vessel, to the freight earned during the voyage, during which the privileged debt claim was caused, and to the accessories of the vessel and the freight, originated since the beginningn of the voyage :

1° the judicial costs and expenses due to the State paid in the common interest of the creditors for the preservation of the vessel in order to arrive at the sales and the distribution of the profits; the tonnage, fire or dockage charges and other similar public charges and taxes; the pilotage dues, the watching and preservation charges from the entering of the vessel in the last port onwards;

2° the debt claims resulting form the labour agreement of the captain, the seamen and other persons serving on board of the vessel;

2°bis The amounts, based on the labour agreement of the captain, the seamen and other persons serving on board of the vessel, due to the Hulp en Voorzorgskas voor Zeevarenden onder Belgische vlag (Help and Precaution Fund for Seamen sailing under Belgian colours), as well as the contributions secured by the last mentioned.

Article 23 (Belgian Sea Law)

Social protection fund to satisfy the claims of the employees and what rights can the social protection fund exercise

According to article 19.3°bis, 19.4°ter and 19.4°quinquies of the same title XVIII Civil Code, the social protection fund (the Fund of Indemnification) has also a general priority over the unsecured creditors for the payments that it made to the employees.

The amount the Fund of Indemnification pays is 22.310,42 EUR per employee. This amount is normally paid within at least 6 months after the above mentioned documents were handed over.

How is the social fund capitalized ?

The Fund for Indemnification in case of closing of an enterprise and when employees made redundant (Fonds tot vergoeding van de in geval van sluiting van ondernemingen ontslagen werknemers) (Fonds d'Indemnisation des Travailleurs licenciés en cas de Fermeture d'Entreprises) is capitalized by employers who legally must contribute.

Has the employee a right to be represented ?

The employees mostly file their claims through one of the representative unions. (ACLVB – ACV – ABVV), respectively inspired by socialist, catholic and liberal doctrine, but they can, of course, submit their claim personally.

The unions can also represent their client in labour procedures before the labour courts.

Obligations of directors and officers in case of bankruptcy

Article 530 of the Belgian Corporations Act provides the trustee in bankruptcy (curator-curateur) with a powerful tool on which grounds a liability action can be started against the former directors de jure and also de facto when a person acted as a director of the bankrupt company.

When the debts exceed the assets of the company in a case of bankruptcy, the directors or the ex-directors and all other persons who acted de facto as a director, can be held personally liable for the total or part of the debts for the remainder, on the basis of an obvious and serious fault.

Antwerpen, 15 May 2006
Frans DE ROY