Workers' influence on outsourcing, tender processes and transfer of employment contracts:

watch the gap!

Booklet on useful tools, good practices and recommendations

UNI global union europa
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KNOWLEDGE FOR ACTION

Content:

Foreword

Over the last few decades, a major outsourcing push has fed the growth of the emerging privatized service industry. Government authorities and private enterprises were stripped to their core functions while many auxiliary functions were outsourced to low wage service companies. Permanent, full-time and in-house jobs entered into a price-driven wheel of fortune of outsourcing and (re)tendering. Both private and public sector organizations driven by budget cuts where 'low, lower and lowest' prices were the motivating and ultimate goal.

While taxpayers and shareholders may be pleased, it is workers in these sectors who foot the bill with less job security, lower salaries and higher workload. Many workers in cleaning, private security, contract catering, IT services, landscaping, waste management, public transport and building maintenance have suffered these consequences. Often the workers remain in place with each new tender; the only things that change are the wages, the uniform and the workloads.

The protection of employees' rights during a Transfer of Undertaking (Protection of Employment) commonly referred to as TUPE, finds its origin in a European Economic Community directive from 1977 (77/187/EC). The directive aimed to level the playing field for a single market by preventing takeovers of economic activities without considering the existing workforce. The directive was further refined by rulings of the Court of Justice of the European Union (CJEU) and this resulted in an amended directive in 1998 (98/50/EC). In 2001 the latest version (2001/23/EC) was completed.

All of these amendments and court ruling were meant to increase the protection of outsourced workers against the negative consequences of outsourcing and/or (re)tendering. However, the directive is often only triggered where appropriate provisions have been negotiated into the Collective Agreements which allow them to be combined with case law.

Despite the changes and campaigning by unions, this project has shown that the application of the directive by its true intend is complex and conditional on passing certain thresholds. This has created a patchwork of local and sectoral differences across Europe, leaving large numbers of European workers subject to the race-to-bottom business model of tendering. This means workers are losing their rights to job security, pay levels and healthy workloads, which has lasting impacts on the workers, their families, and the entire workforce in the industry as further downward pressure is created on wages and conditions.

These gaps in the system have resulted in ongoing court cases and further developing case law. The outcomes of these cases will be interesting to all players. Revision of the directive combined with collective bargaining strategies is critical, and an opportunity to close the gap and improve the lives of hundreds of thousands of workers.

I would like to thank all participants and contributors to this insightful booklet. Our ambition is that it creates a new understanding of the real-life challenges faced by workers caught in the tendering processes and a motivation to make the changes necessary to see the envisioned protections come to life when they're needed most.

February 2021
Eddy Stam, Head of UNI property services

Introduction

This booklet is the outcome of the two-year project – *"Workers' influence on outsourcing, tender processes and transfer of employment contracts: watch the gap!"* – conducted by the main European trade union federations representing workers employed by service providers in catering, transport, cleaning industry, private security and municipalities.

The project covered different situations: the process of being outsourced (for the first time), or insourced (in particular by municipalities), and more frequently cases of outsourced services being transferred to another service provider.

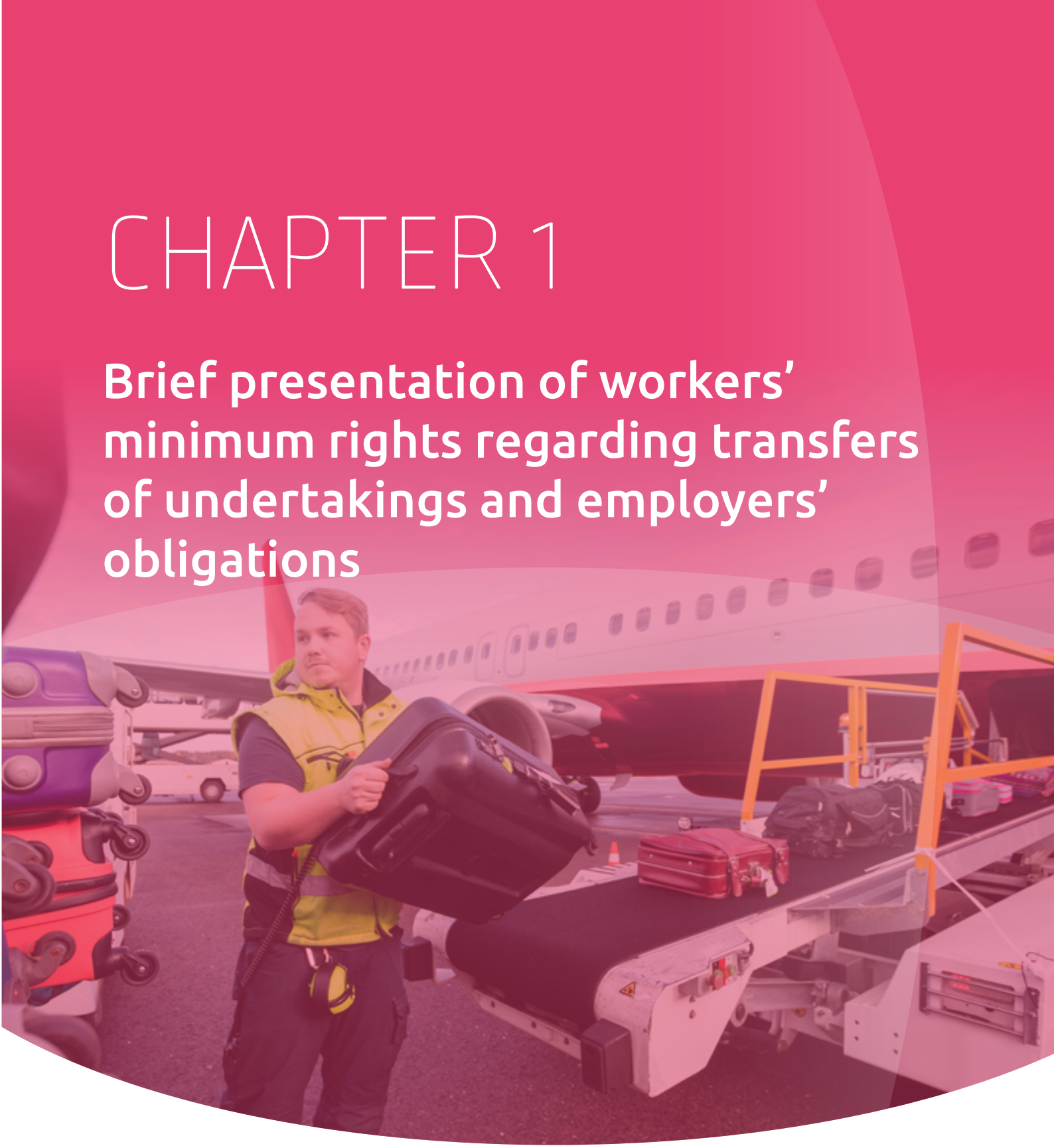
It also considered EU legislation on the protection of workers' employment and working conditions in the case of a change of employer following a tender, in conjunction with the European and national information-consultation rights of workers' representatives.

In cases where the incumbent service company loses all or part of its service contract after losing a tender, workers' rights are protected at EU level through the provisions of Council Directive 2001/23/EC of 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, businesses or parts of undertakings or businesses. Other European and national regulations as well as collective agreements may apply at sector level.

To strengthen workers' voice in such cases, we need to analyse the underlying legal mechanisms. Numerous studies show that, despite European legislation and jurisprudence, there are major discrepancies between countries. For this reason, EFFAT, EPSU, ETF and UNI Europa, with the support of Syndex, have joined forces to uphold and strengthen the influence of workers in such processes, identifying sectoral, cross-sectoral and European recommendations and best practices.

CHAPTER 1

Brief presentation of workers' minimum rights regarding transfers of undertakings and employers' obligations



a) Understanding Directive 2001/23/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Applicable to all EU Member States, this Directive (EU Law) updates the previous legislation of 1977 (the so-called Acquired Rights Directive) that had led to significant court cases / disputes.

Its objective is twofold:

- **To provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded (Recital 3).**
- **To reduce differences that still remain in the Member States as regards the extent of the protection of employees in case of transfer of activities to another employer (Recital 4)**

Where does this Directive apply?

The European directive is applicable to all EU Member States through transposition into national law, usually into the labour code, but sometimes complemented by collective agreements.

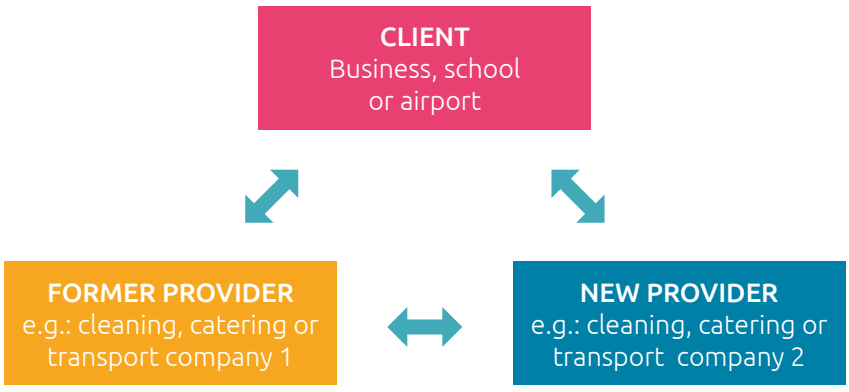
When does it apply?

This legislation applies to two cases:

- A merger between two companies OR
- A legal transfer between two companies: this can be a unilateral act. There is no need for a contractual relation to exist between company 1 and 2.

A MERGER BETWEEN TWO COMPANIES

A LEGAL TRANSFER BETWEEN TWO COMPANIES



(source: Syndex)

What is a transfer?

A transfer in the meaning of this Directive 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 (Art. 1)

What are the conditions for a transfer to take place?

1. Change of employer and,
2. Maintenance of the identity of the activity: Company 2, the new employer, acquires the assets of Company 1, the previous operator, and / or takes over the majority of staff (for more detailed information, see the Court's decision below and in the annex)

However, the Directive states that Member States can chose whether or not to establish joint and several liability between Company 1 and 2 after the date of transfer as regards social obligations (social security, dismissal compensation, …).

What are workers' minimum rights in the case of a transfer?

- **What contracts / jobs are transferred to the new employer, if any?**

  Open-ended contracts, fixed-term contracts, part-time workers, workers on (long-term) leave, … (Art. 2)

  Almost rights and obligations of Company 1 (transferor) to company 2 (transferee) arising from an employment contract or employment relationship are transferred (Art. 3)

Exclusions:

- In principle, jobs are not protected by the transfer rules in the case of Company 1's insolvency.
- Employees' rights to supplementary old-age, invalidity or survivor benefits outside the statutory social security system are not transferred.

- **Are rights enshrined in the collective agreements transferred?**

  Yes. The rights are transferred except when another collective agreement applies to the new employer. (Art. 3.3).

- **How long are working conditions protected?**

  At least one year. This is the minimum duration, though EU Member States can fix a longer period.

- **Can a worker refuse to be transferred?**

  Yes, but in many countries this may lead to breaching the labour contract. In such a case, in most countries, national labour law decides who is responsible for breaking the employment contract. E.g.: One needs to assess whether there are substantial changes to working conditions and workplaces.

What are the employer's obligations?

- **Company 1 does not have to make workers redundant. Nor is the transfer of activity a valid ground for redundancies in Company 2.**
- **If an EU Member State so decides, Company 1 and 2 can be held jointly and severally liable as from Day 1 of the transfer 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. However, Company 2 is the first in line.**
- **If an EU Member State so decides, Company 1 (transferor) must notify Company 2 of the jobs and their characteristics in terms of rights and obligations. Even if Company 1 does not provide this information, workers' rights remain protected.**
- **Company 1 and 2 must inform their respective workers of the following:**
  - The date foreseen for the transfer
  - Reasons of the transfer
  - Legal, economic, social consequences for workers
  - Measures planned, if any, as regards workers
- **Both companies shall provide this information "in good time", before the transfer, to workers' representatives. IMPORTANT: when "measures" are planned as regards workers, consultation shall take place "with a view to reaching an agreement" (but there is no obligation to reach an agreement, says the Court of Justice of the EU).**
- **If the company or part thereof preserves its autonomy, the status and function of workers' representatives continue as before the transfer. However, the threshold for appointing workers' representatives applies to the new situation, possibly leading to a reduction in the number of mandates.**

Limitations to workers' protection

If the transfer involves a substantial change in working conditions to the detriment of the worker (e.g. a workplace much further away, lower responsibilities, …), this is in breach of the employment contract under the responsibility of the new employer. (Art. 4.2)

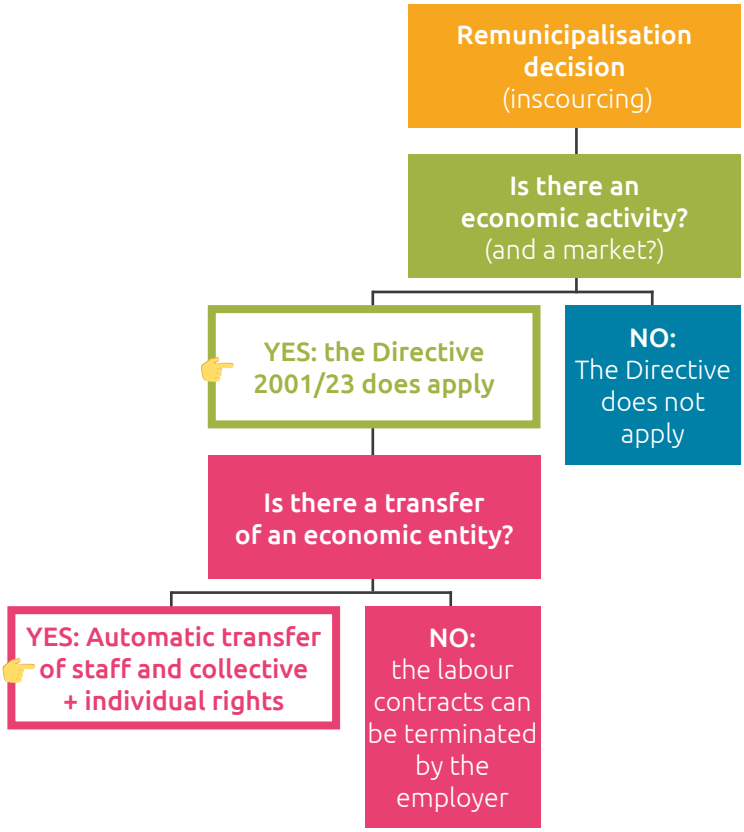
IMPORTANT: in principle, the new employer can dismiss workers at any time for **economic**, **technical** or **organisational reasons** as foreseen by the labour law of the country concerned. Standard individual or collective redundancy rules have to be complied with, as they also do when working conditions change substantially (see above).

Does Directive 2001/23/EC apply to the public sector?

- **YES. The Directive applies to any type of "undertaking", irrespective of whether public or private (Art. 1.1)**
- **BUT: the entity must pursue an economic activity, providing goods and services to a market. However, this does not mean that the entity has to be operating for gain.**
- **Exclusions foreseen by the directive: administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities.**

If this criteria are not met, the protection of the directive does not apply, and there is no automatic transfer of staff. The employer can immediately terminate employment contracts in accordance with standard labour law practices

THE DIAGRAM BELOW SHOWS HOW TO ASSESS WHETHER PUBLIC SECTOR SERVICES ARE COVERED BY THE EUROPEAN LEGISLATION ON TRANSFERS OF UNDERTAKINGS.



(source: Syndex)

In the rail and road sectors, Directive 2001/23/EC is expanded!

The 2007 EU PSO Regulation (1370/2007 revised in 2016) concerning the opening of the market for domestic passenger transport services by rail and by road states that, while Member States are obliged to fully respect Directive 2001/23/EC, they are also free to extend its application. Members States may implement the Directive in transfer cases where it would not normally apply.

The EU can learn from Norway!

Under Directive 2001/23/EC, Members States are not obliged to transpose the transfer of staff rules with regard to bankruptcies. Although the European Directive is not binding for Norway, the country has adopted a national law providing workers with quick protection: **in the case of a service provider going bankrupt, local authorities must sign a new ad hoc contract directly with a new operator for 18 months without following usual tender procedures**. After this period, the municipality can decide whether it wants to tender out or re-municipalise.

b) Input from the Court of Justice of the European Union (CJEU)

The current and previous directives have been and still are the subject of important case law. Despite its revision, the 2001 Directive remains vague, with the result that the CJEU has specified a list of criteria for determining whether the law on the transfer of undertakings is applicable to a change of service provider or not.

Criteria established by the CJEU for use by national courts in the event of disagreement regarding the continuation of employment and working conditions:

- type of undertaking or business: does the entity transferred have some autonomy to operate?
- whether or not tangible assets such as buildings and movable property are transferred,
- the value of intangible assets at the time of transfer (e.g.: brand value, patents, …)
- whether or not the majority of employees are taken over by the new employer,
- whether or not the customers are transferred,
- the degree of similarity between the activities carried on before and after the transfer,
- the period, if any, for which these activities were suspended.

All these circumstances are merely individual factors in the overall assessment to be made and **cannot be considered in isolation**. A range of factors must be embraced for the law on transfers to be applied to a specific case.

SERVICES V. SERVICES

Individual service sectors neither have the same characteristics, nor are affected by this legislation in the same way.

On the basis of the criteria above, the CJEU distinguishes between:

- activities based essentially on manpower, such as cleaning and surveillance, and
- activities based essentially on assets, such as public transport or contract catering.

In the case of manpower-based services, the taking over by the new employer of **a large proportion, in terms of their numbers and skills, of staff** specifically assigned by its predecessor to the provision of the services in question can result in the maintenance of the identity of the entity (hence to a transfer of working conditions).

See the annex for more information on case law.

CHAPTER 2

Improving workers' rights at all levels: a strategic approach

Regrettably, the law on the transfer of undertakings is applied differently from one country to another. There are several possible reasons for this: a lack of collective agreements, national court decisions contrary to European case law, low protection of workers by EU Member States permitted by the EU directive on certain topics, etc.

However, these reasons are no justification for differences in the conditions faced by workers. On the contrary, workers should have similar rights regardless of their country of work. To strengthen workers' rights in countries where this is necessary, trade union organizations have several options:

- **Identify stakeholders and leverage:** trade unions should identify where staekeholders stand and how they can get their support.
- **Plan a set of activities** on the basis of priorities, activities and resources and draft a timeline: the different paths listed in the Sitava example below show how to gain new members and at the same time improve their employment and working conditions.
- **Use social dialogue outputs** at European and national level. In several sectors, especially those where there is fierce competition, some employer federations or companies have entered into dialogue with unions and workers' representatives to facilitate transfers. In the interest of both business and workers, fair solutions may be found to avoid unnecessary workplace tension.
- **Use templates before the effective transfer:** Trade unions need to have concrete tools to ensure that a transfer is conducted in compliance with legislation and collective agreements.

a] Identify stakeholders and possible levers

Stakeholder mapping is a proven methodology for establishing where a union stands. We recommend using the following 3-phase activity to map stakeholders and decide which actions are most suitable for addressing each stakeholder

TOOL: The mapping

Already used in several trade union meetings, this is an effective methodology applicable in all countries:

National Groupwork Phase #1

Participants are divided into working groups according to their numbers and profiles. Each working group is tasked with identifying allies and opponents at national level, should they seek to strengthen transfer legislation through social dialogue, include transfer rights in their collective agreement, or take industrial action over the issue.

Public decision-making bodies/representatives/elected officials

- EU level
- National level (Who are the decision-makers in your government?)
- Regional and local level

Organized opposition formations

- Lawyers, Law firms
- Public relations firms
- Businesses (SMEs, large employers, MNCs) – which companies do not abide by legislation? Which ones are you always in a fight with?
- Business, employers and industry associations (who controls the employers' association?)
- Clients

Potential Allies

- Community organizations
- NGOs
- Other trade unions
- Churches and mosques

Other organized forces

- News and media outlets
- Clients (is there a particular client segment where it is more difficult than elsewhere?

Current Policy Fights

- What votes/who voted how/votes taken (zero hours contracts, short-term contracts)
- Identify important political dates in the coming 2-4 years.
- When are your collective negotiations? When are your works council elections?

National Groupwork Phase #2

Each working group should identify actions that they can take at national and EU level with regard to the following four topics. Possible ideas are listed below each topic. In these sessions we should try and get participants to commit to engage in different activities.

Participants should ask themselves how they can use these different activities to strengthen union structures – **Do they strengthen/weaken union structures?**

Social Dialogue

- Set up buy-in sessions for employers
- Organise national events with high-road employers
- Raise the issue in bipartite and tripartite meetings
- How can we leverage the European Works Council in an MNC?
- Could we move to a framework agreement in the EU sectoral social dialogue?

Legal Action

- Enshrine good dispute resolution mechanisms in company agreements to strengthen their implementation
- Set up meeting with possible union and non-union allies on how to win this in court
- Use case law
- Coordinate strategic litigation

Industrial Action (Organizing)

- Hold organizing training with activists
- Identify possible targets
- Build new shop steward/delegate structures
- Recruit new members
- Develop new leaders

EU Lobbying

- Organise an EU event: e.g. the Cleaners' Parliament day
- Approach European employers' federations
- Leverage the RETAIN Project (see below)
- Get the opinion of the European Economic and Social Committee Opinion on Transfer of Undertaking
- Get transfers of undertakings into revised Public Procurement Directive

National Groupwork phase #3

In this groupwork phase we discuss which resources unions need to be effective in all fields:

- Organisers
- Members
- Workplace leaders
- Further Research
- Legal/lawyers
- Support from politicians
- Etc.

We close with a discussion on what support the European Trade Union Federation can provide to affiliates.

How to compile the information above?

Please use the following table to summarise your findings:

Identify actions that your union can take at each level

	Company/Local Level	National level	European Level (EWC, European social dialogue committee, EU institutions,...)
Social Dialogue			
Legal Action			
Industrial Action			
EU Lobbying and campaigning			

Identify the structures and the necessary action to either neutralise opposition or win it over

	Structure	Action
Local level		
National level		
European level		
Global level		

b) Plan activities on the basis of your priorities, activities, resources and draft a timeline

Whatever your trade union objectives are, a good strategy is critical to reach success. It is important to be very selective to avoid multiple plans that would not be realistic.

TOOL: The roadmap

Please answer the following questions in order to build your own roadmap activities.

This exercise is a process, with each step needing to be followed:

Step 1: Identify the priorities of the roadmap

Please select ONLY 2 topics that you consider to be a priority according to your personal profile and situation:

Identify priority number: please chose 1 or 2 only	I am a company-level worker/ union representative	Identify priority number: please chose 1 or 2 only	I am a national trade union federation/ organization representative
	My priority is: 1. To have more time for information – consultation before a transfer 2. To better protect my working conditions or my job in the case of a transfer 3. To protect my mandate as a worker representative 4. To be able to reject a transfer 5. To increase trade union membership (organizing) to gain workplace power 6. To go to court 7. Other:		My priority is: 1. To negotiate or renegotiate a collective agreement at sector or company level 2. To go to court 3. To change European or national legislation 4. To increase the trade union membership (organizing) to gain workplace power 5. Other:

Step 2: Explain the main actions that you want to carry out in the year (for instance, organize a meeting, set up a network, meet the workers, meet management, hire a lawyer, launch a media campaign, ...):

Action 1:
Action 2:
Action 3:
Action 4:

Step 3: Identify the main resources needed to carry out your actions (for instance: support from the ETUF and Syndex, financial support, IT communication needs, support from your trade union, budget from management, translation, ...)

Resource 1:
Resource 2:
Resource3:
Resource 4

Step 4: Timeline

Please fill in the table below using the information provided in points 1 to 3. Note: the objective is to draw your own roadmap, in a realistic way.

Month	Priority	Action	Resources needed
JANUARY			
FEBRUARY			
MARCH			
APRIL			
MAY			
JUNE			
JULY			
AUGUST			
SEPTEMBER			
OCTOBER			
NOVEMBER			
DECEMBER			

A trade union strategy example:

The SITAVA Strategy

In 2020, Portuguese transport union Sitava launched an effective campaign to improve workers' rights in the ground-handling sector, a sector open to competition since the adoption of legislation in 1996 at European level and more recently in Portugal.

To improve the conditions of workers in particular to tackle issues related to the transfer of employment contracts between providers, Sitava decided to push for both legislative improvements and the adoption of a collective agreement with employers. The first step involved organising collective action at airports to boost union membership. This helped in raising the pressure during negotiations. Once the agreement was signed, the union decided to turn to the government, demanding legislative improvements to secure coverage of the entire sector throughout the country.

Examples of social dialogue at European, national and company level

Social dialogue in EWCs and multinational companies:

the ISS / UNI joint statement to safeguard jobs in the case of transfers of undertakings

A European works council (EWC) is an appropriate tool for gaining a global view of your company's policies. Thanks to EWCs, workers representatives can compare national practices and raise concerns about unbalanced company policies with management.

EWCs do not replace works councils or national trade union organizations but complement them. However, EWCs are not in a position to negotiate collective agreements, whereas a European or international trade union federation can do so, with the support of information provided by the EWC.

One possibility, highlighted by the example of UNI Europa below, is to provide a framework for restructuring measures to ensure that human resources departments in the different countries involved behave in a fair way.

ISS and UNI Global Union agree joint statement aimed at safeguarding jobs

In a joint statement with UNI Global Union, property services giant ISS gave reassurances that no dismissals or forced redundancies were planned in its global divestment plan that will affect 100,000 workers in 13 countries.

The countries ISS is planning to pull out its operations are Thailand, Philippines, Malaysia, Brunei, Brazil, Chile, Israel, Estonia, Czech Republic, Hungary, Slovakia, Slovenia and Romania.

In the joint statement with UNI, ISS agreed:

- to apply the Directive 2001/23/EC on transfer of businesses in the EU countries affected, as well as relevant national legislation in all 13 countries.
- that in countries where no such regulation is applicable, ISS would endeavour to transfer contracts together with the deployed workforce, meaning that the current workforce would be given the opportunity to transfer to the new owner of the company or business.
- that no dismissals or forced redundancies were planned in connection with the divestment plan.

Head of UNI Property Services Eddy Stam said: "We are talking about the livelihoods of 100,000 workers, over a fifth of ISS's workforce. UNI is pleased to have this written re-assurance and we will hold them accountable."

Information and Consultation

As a follow-up to this project, UNI Europa has also developed the project "*RETAIN: Tackling Labour Turnover and Staff Retention in Industrial Cleaning, Private Security and Long-Term Care*". As part of the project, UNI Europa and its affiliates are investigating how unions and multinational companies can cooperate in ensuring higher levels of staff retention and a decrease in labour turnover.

One could expect an EWC to be informed and consulted about the multinational company policies regarding subcontracting. Similarly, an EWC could request information from management on tendering processes and policies, in accordance with business confidentiality rules when the company's competitiveness is at stake.

Sectoral social dialogue at European level

European sectoral social dialogue is a key tool for dealing with issues relating to the transfer of employment contracts between service providers. Indeed, as explained by the CJEU, this issue is a sectoral one – and sectoral social dialogue can cover all EU countries. UNI Europa, for instance, has agreed to debate this issue with the European employers' association for cleaning industry and private security services, incorporating it into the respective new joint annual work programme.

Social aspects and the protection of staff in competitive tendering of rail public transport services and in the case of change of railway operator (joint opinion of ETF and CER):

"Although the European social partners differ in their view on the need for further liberalization and market opening, they share the conclusion that the consequences of competition should not affect the working conditions of staff providing services by requiring on national, regional, local level binding social standards and/ or the compulsory transfer of staff in case of change of operator"

EFFAT : The contract catering example

In the contract catering services sector, the issue of staff transfer has been on the agenda for a long time. The European social partners have been discussing it since 1999, with more specific activities undertaken from 2014 onwards. EFFAT has favoured social dialogue as an essential tool for progress and for covering the sector as broadly as possible. Following a survey on the state of play of the implementation of Directive 2001/23/EC in 2015, the social partners adopted recommendations in 2017 to promote the transfer of information between the transferor and transferee with a view to protecting jobs and working conditions. Social partners have also ensured that they work upstream of transfers, focusing on the procurement process of catering services.

On 21 November 2017, FoodServiceEurope and EFFAT adopted a recommendation on the transfer of information between employers in the context of a transfer of undertaking.

Aware of the fact that the 2001 directive does not oblige EU Member States to adopt legislation on this point (see Article 3.2 of the 2001/23/EC Directive), the social partners consider it extremely important to ensure that the new contractor has all relevant information on the transferred workers. There are several reasons for this, including that:

- workers will not be penalized, and their rights will be better preserved
- it will enable the new operator to perform the contract under good conditions.

Additionally, the social partners highlight the need for an efficient and timely transfer of information between the transferor and the transferee. The information should be transferred "in good time" and as soon as possible after the transfer decision has been formally taken, i.e. before the transfer is carried out.

The social partners also strongly recommend that this process of exchanging information between employers should also include informing the workers concerned "in order to preserve their ability to intervene in full knowledge".

Finally, the recommendations list (non-exhaustively) the information to be transferred: information on each worker, his/her employment relationship characteristics (labour contract features, seniority, functions, working time, …), wages and fringe benefits, medical examinations where legally permitted, as well as on collective agreements in force and social security payments.

The social partners however recognize that their recommendations should be applied within the framework on national legal provisions (including data protection/privacy considerations).

Upstream action: influencing calls for tenders by "Best value"

Another example of successful European sectoral social dialogue is the adoption of tools that can be used upstream of any transfer process. Mirroring an approach taken by other sectors (e.g. textiles, cleaning and security industries) in the early 2000s, the European contract catering social partners have issued a guide entitled *"Choosing best value in contracting food services: a guide for public and private client organisations*[1]*"*.

This guide reminds service purchasers like schools, hospitals and companies that compliance with labour law and collective agreements is a fundamental criterion to be included in their calls for tenders. According to the guide, calls for tenders should require compliance with the respective national legislation and collective agreements implementing Directive 2001/23/EC.

Sectoral social dialogue at national level

Collective bargaining is probably the most effective tool for improving the protection of workers as complement to the 2001 European directive. It is the best possible way to bring legislation it into line with workplace realities. But collective bargaining depends on the representativeness of the social partners, which may be weak in some sectors and countries.

Many collective agreements set out in detail the conditions governing a transfer (e.g. is a change in the geographical location of the workplace acceptable and to what extent can it constitute a substantial change in working conditions, in turn implying a termination of the employment contract by the employer) and the rights transferable from one employer to another. A collective agreement may, for example, exclude the continuity of a supervisor's grade or, on the contrary, strengthen the protection of workers by excluding redundancies on economic grounds (Belgium, industrial cleaning sector).

1 For cleaning, the UNI Europa / EFCI guide: http://www.cleaningbestvalue.eu/the-guide.html
For Security services, the UNI Europa / CoESS guide: http://www.securebestvalue.org
For contract catering, https://contract-catering-guide.org/wp-content/uploads/2019/09/Catering-Services_Best-Value-Guide_EN_Web.pdf

The Spanish example: in the ground-handling sector, the Spanish social partners agreed to adopt additional criteria to identify whether a change of supplier involves a transfer of employment labour contracts and working conditions.

In Spain, the ground-handling sector collective agreement includes a precise mechanism for identifying workers whose contract will be transferred:

- Chapter XI of the agreement relates to transfers ("subrogación"), providing that: "For the purposes of determining the percentage of business transferred, consideration shall be given to the number of aircraft subject to transfer, divided by the total number of aircraft serviced by the transferring operator, both over a twelve-month period of activity, or, if less than twelve months, with respect to the time actually operated. Calculation of the number of aircraft shall be based on the last weighted table of "maximum rates charged by ground-handling agents for apron services", published by AENA." (Art. 63). "For loading and mail services, the same method shall be used but with kilograms of goods and mail taken as a reference" (Art. 64).
- "(…) Upon determining the percentage of business lost, and in accordance with previous sections hereof, such percentage shall be applied per type of contract and subsequently per job category, based on the existing staff involved in the activity at the affected entity's work centre, including the proportional part of its structure, at the moment such entity is duly informed of the change in service, pursuant to the requirements established herein. Application of the above criteria shall determine the number of workers to be subrogated, provided they consent, rounding off fractions thereof above 0.5; and decimal fractions of less than 0.5".

CHAPTER 3

Conclusions and recommendations

a] Confronting the state of play

The purpose of this booklet is to promote an understanding of the law applicable to protect private and public sector workers in the event of a change of service provider by a client or in the event of outsourcing or insourcing of service provision. For a more detailed understanding of the issues at stake and the possibilities for action, it may be necessary to read the **annex** containing sectoral reports and case law published as part of the project "Workers' influence on outsourcing, tender processes and transfer of employment contracts: watch the gap!"

These reports, and in particular the surveys of trade union representatives, conclude that:

1) **The best protected workers are those who benefit from specific industry-level collective agreements on the transfer of staff between providers.** Employers who refuse to enter into negotiations with trade union organisations should review their position with a view to promoting a fair development of the sector and creating a level playing field between employers. Soft regulation tools, such as joint declarations and best value guides, have a positive impact and should be adopted and promoted by both sides of the industry.
2) **National transpositions by Member States are poor:** The European legislation revised in 2001 is necessary; it provides protection for workers for at least one year. However, the majority of Member States have adopted minimal transpositions, rarely strengthening workers' rights. National law thus fails to provide satisfactory protection. Member States should review the law applicable in their respective countries and promote sectoral solutions, including through social dialogue at the most effective level.
3) **It is possible to expand current European legislation:** As demonstrated by the PSO regulation in the transport sector which extends the possibility of applying Directive 2001/23/EC, it is possible to guarantee the jobs and working conditions of workers not formally protected by the Directive. However, in practice, this extension is, in vast majority of cases, not used by members states.
4) **Going to court cannot be the only solution:** The CJEU case law provides a set of criteria on whether the protection of workers against loss of employment and the calling into question of working conditions between two employers can be activated. However, this approach is limited by at least four factors:
   a. Certain lawyers are unaware of European case law. This gives rise to numerous preliminary questions and thus lengthens proceedings to the detriment of those whose jobs are at stake. In some cases, it may even lead to bad court decisions. Trade union lawyers should also bring more cases to the courts to enforce workers' rights during transfers.
   b. Recourse to a court ruling is not always a satisfactory solution because it positions the worker as the plaintiff, thereby placing the burden of proof on him/her. However, the worker does not necessarily have at his/her disposal the necessary information from the employer(s) to argue his/her case.
   c. The long history of case law and the number of cases demonstrate that the current legislation is vague and contains loopholes. Moreover, it offers insufficient protection, in many cases forcing victims to seek interpretation by a court.
   d. Other solutions could be encouraged by European and national legislation: In several countries, national social partners have set up joint conciliation and/or arbitration procedures in collective agreements that provide satisfactory and quick outcomes.
5) **European social dialogue is relevant:** Taking into consideration both the good achievements of the European sectoral social dialogue Committees and the CJEU case law that is based on sectoral specificities (in relation to the list of criteria used to identify transfer cases involving workers protection), European sectoral framework agreements on transfer of staff could without doubt considerably improve the protection of workers while setting up a fairer level playing field for companies.

b) Does Directive 2001/23/EC need to be revised ?

Although the 2001 European Directive states in its preamble, that "differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced" (Recital 4), the CJEU states in the Telecom Italia (Case C-458/12) that the Directive *"does not aim at establishing a uniformed level of protection for worker in the EU"* but rather at ensuring that the worker has the same level of protection with the new employer as he/she had with the previous one under the rules of the Member State concerned.

In their two-year project "Workers' influence on outsourcing, tender processes and transfer of employment contracts: watch the gap!" (2020 – 2021), EFFAT, EPSU, ETF and UNI Europa, with the support of Syndex, have identified key differences between countries in the interpretation of the law by national courts and the impact of collective agreements.

The European legislation is weak in the sense that many "may" articles open the door to low standard implementation by Member States:

- **Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable (Art. 3.1):** joint and several liability is a major issue not only for employment considerations but also for social security contributions which impact workers' rights and welfare benefits. At the same time, differences between countries on this matter have an influence on competition between suppliers within the Internal Market, especially when suppliers operate transnationally.
- **Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee (Art. 3.2):** this information is of great importance and should be made compulsory to safeguard the transfer of employment contracts and the mandates of workers' representatives. In addition, the documentation can serve as input for information and consultation procedures in companies where a works council and/or trade union is in place.
- **Member States may limit the period for observing (..) terms and conditions with the proviso that it shall not be less than one year (Art. 3.3):** almost all countries in the EU have adopted a minimalistic approach of one year.
- **Member States may provide that the protection 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. (Art. 4)**
- **An EU Member State may provide that liquidations in bankruptcy proceedings are covered by the directive; otherwise it will not apply.** When an EU Member State decides that the Directive does apply in this context, the EU Member State may water down the protection of workers if (i) the debts (unpaid remuneration and compensation) of workers are protected by national law or (ii) changes to employees' terms and conditions may be agreed between the representatives of the employees and the new employer, provided these are designed to safeguard employment opportunities by ensuring the survival of the business (Article 3 of the Directive).

👉 Sub-contracting has increased to unexpected levels over the last two decades, very often at the expense of workers' rights and jobs. **EFFAT, EPSU, ETF and UNI Europa will meet and invite the European Commission to analyse the points presented in this booklet and to open a debate on the revision of Directive 2001/23/EC. In this direction, we ask for an immediate updated impact assessment of the European directive 2001/23/EC that will help European Sectoral social dialogue Committees to address this issue in an efficient manner.**

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Syndex Europe & International
Bld du Roi Albert II, nr5
1210 Brussels
BELGIUM