

**UNIVERSITY OF OXFORD**  
**Faculty of Law**

**Doctor of Philosophy in Law**

**Thesis**

**Balancing Employer and Employee Interests: Legitimate  
Expectations and Proportionality under the Acquired Rights  
Directive**

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## **ABSTRACT**

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### **Balancing Employer and Employee Interests: Legitimate Expectations and Proportionality under the Acquired Rights Directive**

This thesis analyses the aims and objectives of the EU Acquired Rights Directive (ARD) in the context of the larger evolution of EU labour law itself. The thesis presents the overall goal of the ARD as that of striking an appropriate balance between the employer's prerogative to transfer the business and the employee's interest in not having the security of the job unduly threatened by such transfers. Given the current complexity and incoherence of the law regulating economic dismissals in the context of transfers, the central argument of the thesis is that there is a need for a clearer conceptual framework for defining and understanding the rights and obligations in the Acquired Rights Directive (ARD). It is suggested that the principles of legitimate expectations and proportionality are ideally adapted to play this role. In analyzing the teleology of the ARD based on these principles, this study not only assists in understanding and explaining the ARD itself, but also has wider implications for understanding the challenges facing European social policy in the field of employment protection.

In its attempts to reconcile fundamental economic freedoms of employers on the one hand, and fundamental rights of employees on the other, the Court of Justice has frequently relied upon the proportionality principle to achieve a 'fair balance' between both parties. Following the interpretations of 'proportionality' in *Viking* and *Laval*, there is admittedly a fear that the proportionality balancing is likely to accord an almost absolute priority to the employers' economic freedoms. The thesis is cognizant of this danger, and therefore advocates a 'symmetrical' approach to balancing.

In this way the thesis offers some insight into the potential for the ARD to remain continuously effective in times of economic crisis. The study therefore finds reason to be optimistic about the prospects for the ARD and other standard-setting directives in the future of social Europe.

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## LIST OF ABBREVIATIONS

AC, QB, Ch, Fam, P	Official Law Reports
AG	Advocate General
All ER	All England Law Reports
ARD	Acquired Rights Directive
AP	Hellenic Supreme Court of Civil and Penal Law
CA	Court of Appeal
CAA	Court of Appeal of Athens
CAT	Court of Appeal of Thessaloniki
Co	Company
Corp	Corporation
CUP	Cambridge University Press
CML Rev	Common Market Law Review
CMLR	Common Market Law Reports
DEN	Labor Legislation Bulletin
DTI	Department of Trade and Industry
EC	European Communities
ECR	European Court Reports
ELR	Employment Law Review
ECJ	European Court of Justice
edn/edns	edition/editions
ed/eds	editor/editors
EL Rev	European Law Review
ER	English Reports
EAT	Employment Appeal Tribunal
ERA	Employment Rights Act
ET	Employment Tribunal
et seq.	et sequens
EP	European Parliament
EIRR	European Industrial Relations Review
EL Rev	European Law Review
EU	European Union

for example	eg
GCC	Greek Civil Code
HC	High Court
HMSO	Her Majesty's Stationery Office
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Review
ILJ	Industrial Law Journal
ICLQ	International & Comparative Law Quarterly
LQR	Law Quarterly Review
Ltd	Limited
MLR	Modern Law Review
NLJ	New Law Journal
OJ	Official Journal of the EC
OUP	Oxford University Press
p/pp	page/pages
para/paras	paragraph/paragraphs
PD	Presidential Decree
PL	Public Law
QBD	Queen's Bench Division
reg/regs	regulation/regulations
ie	that is
trans	translated
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUPE	Transfer of Undertakings (Protection of Employment) Regulations
vol	volume
UK	United Kingdom
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports
YEL	Yearbook of European Law

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## **Introduction: Overview of the Thesis**

This thesis analyses the aims and objectives of the EU Acquired Rights Directive (ARD),<sup>1</sup> in the context of the larger evolution of EU labour law itself, to try to understand and to suggest possible ways of addressing the problems which have been encountered in the realisation of those aims and objectives. The purpose of this introductory chapter is to explain the essential argument and methodology of the thesis, offering an overview of how the research project, of which this thesis is the culmination and outcome, has evolved.

### ***1.1 The Acquired Rights Directive and the Ideas of Proportionality and Legitimate Expectation: between the particular and the general in European Labour Law***

Although the ARD may be viewed simply as a worker-protective measure to the extent that it protects the ‘acquired’ rights of workers when the entity for which they work is transferred to a new owner, its policy history actually suggests that it has acquired a more complex role in structuring the markets in which corporate enterprises are bought and sold, a role moreover which became increasingly controversial as the general policy framework for EU labour law evolved towards the pursuit of ‘flexicurity’,<sup>2</sup> and in the most recent years the effort to manage continuing economic crisis.

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<sup>1</sup> Council Directive (EEC) 77/187 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 [1977] *OJ L61/26* as amended by Directive 98/50/EC [1998] *OJ L210/88* and consolidated in Directive 2001/23 [2001] *OJ L82/16*.

<sup>2</sup> ‘The combination of labour market flexibility and security for employees’: S. Bekker and T. Wilthagen, ‘Flexicurity- a European Approach to Labour Market Policy’ in O. G. Mayer (ed) *Intereconomics: Review of European Economic Policy* (Econpapers 2008) 68.

In studying the evolution of the ARD it becomes increasingly apparent that the interpretation and implementation of the directive is hampered by lacking a sound theoretical and conceptual underpinning to help delineate the scope and boundaries of its application. Hence the case law has become trapped in increasingly complex formulations of the existing statutory tests to determine which transfers defeating the 'acquired' rights of employees should be allowed to proceed and which should be prevented or at least be held to incur liability to pay compensation to the affected employees. In the course of this study, in seeking a coherent theoretical approach that might offer a clearer and more satisfactory way of understanding the scope and aims of the ARD, the interlinked ideas of Proportionality and Legitimate Expectation gradually emerged as general or overarching principles of EU law which might provide a basis for the better understanding and resolving of the set of regulatory issues and problems which the ARD has over time come to represent. The thesis therefore sets out to build on this central analysis of the ARD by reflecting upon the role of proportionality and legitimate expectation in this regard. In doing so the thesis does not simply move from the particularities of the ARD to the generalities of proportionality and legitimate expectation in a simple linear progression. In relying upon these concepts to explain and interpret the evolving goals of the ARD, the eventual aspirations of the thesis consist of creating a continuing interplay, a harmony of point and counterpoint, between the particular outcomes and impacts of the ARD and the general development, and potential for development, of the ideas of proportionality and legitimate expectation in the field of European labour law.

The doctrine of proportionality is presented as a promising legal framework within which to balance employment protection with the employer's economic freedom to transfer the undertaking even when such transfers might put jobs at risk; the doctrine of legitimate expectations is in turn an apt representation of the interest accorded to employees by the ARD. Defining the interest of the employees as a legitimate expectation facilitates the proportionality exercise by clarifying the nature of the interest to be weighed in the balance against the employer's managerial prerogative in the decision-making processes surrounding the transfer.

The proportionality test is particularly attractive in this context in so far as it is compatible with flexibility: it does not unduly restrict the employer's freedom to restructure the enterprise. Instead, it targets only those limitations of managerial prerogative that are disproportionate having regard to the social goals of the ARD, namely the desire to protect the employees' legitimate expectation of continuing employment when there is a change in the identity of the employer. Hence the main contribution made by this thesis lies in showing how the proportionality principle can be harnessed to shed light on appropriate ways of balancing the conflicting interests in the regulatory field with which the ARD is concerned.

In pursuing this line of analysis, the thesis remains cognisant of the difficult implications of deploying the idea of 'proportionality' as a way of handling the collective rights to freedom of association, collective bargaining, and industrial action in EU labour law.<sup>3</sup> However, the exploration of a link between the 'acquired rights' of the ARD and the ideas of proportionality and legitimate expectation is a less intrinsically provocative

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<sup>3</sup> For the diverse responses to *Viking* case in different Member States, see S. Sciarra 'Notions of Solidarity in Times of Economic Uncertainty' (2009) 39 ILJ 223, 235 et seq.

or suspect activity than the importation of the idea of proportionality into the more obviously collective aspects of European labour law has proved to be.

In this way the narrative of the thesis may be described as one in which the particular regulatory exercise, which the ARD represents, provides both the primary location for the thesis and, on the other hand, the main chosen illustration of the workings of the ideas of proportionality and legitimate expectation. The general ideas of proportionality and legitimate expectation, for their part, constitute a basis for explaining the underlying ideas which influence the formulation and implementation of the ARD. The thesis in this way constructs a counterpoint or dialogue between two different doctrinal perspectives.

### ***1.2. The Core Concerns of the Thesis***

The formulation of this thesis has entailed weaving together a number of very diverse kinds of thread, creating the risk that the clarity of the overall narrative or the relevance of each detailed element in the overall mixture might at certain stages become obscured. To mitigate this risk it is essential to identify at the outset the core concerns of the thesis, which if borne firmly in mind will help to make more readily apparent the overarching theme which each section of the thesis seeks to develop.

To make clear the nature and implications of these core concerns, it may be helpful at this stage to advance a simple syllogism which is at the core of the thesis and which links the particularities of the ARD regime with the generalities of the ideas of proportionality and legitimate expectation. This simple syllogism is that, by its very

name and proclaimed conception, the Acquired Rights Directive, properly understood, directly invokes a certain notion of workers' entitlements arising in connection with the transfer of the employing undertaking, entitlements which are strongly vindicated by the Directive, but are nevertheless both implicitly intended and explicitly at certain key points expressed to be balanced against the needs of the employing undertaking.<sup>4</sup> This regulatory framework can best be understood by drawing upon the conceptual language of proportionality and legitimate expectation; and it is, moreover, a regulatory framework which itself provides a platform for the better understanding of those broad conceptions themselves and of the place they have come to occupy in thinking about European labour law. In this way the general ideas of proportionality and legitimate expectation represent both a basis for a critique of the formulation and implementation of the ARD and, at the same time, a methodology which might become a transcendent one across the whole sphere of European labour law.

Stated in that way, this syllogism is fleshed out more fully in the thesis by suggesting that the ARD essentially invokes the idea that upon the transfer of an employing enterprise, its workers have certain 'acquired rights' which deserve protection: rights to consistency, continuity<sup>5</sup> and fairness of treatment of their situation by and between the transferor and the transferee of the enterprise in question. We should not

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<sup>4</sup> For example, the ARD explicitly permits dismissals 'for economic, technical or organisational reasons entailing changes in the workforce' (ETOR) (Article 4 par. 1 second sentence). This provision reflects the attempt to balance the conflicting interests existing in transfers. Indeed the ETOR justification for dismissals constitutes recognition of 'the potential conflict between economic and social rights' during transfers, S. Hardy, 'The Acquired Rights Directive: A case of economic and social rights at work' in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 486.

<sup>5</sup> For the interpretation of the aim of the ARD as 'ensuring continuity of employment relationships within an economic entity, irrespective of any change of ownership', see para 19 of Case C-172/99 *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen* [2001] ECR I-745.

expect and we do not find that such claims to consistency or continuity or fairness of treatment, even if they are identified as ‘acquired rights’ are recognised as *absolute* ones; various conditions and qualifications are placed upon their recognition, which reflect the complex purposes of the regulatory interventions which recognise those claims. This gives us the key to understanding the ARD as an exercise in recognising a certain set of workers’ claims as ‘rights’ in a certain particular sense for a certain particular set of purposes. In sum, this thesis will argue that the self-defining rhetoric of the ARD, the very terminology of ‘acquired rights’, actually invokes a complex and nuanced set of ideas about workers’ entitlements which can usefully be understood and handled with the conceptual tools of proportionality and legitimate expectation, and moreover that in the course of this handling, we learn valuable lessons about the nature and potential of those conceptual tools themselves in the European labour law context.

It is hoped that this syllogism provides some assurance as to the robustness of the ensuing thesis, insofar as it establishes two distinct, though eventually convergent, paths along which the objectives of the thesis can be pursued. The first path, which is trodden in the first volume of the thesis, is to investigate in depth the teleology and functioning of the regulatory system which was ushered in by the ARD, as a way of understanding the rights or legitimate expectations which that system has recognised and sought to vindicate. The second path, which is taken in the second volume of the thesis, coming as it were from the opposite direction, is to probe in detail the ideas and methodology of proportionality and legitimate expectation, homing in on the particular context of workers’ claims to continuity, consistency or fairness of treatment upon or in connection with the transfer of the employing enterprise.

Both those paths will turn out to be winding ones. Some choices of particular byways will require especial attention to ensure that in developing the analysis sight is not lost of the eventual destination of the thesis.

### ***1.3 The Comparative Study of Greek and UK Law***

One such byway, which might usefully be explained at this stage, is constructed by introducing some comparative reflections upon the workings of the ARD as implemented in the legal systems, labour markets and business structures of Greece and of the UK. This represents a choice to concentrate upon those national systems with which the writer is most familiar; but to ensure that those very selective comparative reflections contribute to the thesis as a whole, the attention of the study is focused on identifying the ways in which two particular legal systems deal with workers' 'acquired rights' in contexts where the notions of proportionality and legitimate expectation are expressly articulated or implicit in the legal reasoning, as a prelude to considering what ameliorations might be realised by further deployment of those conceptual tools.

Greek law offers a particularly interesting national framework for observing the national implementation of the Directive in light of the measures recently adopted as a response to the financial crisis. Amendments to employment protection law in the wake of the crisis have caused a significant watering down of protection in core areas of labour law, such as the autonomy of the social partners, collective bargaining and protection against dismissal.<sup>6</sup> The adoption of analogous measures in other Member States, such as

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<sup>6</sup> For a fuller discussion see A. Koukiadaki and L. Kretsos 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 ILJ 276 et seq.

Portugal, makes the findings of the study on Greek law regulating transfers even more significant in light of the challenges that European labour law is going to face in the near future.<sup>7</sup>

#### ***1.4 Normative Goals of the Thesis***

This thesis conducts an essentially normative discussion, developing the view that the concepts of proportionality and legitimate expectation might have a useful role to play in developing and carrying out the regulatory task with which the ARD is concerned. Thus, the study is concerned with the normative underpinnings of the legislation rather than legislative reform, although at the conclusion of the thesis some remarks will be made about implications for the development of European labour law and social policy. With its normative focus, the proportionality analysis addresses the circumstances in which dismissals can be deemed justifiable.

There are essentially two kinds or levels of normativity, represented by the two respective parts of the thesis. The first part of the thesis discusses the historical analysis of the ARD and the insights to be gained from a comparative study of Greek and UK law. As already noted, this part explores the historical evolution of the Directive and tests this history against a comparative study of two quite different member states. Having described the policy history and identified some problematical aspects of the operation of the ARD, the second part then takes a more directly normative turn. It seeks to develop a sense of how far and in what way a fully honed notion of proportionality and legitimate

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<sup>7</sup> For a discussion of these challenges see C. Barnard, 'The financial crisis and the Euro Plus Pact: a labour lawyer's perspective' (2012) 41 (1) ILJ, 98, 108-109.

expectation might usefully be 'reimposed' - in light of the theoretical development conducted in Part A of the thesis - upon the existing body of law (hard and soft) which has been constructed around the ARD.

It is argued that such a reimposition of proportionality would enable a more effective reconciliation of the conflicting interests underlying the ARD. The normative inquiry of the thesis highlights the role of proportionality in developing a useful theoretical framework to steer negotiations between social partners so as to alleviate the negative effects of transfers. This idea is developed by arguing that the idea of proportionality becomes relevant as soon as the transfer decision that could potentially entail economic dismissals is contemplated by the employer so that the prospects of an effective negotiation-based dispute settlement are greater.

So this thesis is embarked upon an ambitious voyage; it is hoped that these initial paragraphs will have created the makings of a narrative for that voyage, a narrative which will start to unfold more fully in the course of the rest of this introductory chapter.

### ***1.5 Aims of the Acquired Rights Directive: Economic Dismissals during Transfers of Undertakings***

The ARD is concerned with the fate of the employment relationship after a transfer of undertaking. In this context workers lose their jobs or the continuity of their employment when the identity of the employer changes. Although the concept of automatic transfer of employment in the event of a change in the identity of employer is not possible at common law, it has always been clear that the question of continuity of employment

becomes more acute when the employer is a corporate entity which can change ownership and control without affecting the underlying employment relationships. In the case *Nokes v. Doncaster Amalgamated*<sup>8</sup> it was in fact the employer, not the employee, who attempted to secure the automatic novation of contracts of employment in the context of a transfer of corporate ownership, as this would allow the purchaser of the undertaking to acquire a ready workforce to continue production without the break which would otherwise be required to allow new workers to be conscripted. The employer's argument in that case was that, in general, when the employer is a company the employee has no personal relationship with the employer and a change in the identity of the employer is 'a matter of indifference' to the employee, as the changes created to him by the transfer are 'no greater than the change he would experience when the company which he is serving throughout changes its directors, its shareholders, its managers, its scope of operations'.<sup>9</sup> Lord Romer found this argument persuasive, taking the view that the new employer will normally rely on

the willingness of the employees to serve the new company in spite of the fact that it might be governed by an entirely different lot of directors and managers and might be carrying on business under an entirely different name from those of the company whom he had contracted to serve. [After all] such changes as these might well occur in the case of his original employers. Directors and managers may come and go. The whole policy and methods of trading of his employers may be changed in the space of a very short time by a new body of shareholders obtaining control of the company. Its very name may be changed (...) Such changes as these must be expected by those who serve limited companies [and] the employee would serve and be paid by the new company in the same way as he had served and been paid by the old one. In such circumstances a novation of his contract of employment would be readily implied.<sup>10</sup>

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<sup>8</sup> *Nokes v. Doncaster Amalgamated* [1940] AC 1014 (HL).

<sup>9</sup> *Ibid.* 1020-1021.

<sup>10</sup> *Ibid.* 1041.

In the event the employer in *Nokes* was unsuccessful, and English law did not have any way to secure the automatic transfer of contracts of employment until the Transfer of Undertakings (Protection of Employment) Regulations were passed to implement the European Acquired Rights Directive. The issue of job security during transfers had attracted the attention of the European legislator at a relatively early stage, the aim of the Acquired Rights Directive being described in its preamble as seeking ‘to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded’.<sup>11</sup>

This issue remains pressing, as transfers of undertakings have become more rather than less frequent. A recent study found that ‘the number of transfers of undertakings doubled every three years at EU level, accounting for 40 per cent of the global number of business transfers’.<sup>12</sup> According to data from the European Restructuring Monitor of the European Foundation for the Improvement of Living and Working Conditions, the number of cross-border transfers increased steadily from 10 at the beginning of data collection in 2001 to 109 in 2005.<sup>13</sup> Examples abound in the daily press of the implications of such transfers for workers, such as the recent takeover of British Midland International (BMI) by British Airways (BA) from Lufthansa which placed 1,200 jobs at risk.<sup>14</sup>

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<sup>11</sup> Preamble, Recital 3.

<sup>12</sup> F. L. Cooke, J. Earnshaw, M. Marchington and J. Rubery ‘For better and for worse: transfer of undertakings and the reshaping of employment relations’ (2004) 15 *International Journal of Human Resource Management* 276, 276.

<sup>13</sup> These figures are available at <<http://www.eurofound.europa.eu/emcc/erm/index.php?template=searchfactsheets>> accessed 07 July 2012.

Responding to these kinds of situations, the Commission observed in its consolidated report on the preparatory workshops for the Employment Summit of May 7, 2009 that there was a pressing need to protect employees' interests during such restructuring: 'restructuring continues during crisis, indeed probably at a much faster pace than before, but the negative employment and social consequences could be much worse'.<sup>15</sup> The need to alleviate the negative consequences of transfers gains support from Article 3 (3) TEU which establishes, as one of the main objectives of the EU the attainment of a 'social market economy'. This key article of the Treaty of Lisbon points towards the combination of economic development with social protection, such as the kind of social protection with which the ARD is concerned.

### ***1.6 Controversies in delineating the scope of the ARD***

The protection awarded by the Directive is articulated alongside three main axes. First, the prohibition of dismissals taking place by reason of the transfer; second, the conveyance of the transferor's rights and obligations to the transferee and third, the imposition of obligations on both the transferor and the transferee as regards informing and consulting with employees affected by the transfer. The intention behind this three-dimensional protection was expressed by the Commission Proposal for the adoption of

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<sup>14</sup> A. Jones , P. Woodman 'British Airways takeover of BMI may lead to 1,200 job losses' *The Independent* (London 12 April 2012) < <http://www.independent.co.uk/news/uk/home-news/british-airways-takeover-of-bmi-may-lead-to-1200-job-losses-7640134.html>> accessed 07 July 2012.

<sup>15</sup> European Commission 'the preparatory workshops for the Employment Summit of May 7, 2009'. <<http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=173&furtherEvents=yes>> accessed 07 July 2012

the Directive as that of guaranteeing that ‘employees do not forfeit essential rights and advantages acquired prior to a change of employer’.<sup>16</sup>

This three-dimensional protection is awarded in cases of ‘transfer of undertakings to another employer’ as a result of a ‘legal transfer or merger’. As will be explained in the first chapter, the term ‘legal transfer’ was given a wide construction by the Court of Justice in line with the protective aim of the Directive. However, the requirement of a change in the identity of employer was interpreted so as to exclude share transfers from the operation of the ARD, as share transfers were, controversially, not deemed to entail a change in the identity of the employer. Similarly controversial is the fact that, in an attempt to promote flexibility the Directive provides for the possibility of non application of the Directive to cases of insolvency and similar cases of serious economic crisis. The intention is to facilitate and promote a corporate rescue culture.<sup>17</sup>

Overall, the issue that has generated the greatest controversy surrounding the ARD is the meaning of the term ‘transfer of undertaking’. The centrality of this issue arises from the fact that the application of the Directive with its full rigour depends on whether or not there is a relevant transfer. In discussing the historical evolution of the ARD the thesis will present the different judicial tests that were adopted in defining this term and the heated debates between Community institutions, the Court of Justice and national courts as to the scope of the transfer test. As a matter of statutory interpretation,

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<sup>16</sup> Commission of the European Communities ‘Proposal for a Directive of the Council on harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations’ COM (74) 351, page 3.

<sup>17</sup> S. Deakin and G. Morris, *Labour Law* (5th edn, Hart Publishing, Oxford 2009) 500.

the term 'transfer' is not a word of art: it merely signifies that the identity of the employer has changed and should take its meaning from its context.<sup>18</sup>

The normative concerns of this thesis suggest that the most meaningful perspective in seeking to understand the goals and challenges of the ARD is not one based on the 'transfer' test, as seems to be supposed in much of the academic debate surrounding the ARD, but should be based instead on identifying the underlying conceptual ideas to which the ARD seeks to give effect. By shifting the emphasis of the academic debates away from the transfer test and redirecting the focus on the essential aims and goals of the ARD, the courts might be assisted in achieving results which are more consistent with the regulatory purpose of the ARD.<sup>19</sup>

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<sup>18</sup> *Nokes v Doncaster Amalgamated* [1940] AC 1014 (HL), para 1021.

<sup>19</sup> For a detailed discussion of problems surrounding the distinction between 'assets-based' and 'manpower-based' activities, see G. Barrett, 'Light acquired on Acquired Rights: Examining developments in Employment Rights on Transfers of Undertakings' (2005) 42 CML Rev, 1053, 1065; V. Shrubbsall, 'Competitive Tendering, Out-sourcing and the Acquired Rights Directive' (1998) 61 MLR 85.

### *1.7 Reflexive Labour Law, the OMC and 'Europe 2020'*

After considering how the conceptualization of the social considerations around the principle of legitimate expectations and proportionality might constitute a framework for balancing the tensions underlying the ARD, the thesis concludes by reflecting on the implications for these proposals of recent developments in European labour law.

The growing significance of soft-law regulation under the Open Method of Coordination, currently implemented within a theoretical framework of reflexive law, has taken European labour law far beyond the traditional method of command and control regulation which was largely in vogue at the time when the ARD was first conceptualised.<sup>20</sup> The thesis understands the role of OMC and traditional labour rights as complementary rather than mutually exclusive.<sup>21</sup>

Deakin and Rogowski express this relationship by reference to the idea of reflexive theory.<sup>22</sup> From the perspective of reflexive law, one of the major advantages of the proportionality analysis formulated in this thesis is that it might enable the Directive to develop its reflexive potential through self-regulation to a greater extent. The ARD currently operates under a very restrictive framework in terms of collective self-regulation, as the Court of Justice is reluctant to allow employees to waive the rights conferred by the Directive, even if the disadvantages resulting from such waiver are offset by benefits such that, taking the matter as a whole, the workers are not placed in a

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<sup>20</sup> N. Countouris, 'European Social Law as an Autonomous Legal Discipline' (2009) 28 (1) YEL 95, 113.

<sup>21</sup> C. Barnard, *EC Employment Law* (3<sup>rd</sup> ed OUP, Oxford 2006) 61.

<sup>22</sup> S. Deakin and R. Rogowski, 'Reflexive Labour Law, Capabilities and the Future of Labour Law' (2011) Warwick School of Law Research Paper No. 2011/04, 1-34  
< [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1780922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780922) > accessed 07 July 2012.

worse position.<sup>23</sup> The Court may of course be concerned to prevent the abuse or exploitation of employees, an approach reflected in its interpretation of other directives such as the Worker Participation Directive<sup>24</sup> and the Working Time Directive (WTD).<sup>25</sup> Nevertheless a proportionality analysis would in such cases enable an evaluation as to whether and in what circumstances collectively agreed variations to employment terms and conditions should be permitted, by providing a test by which to balance the risks against the benefits to be gained. In this way the reflexive potential of the ARD could be developed further. The thesis therefore offers some insight into the potential for the ARD to remain continuously effective in regulating restructuring in view of constantly evolving and fast-changing economic and social pressures.

The study finds reason to be optimistic about the prospects for the ARD and other standard-setting directives in the future of social Europe, arguing that such directives have a significant role to play in EU social policy. To appreciate this fully, it is necessary to show that the current emphasis on reflexive law does not undermine the significant role of directives such as the ARD, but, on the contrary, hard law regulation and collective self-regulation in the field of labour relations supplement each other quite effectively.

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<sup>23</sup> Case 362/89 *Giuseppe d'Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* [1994] ECR I-2435; Case 132/91 *Katsikas* [1992] ECR I-6577.

<sup>24</sup> Council Directive (EC) 94/45 (1994) OJ L 254 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended initially by Council Directive (EC) 97/74/EC (1998) OJ L 10 and later by Council Directive (EC) 2006/109 (2006) OJ L 363.

<sup>25</sup> Directive 2003/88/EC Working Time Directive (2003) OJ L299/9; The Court of Justice very forcefully expressed the need for a 'free' genuine and not coerced agreement on behalf of employees for the derogation from minimum standards of protection provided by the WTD in *Pfeiffer v Deutsches Rotes Kreuz*: Joined Cases C-397/01 to C-403/01 *Pfeiffer v Deutsches Rotes Kreuz* [2004] ECR I-8835 para 82.

Firstly, it is possible for these directives to accommodate a wide scope for collectively agreed derogations and, in this way, to develop an important reflexive potential. This will offer the advantage to these directives of being adaptable to a variety of standards depending on the needs of different enterprises and sector of activities while, at the same time, they constitute a minimum level of protection. Secondly, reflexive law theory with its emphasis on consensus and wide dialogue between various actors may indeed contribute to the setting of standards characterised by a great degree of consensus and, thus, to a better democratic foundation for these standards.<sup>26</sup>

### ***1.8 Outline of Chapters***

The thesis is structured in three main parts. Part One, consisting of the first two chapters, examines the teleology of the ARD understood through its policy and interpretative history. The main aim of this part is to examine the tensions and uncertainties in defining and implementing the goals of the ARD. Part Two proceeds to the conceptual study of legitimate expectations and proportionality, presenting this as a theoretical and normative framework within which the difficulties outlined in Part One can be effectively understood and resolved and which in turn offers a basis for developing the role played by these concepts in European labour law. Part three, the concluding section, explores the implications of current thinking about the OMC and reflexive regulation. The discussion proceeds as follows.

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<sup>26</sup> This is indicated by the Commission's recent Communication on 'A renewed EU strategy 2011-14 for Corporate Social Responsibility': European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681 final (Brussels, 25.10.2011).

*Part One: Policy and Interpretative History of the ARD*

Chapter one describes the legislative history of the ARD. The directive was initially enacted in 1977, significantly amended in 1998 and codified in 2001. Its evolution through these stages was strongly influenced and shaped by the respective roles of different actors involved in the process of developing EU law: the European Parliament, the Commission, the Court of Justice and national legislatures and courts. The chapter demonstrates how the dialogue and interaction between these different players influenced the current approach to implementing the ARD, and at the same time can be said to have played a crucial role in creating the difficulties faced in that implementation. Although this concept of an informal ‘dialogue’ between the various institutions is not the only way of explaining these legal developments, understanding the interpretation and evolution of the ARD as an outcome of such a dialogue offers insights into ways of reconciling the underlying tension with which we are concerned, i.e. the tension between the employer’s economic goals and the employees’ social welfare represented by employment security.

Chapter two focuses on the interpretative history of the ARD, demonstrating how these legislative difficulties are reflected in the implementing regulations, as well as the case law developed by the Court of Justice and the member states. This jurisprudence reveals the fundamental lack of coherence in understanding or explaining the aims of the directive. These underlying uncertainties are more clearly appreciated by a comparative study of UK and Greek law. This chapter helps to construct the overarching narrative of the thesis by delineating the conceptual void which currently exists in the interpretation of the ARD. In this way the chapter provides a platform on which to construct an

alternative conceptual and theoretical framework based on ideas of proportionality and legitimate expectation.

*Part Two: Conceptual Framework of Proportionality and Legitimate Expectations*

Having explained the evolution of the ARD, the influence of social and economic policy on that evolutionary process, and the pressing need for a more effective conceptual framework for resolving conflicts of interest that arise in the context of transfers, the thesis in Part Two presents the idea of proportionality as a solution to tackling these problems and uncertainties. The principle of proportionality in this context offers a more fruitful approach in understanding the jurisprudence and legislative interpretation of the ARD. Given the social policy elements which played a crucial role in the history of the ARD, the conceptual framework in this part is constructed in such a way as to offer a normative improvement in the interpretation of the ARD. To this end, Chapter three of the thesis explores the role which can be played by the principle of proportionality as the lead concept in responding to the problematic teleology of the ARD. Chapter four then shifts to an investigation of the potential role of the doctrine of legitimate expectations in shaping the proportionality balancing. The main argument of this part is that the idea of legitimate expectations is able to achieve the kind of ‘symmetrical’ outcome envisaged by the AG in *Commission v Germany* by helping to foreclose the proportionality balancing in favour of the employee whose legitimate expectation would be defeated by a transfer-related dismissal. The thesis does not suggest that proportionality should become ‘the test’ under the ARD in any formal sense, as that would clearly require legislative reform. Nor is proportionality presented as a formal obligation which employers must

embark on in the process of making transfer decisions or indeed decisions to dismiss the employees. Instead, the thesis suggests a different way of thinking about the aims and potential of the ARD, developing an analytical and theoretical approach which is more likely to be effective in securing employment protection without unduly impeding flexibility for employers. The thesis argues that identifying and formulating a new and coherent way of thinking about these problems is the essential and fundamental starting point in bringing much needed clarity of exposition to what has become an area of law steeped in complexity and incoherence.

### *Part Three: Conclusions*

This brief section identifies the insights which might be gained by linking the framework of proportionality and legitimate expectation in the context of the ARD to recent regulatory developments in EU social policy, concluding that within the framework of reflexive regulation the ARD is able to continue to play an effective role in safeguarding employees' interests in the context of transfers of undertakings.

## **PART ONE: Policy and Interpretative History of the ARD**

### **Chapter 1: History and Evolution of the Acquired Rights Directive**

#### **1. Introduction: from Job Security to Flexicurity**

This chapter explores the tensions which result from the conflicting priorities and policy considerations reflected in the ARD as it evolved over time.<sup>27</sup> The chapter situates the ARD in its wider historical context, shedding light on its evolution to enable a more informed analysis of the implementation problems and incoherencies underlying the ARD.

The ARD was initially drafted at a time when the notion of traditional employee security was dominant and was therefore strongly articulated along the lines of making dismissal difficult so as to safeguard an employee's particular job. Eventually, however, the shift towards the idea of employability in the labour market as a whole came to have a clear impact on the Directive, which by the time of its amendment in 1998 tried to offer more significant leeway to flexibility.<sup>28</sup> Currently the ARD, consistently with the interpretation of other social policy legislative instruments, has squarely arrived at a position where it is seen not as an instrument of employment protection but rather as an

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<sup>27</sup> Council Directive (EEC) 77/187 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 [1977] OJ L61/26 as amended by Directive 98/50/EC [1998] OJ L210/88 and consolidated in Directive 2001/23; This thesis will use the term ARD so as to refer to the Acquired Rights Directive in general. The same applies for the term 'Directive' without further clarification. When particular reference is made to a specific version of the ARD, this will be clarified by using the terms Directive 77/187 or Directive 98/50. The term 'amended Directive' refers to the Directive 98/50/EC.

<sup>28</sup> M. Rodriguez-Pinero Royo, 'Flexibility and European Law: A Labour Lawyer's View' in G. De Burca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, Oxford 2000) 230: 'in this [amended] directive, a central one in the development of European labour law, Flexibility is no longer confined to its implementation or to the moment of its application, it is indeed in its very regulatory content, allowing Member States an enormous number of options in regulating the transfer of undertakings in their own national labour legislation'.

instrument to promote flexicurity. In this part of the chapter we explain how this interpretative transformation came about, and show, for commentators inclined to support of this transformation, the roots of the idea of ‘flexibility’ can be discerned even in the earliest formulations of the Directive.

By the late 1990s the effects of flexibility had become clear in the judicial interpretations of the Directive by the Court of Justice;<sup>29</sup> Upex and Hardy observe that as flexibility became an overriding concern the broad interpretation initially adopted by the Court of Justice in construing the scope of a relevant transfer of an undertaking, which tended to offer greater protection for employees, was later replaced by a far more restrictive interpretation limiting the number of cases where the Directive applies.<sup>30</sup> This has resulted in tensions, to be studied by this thesis, which reflect the difficulty in reconciling the original vision of the ARD with the modern emphasis on flexibility.

In the final analysis, this chapter argues that the general tension between the economic and social underpinnings of the ARD can be seen as part of the explanation for the controversy surrounding the definition of the term ‘transfer’ which has preoccupied the courts and indeed many commentators. Rather than join the debate about the appropriate interpretation of the term ‘transfer’, the thesis seeks to develop a more

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<sup>29</sup> Article 19 par. 1 TFEU provides that ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts’. The use of the term Court without further clarification in this thesis refers to the Court of Justice. When reference is made to national courts of Member States, the particular court will be specifically determined.

<sup>30</sup> ‘until recently, the tendency of the Court was to give a wide construction to the Directive, but, as the consideration of recent cases later in this chapter will suggest, it appears to have moved to a more cautious approach’, R. Upex and S. Hardy, *The Law of Termination of Employment* (8<sup>th</sup> ed Bristol, Jordan Publishing Limited 2012) 69; Similarly, McMullen argues that: ‘Generally, the *Süzen* decision may be seen to embody flexibility and competitiveness over social rights, allowing, of course, the client, on second generation outsourcing, to regain choice over service provider and its staff’, J. McMullen, ‘Some Problems and Themes in the Application in Member States of Directive 2001/23/EC on Transfer of Undertakings’ (2007) 23/3 *The International Journal of Comparative Labour Law and Industrial Relations*, 335, 342-343.

principled formula for balancing the contradictory economic and social considerations that arise in the specific context of the implementation of the Directive. Simply asking whether there is a transfer of undertaking, with no attempt to engage in a more purposive understanding and interpretation of the legislation, is unlikely to redeem the ARD jurisprudence from the incoherence in which it is currently mired.

## **2. Origins of the ARD: The single market and economic integration**

The starting point in understanding the origins of the ARD is to appreciate the impact and influence of the goal of creating a single market in Europe, a goal which was explicitly economic in its vision. This background is essential to understanding the subsidiary role envisaged for social policy legislative instruments such as the ARD which were seen as instrumental in achieving the economic vision of the European Union.<sup>31</sup>

### ***2.1 The Treaty of Rome***

The ARD is rooted in the single market ideals of the Treaty of Rome. The Treaty of Rome sought to achieve economic integration, and was characterized by an abstentionist policy in the social field. This is not to say that the Treaty contained no social provisions. On the contrary, although its basic aim was stated in article 2 as that of establishing ‘a common market and progressively’ to approximate ‘the economic policies of Member States’ and ‘promote throughout the Community a harmonious development of economic

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<sup>31</sup> This thesis, despite acknowledging the difference existing in the meaning of the terms ‘Community’ and ‘Union’ law, uses the terms ‘Union’, ‘Community’ and accordingly ‘EU’ and ‘EC’ interchangeably.

activities’, a clearly economic aim, nevertheless this article also refers to the social objective of attaining ‘an accelerated raising of the standard of living’.

The preamble of the Treaty also makes two references to social policy, namely the signatories declared that they were resolved ‘to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe; affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples’. Additionally, the second article of the Treaty of Paris gave rise to article 117 par. 1 EEC providing that ‘Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained’. The basic social provisions of the Treaty of Rome are included in a title on social policy, education, vocational training and youth consisting of three chapters (on Social Provisions, the European Social Fund and Education, Vocational Training and Youth) and twelve articles (117-128). These social provisions ‘were largely exhortatory and conferred little by way of direct rights to citizens’.<sup>32</sup>

This lack of intensive intervention by the Community in the social field was accompanied, as Syrpis observes, by the intention of strengthening the Member States social governance in national laws as a counterbalance to EU-level action.<sup>33</sup> This was mainly attributable to the Ohlin (Committee of Experts from ILO) and Spaak reports (a Committee set up by the Member States) that suggested that the freeing of cross-border trade would enable states to take advantage of their comparative specializations, which in

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<sup>32</sup> C. Barnard, *EC Employment Law* (3<sup>rd</sup> edn OUP, Oxford 2006) 4 (footnotes omitted).

<sup>33</sup> P. Syrpis, *EU Intervention in Domestic Labour Law* (OUP, Oxford 2007) 7.

turn would lead to increased productive efficiency, higher productivity, and enhanced demand. As described by Davies

The Treaty of Rome was more concerned with labour as a factor of production - see the strong free movement provisions contained in the part of the Treaty which, at that time, was labelled the “Foundations of Community”- than with mechanisms for redressing the asymmetrical relationship between employer and employee - see the weak provisions on social policy contained elsewhere in the original Treaty.<sup>34</sup>

The content of the Ohlin report is summarized by Shaw as follows:

social progress would be the natural correlative of the economic progress fostered by the benefits of a common market and closer economic integration between the Member States, suggesting that an interventionist social policy on the part of the European Communities themselves would in fact be counterproductive.<sup>35</sup>

One Treaty provision arguably going further in justifying Community action in the social field was Article 119 (now article 157 of the Treaty on European Union and the Treaty on the functioning of the European Union- TFEU) on equal pay for men and women. However, this was justified, on the one hand, by the dominant economic role of equal pay in the functioning of the common market, and on the other, by the influence of political compromise between France and Germany.

France had a number of employment protection rules referring, inter alia, to the right to equal pay, which raised concerns that in order to ensure that French goods would not be uncompetitive due to higher production costs, it was not enough to eliminate gross distortions of competition, but ‘it would be necessary to assimilate the entire labour and

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<sup>34</sup> P. Davies, ‘The European Court of Justice, National Courts and the Member States’ in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996) 96.

<sup>35</sup>J. Shaw, ‘Introduction’ in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 6.

social legislation of the Member States, so as to achieve parity of wages and social costs'.<sup>36</sup> As Barnard writes:

the French were particularly concerned about discriminatory pay rates resulting from collective agreements in Italy. At that time France had one of the smallest differentials between the salaries of male and female employees (7 per cent compared with 20-40 per cent in the Netherlands and in Italy). This risked placing those parts of French industry employing a very large female workforce, such as textiles and electrical construction, in a weaker competitive position than identical or similar industries in other Member States employing a largely female workforce at much lower salaries.<sup>37</sup>

This intervention may be considered to be in conformity with the Ohlin report, which recognised that it would be unacceptable to have extensive differences in wages and social charges unrelated to productivity, because this would be financially unsound and would lead to unfair competition. The idea was that these differences should be tackled at Community level, because they could potentially lead to serious distortions of competition. In this sense, equal pay appears at first sight to be an exception to the focus on economic integration, while in fact it is best understood as another instance of that integration.

Another effect of this preoccupation with economic integration was that the dominant role of national autonomy in relation to social policy was preserved, with the simultaneous exclusion of European competence. There was no explicit legal basis for Community intervention in the social field. In addition, a unanimous vote was required for any social measures to be adopted. Therefore the scope for intervention in the social

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<sup>36</sup> C. Barnard (n 32) 6.

<sup>37</sup> Ibid. 52.

field under article 117 (now article 151 TFEU),<sup>38</sup> was significantly restricted by article 100 (now article 115 TFEU)<sup>39</sup> providing for the approximation of national laws only to the extent that the establishment or the functioning of the common market so required. Davies comments on the extensive use of article 100 as the legal basis for the social policy measures by observing that ‘in the pre-Social Agreement period Community labour law had to be built up slowly and painfully, mainly through the use of directives adopted under the “gap-filling” provisions of article 100’.<sup>40</sup>

However, it is also important to refer to the advantage of grounding Community social action on the integrationist rationale of harmonization, which Syrpis identifies as ‘a more secure basis in the Treaties than action based on the economic or social rationales’. Syrpis explains that it may be easier for Community social action based on social or economic rationales to be struck down on the basis of subsidiarity principle, compared to action being based on the integrationist rationale arising from the article 117.<sup>41</sup>

To sum up, the social policy dimension of the Treaty of Rome is characterized by a striking absence of provisions safeguarding a wide scope for intervention in the social field.<sup>42</sup> This abstentionist approach towards social policy issues eventually created

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<sup>38</sup> ‘Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained’.

<sup>39</sup> ‘The Council shall acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market’.

<sup>40</sup> P. Davies (n 34) 104 (footnotes omitted).

<sup>41</sup> P. Syrpis, ‘The Integrationist Rationale for European Social Policy’ in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 18-19.

<sup>42</sup> P. Davies, ‘The Emergence of European Labour Law’ in W. McCarthy (ed), *Legal Intervention in Industrial Relations: gains and losses* (Blackwell, Oxford 1992) 324-325.

significant difficulties which led to new legislative activity, a development which is discussed in the next section.

## **2.2 The Social Action Programme of 1974**

The absence of provisions safeguarding a wide scope for intervention in the social field in the Treaty of Rome was followed by an extensive legislative activity in the social field in the mid-seventies following the Social Action Programme (SAP) of 1974.<sup>43</sup> The SAP was largely prompted by social unrest in Europe in 1968 and the twin oil shocks in 1970 which made it clear that the Community required a human face so as to persuade its citizens that it did not care only about businesses. While the oil shocks of 1970 played a key role in the adoption of the SAP in 1974, Bercusson highlights the presence of other significant factors that prepared the ground for this political decision.

Firstly, a more union active participation at European level, as indicated by the establishment of a European liaison body between the two strongest union federations in France and Italy, the CGT and CGIL, which had not been active at Community level until then. Secondly, Italy and France were particularly concerned by the student protests and workers strikes that were rising in 1968 and 1969 in their countries. Germany and the Benelux countries were equally concerned with solving the underlying social problems.

Thirdly, the planned expansion of the Community to include Norway, Denmark, the United Kingdom and Ireland meant that a focus on social policy aspects was needed, as more diverse set of social systems would come into the Community. Finally, a major political shift within the Community's most influential nations was crucial to the

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<sup>43</sup> Council Resolution of 21 January 1974 concerning a social action programme OJ [1974] C13/1.

adoption of the SAP. In Germany Chancellor Willy Brandt was willing to make the EEC social agenda a primary objective of the German political philosophy and, in France, Georges Pompidou, who was the successor of Charles De Gaulle after his retirement in 1969, proved to be less pre-occupied with the French autonomy and more committed to European integration.<sup>44</sup> At this time it was realized that the pure economic integrationist model could not succeed in its aims and a social dimension was necessary so as to address the social problems.<sup>45</sup>

At the same time, the Community realised that the evolution of Community social policy would depend on the possibility of legitimating it ‘in economic policy terms as well as in social policy terms’.<sup>46</sup> The response was a communication issued in Paris in 1973 emphasizing that vigorous action in the social field was just as important as achieving Economic and Monetary Union, and the adoption of an Action Programme in 1974 containing three objectives: a) full and better employment, b) improvement of working and living conditions, c) increased involvement of management and labour in economic and social decisions and of workers in the life of undertakings.<sup>47</sup>

The problem was, as said before, that the Treaty of Rome lacked a provision allowing for legislation aiming explicitly at social and labour policy objectives. This made it essential for the Community to resort to the general legal bases of the Treaty (articles

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<sup>44</sup> B. Bercusson, *European Labour Law* (2<sup>nd</sup> edn. CUP, Cambridge 2009) 108-109.

<sup>45</sup> C. Barnard (n 32) 9.

<sup>46</sup> M. Freedland, ‘Employment Policy’ in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996), 287 (citations omitted).

<sup>47</sup> Council Resolution, of 21 January 1974, concerning a social action programme, under the heading ‘Improvement of living and working conditions so as to make possible their harmonization while the improvement is being maintained’ OJ [1974] C13/1.

100 and 235) that provided for the adoption of directives aiming at the approximation of national laws of the Member States directly affecting the establishment and functioning of the common market.<sup>48</sup> Thus, a number of directives were adopted in the field of health and safety, mass redundancies, transfer of undertakings and insolvency.

A prima facie contradiction may be observed with regard to this attempt to develop the SAP, on the one hand, and the ethos of the Treaty of Rome on the other. The far reaching effects of this abstentionist policy in the social field reflected into the Treaty of Rome on the next stages of European integration are captured well in Barnard's words, who observes that 'the economic mantle' of EU social policy 'will never truly be shed'.<sup>49</sup>

In contrast to the abstentionist position of the Treaty of Rome,<sup>50</sup> the SAP contained the three ambitious employment objectives referred above. Hence the social objectives of the SAP may seem irreconcilable with the Community's lack of competence in the social field. However, as the drafters of the Council resolution in relation to the SAP point out, 'it is essential to ensure the consistency of social and other Community policies so that measures taken will achieve the objectives of social and other policies simultaneously'.<sup>51</sup>

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<sup>48</sup> W. Daubler, 'Instruments of EC Labour Law' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996) 155-156.

<sup>49</sup> C. Barnard, 'Competitive Federalism in the EU' in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 60.

<sup>50</sup> The lack of wide scope for intervention by the Community in the social field in the Treaty Rome is justified by the conclusions of Ohlin report preceding the adoption of this Treaty, S. Deakin, 'Labour Law as Market Regulation: The Economic Foundations of European Social Policy' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996) 67-70.

<sup>51</sup> Ibid.

Thus, the Council perceived that these social objectives would be reconcilable with the attainment of other objectives of the Community. In the opinion of Michael Shanks, the then Director General for Social Affairs, the objective of the programme 'was to secure worker consent, or at least acquiescence in the programme of restructuring of enterprises which the dismantling of barriers to trade was thought likely to engender'.<sup>52</sup>

The idea was that

workers were not to be given a veto over this process, which was viewed as a necessary and desirable part of the enlargement of the market, but were to be afforded some assurance by Community law that their interests would be taken into account when re-structuring decisions were taken by management and some safety-net protection against the downside risks of the process was to be provided.<sup>53</sup>

Thus, the SAP aimed to improve the situation of workers, but without challenging the deeper underlying perception of the Community regarding the predominant role of national autonomy in the social field. Hence Barnard's observation that 'although this legislation appeared quite extensive, it was in fact confined to certain areas of employment law, as strictly understood, and not to the broader social sphere as originally envisaged by the 1972 communiqué'.<sup>54</sup> Freedland refers to the same issue in a wider context by describing the danger of 'the source-based' definition of European Employment Law, instead of the 'subject-based' one. He uses the illustrative examples of equal pay between men and women, collective dismissals, acquired rights so as to indicate

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<sup>52</sup> M. Shanks, 'Introductory Article: The Social Policy of the European Communities' (1977) 14 *Common Market Law Review*, 375-383, as cited in P. Davies, 'Transfer of Undertakings' in Sciarra (ed), *Labour Law in the Courts – National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 134.

<sup>53</sup> *Ibid.*

<sup>54</sup> C. Barnard (n 32) 10.

that the wider issues of discrimination in employment, termination of employment and collective bargaining are excluded from the scope the European Employment law.<sup>55</sup>

### ***2.3 The Acquired Rights Directive of 1977***

How is the foregoing compromise reflected in the adoption of the Acquired Rights Directive of 1977 (ARD)? The SAP included, among its main objectives, the protection of ‘worker’s interests with regard to the retention of rights and advantages in the case of mergers, concentrations or rationalization operations’<sup>56</sup> and the safeguarding of ‘increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertaking’.<sup>57</sup> In the light of these objectives, the SAP concludes with a call for the adoption of ‘a directive on the harmonization of laws with regard to the retention of rights and advantages in the event of changes in the ownership of undertakings, in particular in the event of mergers’.<sup>58</sup> This section considers the response of the Commission to that invitation.

#### ***2.3.1 The Commission’s Proposals***

The Commission responded to this invitation by issuing a Proposal ‘for a Directive of the Council on harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations’

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<sup>55</sup> M. Freedland (n 46) 278-279 (citations omitted).

<sup>56</sup> Council Resolution, of 21 January 1974, concerning a social action programme, under the heading ‘Improvement of living and working conditions so as to make possible their harmonization while the improvement is being maintained’ (n 43).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

(the proposal).<sup>59</sup> The difference in the terminology used by the proposal and the actual Directive is obvious, as the proposal used the terms ‘retention of employees’ rights and advantages’ ‘in the case of mergers, takeovers and amalgamations’; while, the actual Directive 77/187 deployed the phrase that it is necessary to ensure that employees’ ‘rights are safeguarded’ ‘in the event of a change of employer’.<sup>60</sup>

The link between the proposal and the implementation of the SAP becomes clear in the sixth paragraph of the proposal, referring explicitly to the implementation of the SAP that expressed, according to the Commission, the political will ‘to initiate the measures necessary for the improvement in the standard of living and working conditions and their harmonisation, while improvement is being maintained’.<sup>61</sup> The Commission considered that this essentially required the adoption of measures aiming at ‘the protection of employees’ interests, particularly as regards the retention of their rights and advantages in the event of amalgamations, concentrations or rationalisations’.<sup>62</sup>

Hence the Commission considered the adoption of a Directive to this effect as indispensable, given that the existing legal framework (consisting of a proposal for a third directive on mergers, a preliminary draft of a convention on international mergers, a proposal for a Council regulation on the control of amalgamations and a proposed European Company statute) represented only ‘a partial’ response to employees’ problems

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<sup>59</sup> Commission of the European Communities ‘Proposal for a Directive of the Council on harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations’ COM (74) 351, page 3.

<sup>60</sup> This is highlighted by F. Valdes Dal-Re, ‘Transfers of Undertakings: An experience of clashes and harmonies between community law and national legal systems’, in S. Sciarra (ed), *Labour Law in the Courts – National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001), 179.

<sup>61</sup> Commission of the European Communities Proposal (n 59) para 8.

<sup>62</sup> *Ibid.* Para 6.

in the event of restructuring.<sup>63</sup> The Commission took the view at this stage that ‘primarily the aim of this proposal for a Council Directive is to ensure that employees do not forfeit essential rights and advantages acquired prior to a change of employer’.<sup>64</sup>

It provided for a wide territorial scope of application of the proposed Directive extending to a merger or takeover ‘irrespective of whether such a merger or takeover is effected between undertakings in the territory of one or more Member States or is effected between undertakings in the territory of Member States and undertakings in third countries’.<sup>65</sup> Thus, according to this provision, the situation of either of the transferor’s or transferee’s undertakings in the territory of a Member State was sufficient for the application of the proposed Directive.

One year after this proposal, the Commission returned to the Council with a revised proposal which made mainly cosmetic changes and renumbered the articles but also introduced some substantive changes. One such change was to introduce a time frame within which employees should be informed of the proposed transfer: at least two months before the actual date of the transfer and in writing. However, it also provided that exceptional circumstances may justify giving the information orally and in ‘due time’ before the transfer.<sup>66</sup> A more significant amendment was the restatement of the aim of the proposed directive, introducing the idea of safeguarding employees’ ‘future rights.’<sup>67</sup> The

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<sup>63</sup> Ibid. Para 5.

<sup>64</sup> Ibid. paras 5,6,7.

<sup>65</sup> Ibid. article 1.

<sup>66</sup> Commission of the European Communities Amended Proposal ‘for a Council Directive on harmonisation of the legislation of Member States on the safeguarding of employees’ rights and advantages in the case of mergers, takeovers and amalgamations’ COM (75) 429, article 9 (2).

aim of the Directive in the original proposal was stated to be that of protecting employees from forfeiting *already existing* rights. Clearly, the addition of the expression ‘future rights’ in the amended proposal could result in a wider scope of protection, but it also would raise questions about the exact meaning of this expression and how these future rights would be safeguarded.

Another significant change in the amended proposal was the widening of the territorial scope of application of the Directive. The amended proposal not only extended the application of the proposed Directive to cases of transfers having been ‘effected between undertakings in the territory of Member States and undertakings in third countries’, as in the initial proposal,<sup>68</sup> but it also provided for the application of the Directive in cases where the transfer merely *affected* an undertaking within the territory of the Member States.<sup>69</sup> As Hepple observes, ‘it was the effects of the transfer within the EC which was to be the decisive criterion’ for the application of the Directive.<sup>70</sup>

This would potentially extend the application of the Directive to transfers taking place entirely outside the territory of the Member States if that transfer affected an undertaking situated in a Member State. As will be shown later, this proposal was not taken up in the resultant Directive, which was based on the notion of ‘territoriality’ so as

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<sup>67</sup> Ibid page 3; as far as the difference in the terminology is concerned, the same observations regarding the initial proposal apply here, as well.

<sup>68</sup> Commission of the European Communities Proposal (n 59), article 1.

<sup>69</sup> Commission of the European Communities Amended Proposal (n 66), article 1(3).

<sup>70</sup> B. Hepple, ‘A Report for the European Commission DG-V: The legal consequences of cross-border transfers of undertakings within the European Union’ (Cambridge 1998), para 3.2.  
< <http://ec.europa.eu/social/BlobServlet?docId=2446&langId=en>> accessed 07 July 2012

to determine the scope of the application of the Directive. Nevertheless it illustrates the extent of the vision behind the Directive.

### *2.3.2 The Framework of the New Directive*

In response to these proposals the new directive (ARD) opened in the second recital of the preamble with the formulation: ‘whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded’. The last recital of the preamble refers to the need ‘to promote the approximation of laws in this field while maintaining the improvement described in Article 117 of the Treaty’ (now article 151 TFEU).

Although it noted in the first recital that ‘economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers’, it is noteworthy that the preamble did not refer to ‘the need for balanced economic and social development within the Community’, as did the preambles of other directives implementing the SAP such as the Collective Redundancies and Insolvency Directives.<sup>71</sup>

In this way the ARD reflected the ambitious social objectives of the SAP. It prohibited dismissals taking place by reason only of the transfer, provided for the

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<sup>71</sup> Council Directive (EEC) 75/129 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L48/29 as amended by Directive 92/56/EC [1992] OJ L245/3; consolidated Directive 98/59/EC [1998] OJ L225/16; Council Directive (EEC) 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L283/23; Recital 2 of the Preamble of the Council Directive 98/59/EC and Recital 1 of the Preamble of Council Directive 80/987/EEC; Recital 2 of the Preamble of the Council Directive 98/59/EC and Recital 1 of the Preamble of Council Directive 80/987/EEC.

conveyance of the transferor's rights and obligations to the transferee, and imposed obligations on both the transferor and the transferee as regards informing and consulting with employees affected by the transfer.<sup>72</sup> Thus, the ARD was articulated around the concept of job security in the sense of safeguarding the employee's rights acquired in a particular job, which was the dominant model of protection in the Member States (i.e. France and Germany) that constituted the inspiration for the adoption of the Directive.

The ARD made provision for employers' interests to a significant extent. This is to be expected, as French law being one of the oldest national laws providing for the automatic transfer of employment relationship to the transferee in the event of a transfer had an employer-oriented inspiration for the enactment of this provision. As Barnard explains this provision 'was introduced at the behest of employers to ensure that, on the date of the transfer, not only were the assets of the business transferred but so was the workforce, thereby ensuring that the new employer had the necessary skilled workers to operate the equipment'.<sup>73</sup>

The directive attempted to strike a balance between managerial prerogative in restructuring and employment protection. Hence Valdes Dal-Re observes that the social dimension of the Directive, i.e. 'the pursuit of objectives linked exclusively to employee protection' is part only of the picture; this picture 'is incomplete and therefore represents a slanted view of the purpose of the Community provisions'.<sup>74</sup> Instead the facilitation of

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<sup>72</sup> For the classification of the provided protection to three pillars, see A. Garde, 'Partial harmonisation and European social policy: a case study on the Acquired Rights Directive' (2002-2003) 5 *Cambridge Yearbook of European Legal Studies* 173, 174.

<sup>73</sup> C. Barnard (n 32) 620.

<sup>74</sup> F. Valdes Dal-Re (n 60) 182.

managerial decision-making during restructuring can be seen as a significant concern. The following reasons may justify this argument.

Firstly, the directive did not question the managerial prerogative to restructure and dismiss employees; instead, it 'aimed to address the social consequences of these managerial decisions and mitigate their effects'.<sup>75</sup> The Commission remained committed to this position, as illustrated by its 1997 memorandum on Acquired Rights of Workers, which clarified that the essential objective of the Directive is not to challenge employer's discretion in restructuring, but 'to ensure that the restructuring of undertakings within the European Community does not have adverse consequences for the employees of the undertaking concerned'.<sup>76</sup> In this sense, the Directive does not create a right to challenge the employer's decision to transfer per se, but only to safeguard their own rights from being defeated by such a transfer.<sup>77</sup> The recognition of managerial prerogative safeguards the smooth functioning of the employment relationship, because the need for constant re-negotiations risks becoming too costly and inefficient.<sup>78</sup>

Secondly, the Council did not accept the proposal that the Directive should have no territorial limits in relation to the transfer itself, so long as an undertaking in a member state was in some way affected by that transfer. The concern might have been that

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<sup>75</sup> C. Barnard (n 32) 619; in Valdes Dal-Re's words the ARD 'belongs to the group of Community labour enactments aimed at defining a social policy which allows the correct functioning of the market', F. Valdes Dal-Re (n 60) 183.

<sup>76</sup> Commission of the European Communities 'Memorandum on acquired rights of workers in cases of transfers of undertakings' COM (97) 85 final, 04/03/1997, page 4.

<sup>77</sup> See, however, Armour and Deakin on the mixed effects of the Acquired Rights Directive, J. Armour, S. Deakin, 'Insolvency and employment protection: the mixed effects of the Acquired Rights Directive' (2003) 22 *International Review of Law and Economics*, 443, 444-445.

<sup>78</sup> S. Deakin and F. Wilkinson, 'Labour Law and economic theory: A reappraisal' in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 47.

overextending the territorial scope of application would unduly impede flexibility and efficiency within the European market.

Thirdly, the ARD applies only to transfers that involve a change of identity of the employer.<sup>79</sup> This excludes share sales, because, as Barnard explains, ‘when a change of share ownership occurs legal theory considers that there is only a change in the identity of the proprietor of the share capital and not in the legal identity of the employer’.<sup>80</sup> This allows for a great extent of freedom to effect transfers in the form of purchase of sales without falling within the scope of the ARD.

It might be argued that the Directive 77/87 ‘was fatally wounded’ by this omission and that ‘there is no reason to think that ‘a new controller of an undertaking who has acquired that control’ by purchase of shares ‘is any less likely to take measures which may affect the employees than a controller whose controls stems from a direct purchase of the underlying undertaking’.<sup>81</sup> Here again the Commission’s proposals to extend the directive to share transfers by analogy were not taken up.<sup>82</sup>

Finally, article 4 (1) stipulates that the ARD does not apply to dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce. Clearly, this article allows for a considerable scope of flexibility for the employer, and will be considered in more detail later in the thesis. It may therefore be

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<sup>79</sup> Article 1(1) of the ARD explicitly provides for a ‘transfer of an undertaking, business or part of a business to another employer’ (emphasis added) so as to be applicable.

<sup>80</sup> C. Barnard (n 32) 635.

<sup>81</sup> P. Davies (n 34) 135.

<sup>82</sup> Article 11 in the initial proposal (Commission of the European Communities Proposal (n 59), page 16) and article 7 in the amendment proposal (Commission of the European Communities Amended Proposal (n 66)).

concluded that despite the fact that the preamble of the ARD seemed to place considerable emphasis on employment protection, the actual articulation of the Directive left wide scope for firms' flexibility and competitiveness.

In this sense, the formulation of the ARD is reconcilable with the principal aim of the Treaty of Rome, i.e. the attainment of a competitive European economy. In a more general context, the Directive seems to be consistent with the logic of the minimum standard-setting mechanisms. The fact that the Directive, even under its initial form, aimed at providing a minimum floor of protection by means of the inability of deterioration by Member States, but on which they were permitted to improve arises from article 7 having provided that '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'.

The role of minimum labour standards is to discourage states and firms from adopting a mutually destructive policy of cutting labour protection in order to attract capital investments.<sup>83</sup> This form of competition between Member States through deterioration of their social standards in order to attract foreign capital investments is known as 'social dumping'<sup>84</sup> and attracted the Community's attention at a relatively early stage of the European integration.<sup>85</sup> In this vein, the ARD does not prevent dismissals

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<sup>83</sup> S. Deakin (n 50) 87.

<sup>84</sup> Hepple defines social dumping as the 'export of products that owe their competitiveness to low labour standards', B. Hepple, 'New Approaches to International Labour Regulation' (1997) 26 ILJ 353.

<sup>85</sup> See European Commission White Paper on Social Policy 'European Social Policy - A Way Forward for the Union' COM (94) 33, 27 July 1994, in which it is stated that 'the establishment of a framework of basic minimum standards which the Commission started some years ago provides a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness'. Additionally, the 1993 Commission's Green Paper on European Social

following a transfer altogether, but simply discourages such dismissals by making them more costly option. This is intended to deter employers from using transfers as a means of escaping from their obligations and, by this means to enjoy a competitive advantage being based on a labour destructive policy.<sup>86</sup>

The discussion now moves on to consider the way in which the next stages of European integration in the social field, requiring to a certain extent the strengthening of flexibility in the employment relationship, led to a controversial amendment of the ARD in 1998.

### **3. The Constitutionalisation of wider Community social intervention**

Section 2 indicated that the adoption of the ARD was characterised mainly by the prioritization of national policies in the social field with relatively minor Community intervention. The Social Action Programme (SAP) introduced an exception to this approach by providing for ambitious social goals, but it did so without challenging the dominant model of the Community. Instead, the SAP was justified on the scope allowed by the Treaty of Rome for minimal intervention in the social field through its harmonisation provisions requiring unanimity for the adoption of measures.

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Policy provided that ‘a commitment to high social standards and to the promotion of social progress forms an internal part’ of the [TEU] and that a ‘negative competitiveness between Member States would lead to social dumping, to the undermining of the consensus making process... and to danger for the acceptability of the Union’, Commission of the European Communities ‘Green Paper- European Social Policy: Options for the Union’ COM(93) 551, 17 November 1993, as cited in C. Barnard (n 49) 56-57 (footnotes omitted).

<sup>86</sup> Syrpis adverts to this intention, in observing that ‘the Community should encourage competition between national regulatory regimes’; however, where such competition produces ‘destructive’ outcomes, the EU has competence to intervene to eliminate’ it. P. Syrpis (n 41) 19.

This part of the discussion considers how the growing recognition of the need for wider Community intervention in the social field subsequently acquired a constitutional dimension through Treaty amendments. This intervention was also characterised by a shifting emphasis away from job security towards concern for the unemployed through active labour market policies, as well as a preference for ‘lighter’ regulatory tools instead of hard law measures.<sup>87</sup> Related to these developments, the drive to increase flexibility signals a major shift in emphasis from protecting traditional labour rights to ‘softer’ forms of governance which emphasise fair process rather than the protection of substantive rights.<sup>88</sup> All these developments had a significant and determinative impact upon the major amendment of the ARD in the 1998 and its implementation.

### ***3.1 The Single European Act***

The Single European Act (SEA) constituted the first attempt to restrict the obstacle of requiring unanimity for the adoption of social measures. It was signed in Luxembourg on 17 February 1986 by the nine Member States and on 28 February 1986 by Denmark, Italy and Greece. The SEA constituted the first major amendment of the Treaty of Rome, and entered into force on 1 July 1987. The chief objective of the SEA was to add new momentum to the construction of the European internal market.

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<sup>87</sup> S. Sciarra, ‘Integration Through Courts: Article 177 as a Pre-federal Device’ in S. Sciarra (ed), *Labour Law in the Courts, National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001), 12.

<sup>88</sup> In Barnard’s words ‘flexibility has been the characteristic of EC social policy in order to maintain the momentum of further integration’. Barnard uses the terms ‘flexibility in the choice of legislative instruments’ so as to describe the emergence of soft-law measures and flexibility in the choice of actors so as to refer to the wide powers of social partners to negotiate European-level collective agreements’, C. Barnard, ‘Flexibility and Social Policy’ in G. De Burca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, Oxford 2000), 204-206, 209-213, 216.

However, this goal was difficult to achieve on the basis of the existing treaties, notably because of the decision-making process at the Council which required unanimity for the harmonisation of legislation.<sup>89</sup> Article 118 (a) EEC, which gave power to the Council to adopt minimum standard directives by qualified majority vote for matters relating to health and safety of workers, was relied upon as ‘an escape route out of the unanimity requirement’ leading to the adoption of directives such as the Working Time Directive and the Pregnant and Young Workers Directive.<sup>90</sup>

To further facilitate the establishment of the internal market, the SEA increased the number of cases in which the Council could take decisions by qualified majority voting instead of unanimity. It seems that the driving force behind this was to circumvent the UK’s veto that had blocked legislative activity during the 1980’s. This facilitated decision-making and avoided the frequent delays inherent in the search for a unanimous agreement among the Member States. Unanimity is no longer required for measures designed to establish the Single Market, with the exception of measures concerning taxation, the free movement of persons, and, significantly for this thesis, the rights and interests of employed persons.

However, there is clear evidence that the SEA lacked a real social dimension. Shaw highlights this by contrasting the very limited scope for the adoption of measures

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<sup>89</sup> For an account of the ambiguity of the term harmonization on the basis of the various conflicting perspectives (i.e. free trade ideology and structural policy ideology) having been deployed by the institutions of the EU for the justification of harmonizing initiatives without having made ‘the reasons of their choice explicit’, see P. Syrpis (n 41) 24.

<sup>90</sup> G. Falkner, O. Treib, M. Hartlapp and S. Leiber, ‘Complying with Europe: EU Harmonisation and Soft law in the Member States’ (CUP, Cambridge 2005), 43; Directive 93/104/EC Working Time Directive (1993) OJ L307/18, as later amended by Directive 2003/88/EC (2003) OJ L299/9; Directive 94/33/EC Young Workers’ Directive (1993) OJ L216/1; Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Pregnant’s Workers Directive) (1992) OJ L348/1.

through qualified majority under the SEA, being restricted only to the field of ‘health and safety at work,’ with the considerably wider use of qualified majority for the adoption of social measures under the Treaty of Amsterdam.<sup>91</sup> Additionally, article 8 (a) sets the deadline of 1992 for the completion of the internal market and was concerned only with the realization of the four freedoms. Finally, as said above, matters related to the rights and interests of employed persons (Article 100a (2) – now article 153 (2) TFEU) still required the unanimous agreement of council.

### ***3.2 Treaty on European Union - Maastricht Treaty (1993)***

The next major step in delineating a wider scope for social policy was the signing of the Maastricht Treaty on 7 February 1992 that entered into force 1 November 1993. The Maastricht Treaty focused on those excluded from the labour market; combating unemployment and encouraging non-inflationary growth constituted two of its primary objectives. Article 2 provided that

the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

In line with these objectives, which reflect both economic and social goals, the Community was given additional competence with a clear social policy orientation, as indicated by article 3 stipulating that ‘for the purposes set out in Article 2, the activities

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<sup>91</sup>J. Shaw (n 35) 8.

of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

... (i) a policy in the social sphere comprising a European Social Fund; (j) the strengthening of economic and social cohesion; (o) a contribution to the attainment of a high level of health protection; (p) a contribution to education and training of quality and to the flowering of the cultures of the Member States; (r) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;

Shaw's analysis of article 3 TEU is that this article cites a number of areas of social policy 'in addition to the market making activities that for so long tended to dominate the work of the EC and now the EU'.<sup>92</sup> Additionally, the principles of subsidiarity<sup>93</sup> and proportionality were for the first time introduced.

A major contribution of the Maastricht Summit of 9 and 10 December 1991 was the adoption of the Protocol on social policy and Agreement on social policy annexed to the Treaty (the Social Chapter). The Social Chapter was not included in the body of the Treaty so as to circumvent the objection of the UK to its adoption. The safeguarding of this 'social opt-out' is depicted by Barnard as one of the earliest examples of 'strong flexibility in the social sphere'.<sup>94</sup>

The legal nature of the Social Chapter was controversial, with two opposing views.<sup>95</sup> One view argued that protocols annexed to Treaties form an integral part of the

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<sup>92</sup> *ibid.*

<sup>93</sup> For an overall negative approach to subsidiarity on the basis of being a 'source of confusion' in the articulation of the Treaty and inconsistent with the path followed by the Social Chapter, see G. Lyon-Caen, 'Subsidiarity' in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996) 49-62.

<sup>94</sup> C. Barnard (n 88) 200.

<sup>95</sup> For a fuller discussion see C. Barnard (n 32) 18.

Treaty and thus part of Community law, while the other view held that the Social Chapter was an intergovernmental agreement between the Member States or simply a separate arrangement between them. The Court of Justice in *UEAPME*<sup>96</sup> settled the issue in favour of the view that Social Chapter formed part of EU law.

The Social Chapter signalled a change in the ‘modus operandi’<sup>97</sup> of the Union. Firstly, the operation of the Union in the social field was significantly enriched by the greater role of social partners. This is captured well by Sciarra who observes that ‘social partners gain a new centrality and make their voice heard beyond national boundaries, thus helping to give new substance to the European social dialogue’. She also adds that social partners ‘are implementing new regulatory techniques and acting as original engines of integration’.<sup>98</sup> It envisaged that the social partners should be consulted on the possible direction of Community action (article 3 par. 2 of the Social Protocol), and that they should negotiate collective agreements which could possibly be given binding legal effect by a Council decision (article 4 of the Social Protocol).

Secondly, it broadened the scope of European competence in the social field and it increased the areas in which measures could be taken by qualified majority vote (article 2 par. 2 of the Social Protocol). However, the Social Chapter ‘did not introduce a broad set of Community level employment measures’.<sup>99</sup> From an economic perspective the most important dimension of the Treaty of Maastricht was the setting of a concrete

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<sup>96</sup> Case T-135/96 *UEAPME v Council* [1998] ECR II-2235.

<sup>97</sup> G. De Burca and J. Scott, ‘Introduction’ in G. De Burca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, Oxford 2000), 3.

<sup>98</sup> S. Sciarra (n 87), 16-17.

<sup>99</sup> E. Szyszczak, ‘The Evolving Employment Strategy’ in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 201 (footnotes omitted).

timeframe for the creation of the European Monetary Union (EMU) in order to establish ‘a macro-economic level for economic and social policy’.<sup>100</sup>

### ***3.3 The Amsterdam Treaty***

The attempt to allow a wider scope for Community intervention in the social field continued with the Amsterdam Treaty that was signed on 2 October 1997, and entered into force on 1 May 1999. The Amsterdam Treaty incorporated the Social Chapter, which therefore formally became part of primary European law. In Shaw’s words, these articles ‘mainstream the social dialogue as a basis for agreement between the social partners over the contents of EU measures, and institute a procedure for a contractual agreement between’ the social partners ‘to be adopted as a formal EU measure’.<sup>101</sup>

Additionally, the Amsterdam Treaty reflects a significant shift in the techniques of social intervention, from traditional labour rights to ‘softer’ forms of governance. Article 137 (now article 153 TFEU) substituted unanimity with the qualified majority vote for the adoption of decisions in a number of social policy areas including working conditions and information and consultation of workers, although the unanimity rule was retained for decisions on social security and compensation for dismissal. As Shaw

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<sup>100</sup> Article 109 (e); S. Deakin and H. Reed, ‘The Contested Meaning of Labour Market Flexibility’ in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 96.

<sup>101</sup> J. Shaw (n 35) 8; for a view that this incorporation was merely symbolic ‘and in some ways’ a ‘backwards-looking step, since the substance of the Agreement was very little altered’, see S. Deakin and H. Reed (n 100) 88.

observes, the issues for which unanimity is still required ‘are those clustering closer to the traditional social policy sovereignty of the Member States’.<sup>102</sup>

The other significant dimension of the Treaty of Amsterdam is its Employment Title.<sup>103</sup> Article 125-129 (now articles 145-150 TFEU)<sup>104</sup> set out a procedure for coordinating Member States policies in light of guidelines issued by the Council aimed at promoting employment. As Barnard writes, ‘this annual cycle of policy formation, policy implementation and policy monitoring was formally launched at Luxembourg in November 1997 and became known as the European Employment Strategy’ (EES).<sup>105</sup> The EES was primarily designed to tackle high levels of unemployment exacerbated by the inability of national laws to address this problem because of the constraints imposed by the Growth and Stability Pact.<sup>106</sup>

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<sup>102</sup> J. Shaw (n 35) 8.

<sup>103</sup> For an overall sceptical approach as to whether the Employment Title may succeed in its goals for various reasons, see S. Deakin and H. Reed (n 100) 71-99, especially pages 97-99.

<sup>104</sup> Article 125 provides that ‘Member States and the Community shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and in Article 2 of this Treaty’.

<sup>105</sup> C. Barnard (n 61) 24; according to Szyszczak, the significant point of these provisions is that they offer ‘a legal basis within the Treaty for Community institutions to interfere in the national employment policies of the Member States’, E. Szyszczak (n 99) 205.

<sup>106</sup> The Stability and Growth Pact (SGP) is an agreement, among the 27 Member states of the European Union, to facilitate and maintain the stability of the Economic and Monetary Union. Based primarily on Articles 121 and 126 of the Treaty on the Functioning of the European Union, it consists of fiscal monitoring of members by the European Commission and the Council of Ministers and, after multiple warnings, sanctions against offending members. The pact was adopted in 1997 so that fiscal discipline would be maintained and enforced in the EMU. Member states adopting the euro have to meet the Maastricht convergence criteria, and the SGP ensures that they continue to observe them. For additional details see P. Syrpis (n 33) 46-50.

### *3.4 Harmonisation and Diversity*

In all these measures the sovereignty of member states in relation to regulating employment is retained in principle, so that these developments are best understood as an attempt by the Commission to intervene in social policy regulation without violating national autonomy. This attempt to strike a balance between the European intervention in form of active market policies and the retention of national autonomy is clear in the words of Henderson, the then Minister for Europe in the United Kingdom, who considered that ‘employment policy would remain a matter for national governments and that the Luxembourg process was seen only as one of “peer review” and “exchange of best practice”’.<sup>107</sup> It will be seen in the final chapter of this thesis that this approach remains central to the European regulatory agenda.

Thus, it seems that the Commission chose to abandon, to a certain extent, the conferment of individual rights on employees, and instead to introduce active labour market policies by way of guidelines. Member States were obliged to take these guidelines into account in their national action programmes (later renamed as national reform programmes). It can be seen that this legal framework is based on ‘non-binding’ and ‘soft law’ procedures, in which, however, ‘fairness’ is ‘a value to be protected and transparency a methodology to favour, even when the role of the judiciary is not clearly defined’.<sup>108</sup> This increasing use of soft-law measures was clearly ‘another consequence of the desire for flexibility in social policy’.<sup>109</sup>

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<sup>107</sup> D. Henderson, ‘The UK Presidency: An insider’s View’ (1998) 36 *Journal of Common Market Studies*, 563, 567, as cited in E. Szyszczak (n 99) 208.

<sup>108</sup> S. Sciarra (n 87) 12.

These soft law measures were introduced alongside a growing abandonment of the ideals of harmonization in favour of encouraging and facilitating diversity. Article 136 EC (now article 151 TFEU) makes explicit reference to fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers.

This Article, despite referring explicitly to harmonisation, also provides for a moderation of the notion of harmonisation by stating that the Community should also take into account ‘the diverse forms of national practices’, when implementing European measures in the social field. Shaw considers that this formulation aims at establishing a ‘softer’ form of approximation of national policies intended ‘to improve the flexibility and responsiveness to changing conditions within the national labour markets in a global economy, as well as to combat market failures such as the gendered division of labour or skill shortages’.<sup>110</sup> Thus, the treaty of Amsterdam enabled the development of social policy mainly through ‘soft’ intervention with a view to protecting not only employees, but unemployed, as well. The significance of these developments has been great, as Barnard observes:

The Amsterdam Treaty and Lisbon strategy have brought about a seismic shift in EC social policy as it moves from being focused solely on a rights based agenda, where the EU legislates for employment rights, towards employment policies with a new method of governance based on guidelines, benchmarking, targets, National Reform Programmes, and recommendations.<sup>111</sup>

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<sup>109</sup> C. Barnard (n 88) 205.

<sup>110</sup> J. Shaw (n 35) 7.

<sup>111</sup> C. Barnard (n 32) 61.

#### **4. The role of flexibility in the evolving social policy**

The previous sections have referred to various developments which reflected concerns about flexibility, such as the UK opting out of the Social chapter, the shift from hard law measures to soft law instruments in social policy and the increased participation of social partners.<sup>112</sup> This section considers in more detail the substantive influence of flexibility upon the evolving context in which the ARD is to be understood and interpreted.

The meaning of flexibility is contested. Deakin and Reed show that it is important to distinguish between demand-side and supply-side flexibility. Clearly different considerations apply when the concern is with flexibility for employers to fire workers, than would apply in relation to workers' flexibility to balance their working lives.

Demand side flexibility refers to the model of the 'flexible firm', pertaining to ideas such as 'numerical flexibility' which allows firms to modulate the numbers employed; 'working time flexibility' permitting the employer 'to raise or lower' working hours; 'financial flexibility' that 'links remuneration directly to output' and 'functional flexibility' that 'refers to the multi-skilling of workers which permits them to move round between tasks and to adapt their working practices to new technological and organisational requirements'.<sup>113</sup> Conversely, as Barnard explains, on the supply side 'flexibility manifests itself in terms of the growth of non-standard employment—such as part-time work and temporary employment'.<sup>114</sup> These forms of non-standard work may

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<sup>112</sup> C. Barnard (n 88) 200.

<sup>113</sup> S. Deakin and H. Reed (n 100) 73- 74.

<sup>114</sup> C. Barnard (n 88) 198.

make it easier for some employees to enter the labour market by enabling them to combine work with other commitments, such as child-care responsibilities.<sup>115</sup>

The idea of combining flexibility and security in the compromise concept of ‘flexicurity’ emerged in the early 1990s, from an attempt by the Danish government to tackle unemployment. The 1994 and 1996 Danish labour market reforms put forward the idea that flexibility and security can be complementary rather than mutually exclusive, combining labour market flexibility with security for workers.<sup>116</sup>

The notion of flexicurity was taken up by the Community in its integrated strategy for employment launched at the Essen European Council in December 1994, which was followed by the European Employment Strategy (EES) introduced by the Treaty of Amsterdam in 1997.<sup>117</sup> The flexicurity model is based on the idea that in the context of globalisation and technological change, which place greater demands on business to adapt continuously, high levels of employment security depend not only on the protection of workers’ specific jobs, but more on ensuring that workers have the means to stay on the job market. The priority is therefore to manage smooth transitions between jobs and support workers in making progress in their careers.

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<sup>115</sup> S. Deakin and H. Reed (n 100) 74.

<sup>116</sup> H. Jørgensen, ‘Danish labour market policy since 1994 – the new ‘Columbus’ egg’ of labour market regulation?’ in P. Klemmer and R. Wink (ed), *Preventing Unemployment in Europe : A New Framework For Labour Market Policy* (Cheltenham : Elgar, England 2000) 108-137.

<sup>117</sup> For more details about the ‘Essen Priorities’ set by the Essen Council Meeting 1994 and the European Employment Strategy, see E. Szyszak, *European Labour Law* (Pearson Education Limited, England 2000) 17-20.

The importance of ‘flexicurity’ is also reflected in the 2006 Green Paper entitled: ‘Modernising labour law to meet the challenges of the 21<sup>st</sup> century’.<sup>118</sup> Flexicurity lies at the heart of the subsequent Lisbon objectives, as the Lisbon Strategy was closely linked with the ambitious goal of making the European Union ‘the most competitive and dynamic knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion’.<sup>119</sup> The growing emphasis on flexibility prompts Royo to describe the role of flexibility in labour law as ‘a nuclear element of labour law itself’.<sup>120</sup>

However, we should be cautious with this notion due to its ambiguity in the European context. The exact role played by ‘flexicurity’ in the Community’s policy documents is not clear, but it is nevertheless important to appreciate that flexibility does not imply the deregulation of social and employment protection.<sup>121</sup> Such attempts to promote flexibility by combining efficiency with employment protection can be seen in the Commission Green Paper on Partnership for a New Organisation for Work.<sup>122</sup> In this Green Paper, flexibility is sought on the basis of a new organization for work that should be based on improvement of productivity and competitiveness through employment

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<sup>118</sup> Commission (EC) ‘Modernising labour law to meet the challenges of the 21st century’ (Green Paper) COM (2006) 708, 22 November 2006.

<sup>119</sup> Lisbon European Council 23 and 24 March 2000 ‘Presidency Conclusions’.  
< [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)> accessed 07 July 2012, paras 5–6.

<sup>120</sup> M. Rodriguez-Pinero Royo (n 28) 233.

<sup>121</sup> In a similar vein, Kenner argues that the employment title incorporates an approach according to which ‘high levels of employment and social protection are linked with competitiveness’, see J. Kenner, ‘The EC Employment Title and the ‘Third Way’: Making Soft Law Work?’ (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations*, 33, 51.

<sup>122</sup> European Commission Green Paper ‘Partnership for a New Organisation for Work COM (97) 127.

relations of a better quality on the basis of high trust and high skill.<sup>123</sup> This Paper, as Deakin and Reed argue, supports ‘the promotion of longer term and stable employment’, which ‘was seen as necessary to enable firms to respond to changes in product demand and to secure worker cooperation in technical development, product enhancement and general quality control’.<sup>124</sup> Clearly this aim of creating high trust employment relationships may not be achieved by the deprivation of employment protection through deregulation. On the contrary, as Deakin and Wilkinson argue, these high trust relationships may arise through effective labour standards that might promote employers’ and employees’ co-operation, which might in turn lead to higher productivity on the basis of a high-protection, high-productivity strategy.<sup>125</sup>

A quite similar view is taken by Barnard, who saw the focus of the Green Paper on promoting economic growth through partnership and cooperation as a more positive justification for social policy legislation, compared to the negative basis offered by social dumping.<sup>126</sup> Barnard also identifies a similar positive foundation for the enactment of social policy measures in the Medium Term Social Action Programme encouraging ‘high labour standards as part of competitive Europe’ and ‘social protection’ as a productive factor.<sup>127</sup> This version of flexibility requiring a combination of efficiency and

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<sup>123</sup> Additionally, very characteristically the Green Paper suggests that ‘the pursuit of high social standards should not be seen as a cost, but also a key element in the competitive formula’, European Commission Green Paper, *ibid.* paras 5, 19-20.

<sup>124</sup> S. Deakin and H. Reed (n 100) 72.

<sup>125</sup> S. Deakin and F. Wilkinson (n 78) 59.

<sup>126</sup> C. Barnard (n 49) 64-65 (footnotes omitted).

<sup>127</sup> *Ibid.* 64 (footnotes omitted).

competitiveness with social protection seems the key foundational principle in understanding the aims of the ARD.

However, this meaning given to flexibility by the Green Paper of 1997 lacks the required coherence in the Community's subsequent policy documents. The imprecise character of flexibility in EU law arises mainly from the lack of clarity surrounding the exact meaning to be attributed to the idea of flexibility in various contexts. This results in contradictory readings of flexibility, even in the same policy document.

For instance the 1994 White Paper on Social Policy is strongly pre-occupied with the attainment of flexibility as a response to the 'low employment, high unemployment trap', and as a way forward to achieve 'a broader access to work and spread income more widely'.<sup>128</sup> However, the White Paper is not clear about how to attain flexibility 'within firms and in the labour market'. As Deakin observes, in this White Paper 'the need to alter fundamentally, and update, the structure of incentives which influence the labour market is still not adequately recognised'<sup>129</sup> and is open to contradicting interpretations.<sup>130</sup>

On the one hand, the White Paper may be seen as 'offering support for deregulation'; however, on the other hand, the Paper also suggests that 'long-run competitiveness is to be sought not through a dilution of the European model of social protection, but through the adaptation, rationalisation and simplification of regulations, so as to establish a better balance between social protection competitiveness and

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<sup>128</sup> European Commission 'White Paper on Social Policy 'European Social Policy - A Way Forward for the Union' COM (94) 33, para 4.

<sup>129</sup> Ibid. para 16.

<sup>130</sup> S. Deakin (n 50) 84-85.

employment creation'.<sup>131</sup> Therefore it seems that the White Paper does not argue in favour of deregulation, but rather for a better form of regulation. The overall impression is that the White Paper does not give a clear picture about the precise way in which flexibility may be attained.

A second example of this ambiguity emerged only one year after the 1997 Green Paper on Partnership for a New Organisation for Work, which, as was shown above, supports a notion of flexibility entailing the existence employees' protection measures.<sup>132</sup> The Commission subsequently issued the 1998 Communication on 'Social Policy Agenda'<sup>133</sup> that complicated the situation by pointing towards an entirely different notion of flexibility. This Communication, according to Deakin and Reed, argues in favour of deregulation in the sense of

a radical rethink of all relevant labour systems (...) to adapt them to a world of work which will be organised differently, in which the concept of security of workers has been reformulated, focusing more on security based on employability (...) rather than security in a specific job.<sup>134</sup>

This reconfiguration of flexibility was further aggravated during the same year by the 1998 Guidelines, which embody two conflicting concepts of flexibility. As Deakin and

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<sup>131</sup> European Commission White Paper on Social Policy (n 159) para 12.

<sup>132</sup> S. Deakin and H. Reed (n 100) 72 (footnotes omitted); additionally, Deakin and Reed argue that 'a normative framework for the employment relationship is not just compatible with, but it is possible a precondition of "high performance" relations at workplace level', S. Deakin and H. Reed (n 100) 80 (footnotes omitted).

<sup>133</sup> Communication from the Commission to the council, the European Parliament, the Economic and Social Committee and the Committee of the Regions 'Social Policy Agenda' COM(2000) 379 final, 28.6.2000.

<sup>134</sup> Deakin and H. Reed (n 129) 72; Deakin and Reed also question whether such a conception of flexibility 'which sees labour standards as inevitably undesirably "rigidities", and rejects any role for a demand-orientated macro-economic policy, can succeed in maintaining social solidarity', Deakin and H. Reed (n 100) 86.

Reed point out, the entrepreneurship pillar appears to promote a ‘deregulatory agenda of the kind which sees the removal of regulation and taxation as essential to providing the necessary conditions for economic growth’.

On the other hand, the equal opportunities pillar being in total contrast to the entrepreneurship one ‘emphasises the reconciliation of supply-side flexibility with individual employment rights in the areas of equal access to work, family-friendly policies, and the needs of people with disabilities’.<sup>135</sup> Arguably if the examination of the guidelines of the same year reveals these wide diversities as to the meaning that they attach to the term ‘flexibility’, the situation might be considerably worse in terms of the comparison of guidelines having been adopted in different years.

Another example emerges from the Commission before the Luxembourg Jobs Summit of 20-21 November 2001 attempting to ‘demonstrate that higher levels of employment and more flexibility in the labour markets can be achieved without abandoning the basic foundation of solidarity and social rights upon which the European societies are built’.<sup>136</sup> Here the crucial question asked by Ashiagbor is how the ‘current commitment to social protection’ could be reconciled with the ‘simultaneous and, equally strong, commitment to greater flexibility’. Ashiagbor refers to the example of part-time work, which is considered to be a major source of increased competitiveness, levels of employment and productivity. However, as she points out, these advantages arise mainly from the exclusion of atypical workers from employment protection. Hence she argues

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<sup>135</sup> S. Deakin and H. Reed (n 100) 95.

<sup>136</sup> CEC Introduction to the European Jobs Summit (Luxembourg: OOPEC, 1997), as cited in D. Ashiagbor, “‘Flexibility’ and ‘adaptability’ in the EU employment strategy’ in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000), 390.

that this form of flexibility, ‘gained from encouraging diversity in the internal organisation of working hours and working patterns, seems to leave little room for the sort of “high value-added” or “high trust” employment relations envisaged by the Employment Guidelines’.<sup>137</sup>

Hence this notion of flexibility has led to an internal contradiction between, on the one hand, advanced social protection, and, on the other, the requirement of flexibilisation of working arrangements, which at an abstract level are presented as reconcilable by the Employment Guidelines but which seem to be incompatible in practice. In other words, the ideal would be for flexibility and security to co-exist in the context of the labour market, but reality shows that in many cases these two notions contradict each other in such a way that they become mutually exclusive.

A final example of the ambiguity connected with the use of the term ‘flexicurity’ is seen in the conclusions of the European Employment Summit that was held in Prague in 2009, which aimed to assess the effects of the recent economic crisis on employment and to identify appropriate responses.<sup>138</sup> The findings of this Summit seem to place emphasis on the attainment of ‘flexicurity’, as the ideal means of maintaining as many people as possible in jobs, with temporary adjustment of working hours, which is

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<sup>137</sup> D. Ashiagbor, *ibid.* 381.

<sup>138</sup> European Employment Summit - 7 May 2009, Main messages.  
<<http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=173&furtherEvents=yes>> accessed 07 July 2012

suggested as one among the ten concrete actions suitable for addressing both short-term and long-term challenges.<sup>139</sup>

Thus, it seems that the flexibilisation of the working time is considered to be a fundamental aspect of responding to economic crisis, on the grounds that ‘once out of the labour market, it is very difficult for people who have lost their jobs to get back in, and the economy as a whole loses out on their skills and human capital’.<sup>140</sup> In this sense, the Summit highlights flexibility to keep workers mobile, prioritising growth and the creation of jobs. The Summit recognizes the necessity of training as a facilitator of long-term job prospects for the EU workforce. At the same time, it expressly highlights the need for the employed to keep their jobs. So the Summit seems to respect the need for job security, and at the same time it proposes a modernization of social systems which entails a decrease in the level of ‘job protection’. In this way, it creates a contradiction in its internal logic which can only be escaped by understanding ‘employment security’ as security in the widest sense of income compensation or support in event of dismissal, rather than security in relation to the particular jobs.

All these examples suggest that, in general, European social policy seems to promote some elements of deregulation, while at the same time it continues to express its commitment to employment protection. This kind of ambiguity in the understanding and implementation of ‘flexicurity’, as a notion in itself and in relation to the ways in which it may be attained, lies at the heart of the difficulties faced by the courts in interpreting the

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<sup>139</sup> EU Employment Summit agrees on ways to tackle rising unemployment.  
<<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=507&furtherNews=yes>> accessed 07 July 2012

<sup>140</sup> EU Employment Summit – questions and answers.  
<<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/223&format=HTML&aged=0&language=EN&guiLanguage=fr>> accessed 07 July 2012

ARD. An attempt to resolve these difficulties in the 1998 amendment of the ARD met with only limited success, as will be discussed below.

## **5. The 1998 Amendment of the ARD**

The evolution of the EU social policy discussed above, in particular the enhanced participation of social partners and the emphasis on flexibility, significantly influenced the 1998 amendment of the ARD. Royo describes the extensive element of flexibility added to the ARD by this amendment:

in this new directive, a central one in the development of European labour law, Flexibility is no longer confined to its implementation or to the moment of its application, it is indeed in its very regulatory content, allowing Member States an enormous number of options in regulating the transfer of undertakings in their own national labour legislation.<sup>141</sup>

The amending procedure started with the Commission's report to the Council on the progress regarding the implementation of the ARD, followed by an amendment proposal issued by the Commission in 1994. This proposal generated heated debates that lasted for four years, resulting in an amended proposal in 1997 leading, eventually, to the adoption of the amended 98/50/EC Directive in 1998.

The exact stages of this amendment will be presented in this part with particular emphasis on the role played by the various Community actors during this process, i.e. the European Parliament, the Commission, the Court of Justice and national legislatures and courts. Laulom captures really well the significant implications of the dialogue between these actors, especially that between the Court of Justice and national courts, by

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<sup>141</sup> M. Rodriguez-Pinero Royo (n 28) 230.

observing that ‘a comparative analysis of national decisions delivered on transfers of undertakings reveals that no Member State has remained unaffected, irrespective of the state of its domestic law prior to the Directive’s adoption’.<sup>142</sup>

Here the concept of ‘dialogue’ is used in the way that it is deployed by Sciarra. Sciarra explains that the use of the term ‘dialogue’ in the context of labour law being simultaneously ‘marginal and yet crucial in terms of its implications for other branches of European law and hence closely linked with broad economic policies’ goes beyond ‘a linguistic exercise’. The dialogue between various interlocutors ‘becomes a highly intriguing expression of law making within the supranational legal order’, as ‘nothing is private about this dialogue’, because

those who talk keep very few secrets and are very often eager to share the floor with other interlocutors and interact with them. This dynamic exchange of viewpoints can re-invigorate the links between the centre and periphery of the European legal system. It can also energise the inter-institutional dialogue and induce innovative results, forcing all actors to take responsibility for future steps to be taken following the effects of litigation or even during its course.<sup>143</sup>

However, she also observes that the meaning of the word ‘dialogue’ proves to be insufficient to express the full vigor of the search for ‘an institutional balance’ that calls into play ‘a powerful confrontation between national and supranational lawmakers, all striving to establish primacy over one another and measuring the strength and breadth of their sovereignty’.<sup>144</sup>

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<sup>142</sup> S. Laulom, ‘The European Court of Justice in the dialogue on the transfers of undertaking: A fallible interlocutor?’ in Sciarra (ed), *Labour Law in the Courts – National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 145.

<sup>143</sup> S. Sciarra (n 87) 3.

<sup>144</sup> *Ibid.* 4.

An example illustrating this confrontation is the choice made by some national judges to follow the Court of Justice rulings in the field of transfers, instead of waiting ‘for parliament to adopt a coherent and overall approach of the matter’.<sup>145</sup> The ‘dialogue’ between the various actors in developing European law is clearly important in explaining the form taken by the law.<sup>146</sup> The rich history of the ARD offers a vivid image of this form of institutional dialogue.

Valdes Dal-Re explains that the dialogues between European and national legislator, on the one hand, and the dialogue between the European and the national courts, on the other, should not be approached as ‘separate or parallel’ dialogues. On the contrary, ‘the paths they each follow are interwoven, demonstrating their mutual influence’.<sup>147</sup> This allows a better understating of the legal framework of the ARD, and the particular problems it faces in its current form of implementation.

### ***5.1 The Proposal for the Amendment of the ARD***

The amendment process started with the Commission’s extensive 1992 report to the Council on the progress of the implementation of the ARD.<sup>148</sup> The report underlined ‘the

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<sup>145</sup> Ibid. 3-4

<sup>146</sup> These terms are used according to the meaning attached to them by Lo Faro. More precisely, Lo Faro uses the term ‘inter-Community’ dialogue so as to refer to the dialogue taking place between a Community body and non-Community actors; while, he deploys the term ‘intra-Community’ dialogue so as to capture the dialogue taking place between bodies falling within the borders of the Community institutional structure. In his paper, he particularly deals with the intra-Community dialogue concerning the development of the definition of the term ‘legal transfer’ under the ARD, A. Lo Faro, ‘Judicial Developments of EC Social Policy and Intra-Community Institutional Dialogues: How to define a ‘legal transfer’ in S. Sciarra (ed), *Labour Law in the Courts, National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 210-211.

<sup>147</sup> F. Valdes Dal-Re (n 60) 191.

aim of reduction in existing differences between the Member States as regards the extent of protection' in transfers.<sup>149</sup> Secondly, it admitted that the definition of 'transfer' in the Directive was 'imprecise', although it considered that this lack of precision was the price to be paid in order to harmonize the concept of 'transfers' in the context of great national differences.<sup>150</sup> This report was followed by a proposal for the amendment of the ARD issued on September 1994.<sup>151</sup>

The trends in the evolution of EU social policy, discussed above, were strongly reflected in this proposal. This is clear in the four main aims of the proposed amendment, which were: 1. to clarify the application of the Directive in cases of international transfers of undertakings; 2. to allow for greater flexibility in situations where transfers are taking place as part of an insolvency procedure; 3. to introduce joint limited liability of the transferor and the transferee; and 4. to clarify the application of the Directive in cases of the transfer of solely one activity of the undertaking (i.e. outsourcing).

The second aim clearly relates to the more general requirement of EU social policy for more flexibility in the employment relations, as it explicitly refers to the need for greater flexibility in the event of transfers taking place as part of an insolvency

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<sup>148</sup> Commission Report to the Council on the progress with regard to the implementation of the Directive 77/187 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (SEC) 92 857 (Brussels, 2 June 1992). <<http://ec.europa.eu/social/BlobServlet?docId=2944&langId=en>> accessed 07 July 2012

<sup>149</sup> Ibid. page 4

<sup>150</sup> Ibid. pg 20; Valdes Dal-Re points out that the report may have identified a good conformity of Member States with regard to the legal formulation of the structural elements of transfer of undertaking and, yet, it was these structural elements, 'which have given rise to most of the contentious problems featuring in Community case-law', F. Valdes Dal-Re (n 60) 201.

<sup>151</sup> Commission of the European Communities 'Proposal for a council directive 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' COM (94) 300.

procedure. In the same vein and in line with the requirement for greater flexibility, the Commission proposed that an economic, organizational or technical reason entailing changes in the workforce may not only justify dismissal (Article 4 (1)), but may also justify alteration of the employment terms and conditions.

The proposal also introduced wider scope for collectively agreed variations to employment terms and conditions, to safeguard the survival of the undertaking (paragraphs 26, 28). It seems that this particular proposal emanated from Italian law, which, even when the initial Directive was in force, recognized ‘the possibility of derogating from the Directive’s provisions if an agreement is concluded between management and the union’ in cases of undertaking being in economic difficulties.<sup>152</sup>

This proposal directly contradicted Court of Justice’s case-law which held that because the protection conferred by the mandatory provisions of the Directive was a matter of public policy, employees could not waive the rights conferred by the Directive and these rights could not be restricted, even with the employees’ consent and even if the disadvantages resulting from the waiver were offset by such benefits that, taking the matter as a whole, the workers were not placed in a worse position.<sup>153</sup> The sole exception, as regards the workers themselves, was that following a decision freely taken by them they were at liberty, after the transfer, not to continue the employment relationship with the new employer.<sup>154</sup> The amendment proposal sought to reverse this by allowing workers greater scope to agree to waive their acquired rights in various circumstances.

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<sup>152</sup> S. Laulom (n 142) 148, 172.

<sup>153</sup> Case 324/86 *Daddy's Dance Hall* [1988] ECR I-739.

As for the greater involvement of the social partners, which was based upon the Social Chapter of the Treaty of Maastricht and was later incorporated in articles 154-155 TFEU, this was included in the first aim of the proposed amendment which sought to clarify the application of the Directive in cases of transnational transfers. Paragraph 39 of the amendment proposal strengthens the role of social partners in transnational transfers by providing that:

The changes proposed here aim to ensure that the transfers Directive is enforced in cases involving transnational undertakings and associated undertakings. Thus, the information and consultation requirements laid down by the directive apply irrespective of whether the decisions leading to the transfers are taken by the employer himself, by a controlling undertaking or by the central administration of a multi-establishment undertaking. In order to reinforce this key obligation an employer's failure to comply with the directive's requirements cannot be condoned on the grounds that the undertaking taking the decision leading to the transfer failed to inform the employer in due time.<sup>155</sup>

Thus, the Commission sought to widen the scope of employees' information and consultation rights by excluding the possibility of the employer avoiding liability for failing to respect information and consultation rights by arguing that the transfer was taken by an associated or controlling undertaking, which was particularly problematic in the context of transnational transfers.

The final major aim of the Commission's amendment proposal, in relation to contracting out, reflected concern about the numerous references to the Court of Justice regarding this issue. It also resulted from the 'dialogue' that developed between the Court

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<sup>154</sup> Case 362/89 *Giuseppe d'Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* [1994] ECR I-2435 and Case 132/91 *Katsikas* [1992] ECR I-6577; additionally, these cases provide that it is for the Member States to determine what the fate of the employment contract or employment relationship should be. Notably, they may provide in such circumstances that the contract is regarded as terminated either by the employee or by the employer. They may also provide that the contract is to be maintained with the transferor.

<sup>155</sup> Commission of the European Communities 'Proposal for a council directive' (n 151), para 39.

of Justice and national courts on this issue.<sup>156</sup> Laulom emphasizes the significant role of this judicial dialogue in the field of transfers of undertakings by observing that ‘the fact that Community case law on the matter has resulted in a reaction from the national courts in all Member States makes the 1977 Directive an ideal locus for analyzing interactions between national decisions and ECJ decisions’.<sup>157</sup>

The significant role of national courts in the formulation of social policy is also underlined by Valdes Dal-Re, who observes that courts ‘are able to adjust, upwards or downwards, the legal policy options initially adopted by the legislature’.<sup>158</sup> The majority of cases referred to the Court of Justice concerned the clarification of the scope of application of the Directive. One particular judgment, in the case of *Schmidt*,<sup>159</sup> was followed by heavy criticisms in Germany and France which the Commission sought to address in its proposal. In this sense, in Lo Faro’s words, ‘it could hardly be considered pure chance that the Commission’s proposal’ for the amendment was issued on 8 September 1994, only a few months after the *Schmidt* case, which was delivered on 14 April 1994.<sup>160</sup> It is necessary to examine briefly the ruling in *Schmidt* in order to understand better the Commission’s proposal.

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<sup>156</sup> Sciarra offers a vivid analysis of the parameters of ‘judicial dialogue’ between the Court of Justice and national courts as to the shaping of the direction of European law, S. Sciarra (n 87) 1-30.

<sup>157</sup> S. Laulom (n 142) 146.

<sup>158</sup> F. Valdes Dal-Re (n 60) 193.

<sup>159</sup> Case C-392/92 *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* [1994] ECR I-1311.

<sup>160</sup> A. Lo Faro (n 146) 217.

## 5.2 Debate and Dialogue after *Schmidt*

The question in *Schmidt* was whether, if the cleaning operations of an undertaking are transferred by contract to a different firm (i.e. outsourcing of the cleaning operations), that would amount to a transfer of ‘part of a business’ within the meaning of the ARD.<sup>161</sup> The Court of Justice ruled that this did indeed amount to a relevant transfer.<sup>162</sup> The Court focused on the similarity of the pre- and post-transfer activities to reach this conclusion.<sup>163</sup> It is noteworthy that the Court did not confine itself to ruling that the specific circumstances were capable of amounting to a transfer, but it commented that the facts of *Schmidt* were: ‘...typical of an operation which comes within the scope of the Directive...’<sup>164</sup>

This extensive reading of the Directive was met with the opposition of France and Germany.<sup>165</sup> This may seem somewhat strange, as these two countries were familiar with transfers of employees in this context, even before the adoption of the ARD. In addition the response of France and Germany appears to contrast surprisingly with the reaction in Britain, where, despite the fact that at common law traditionally the change of employer entailed the termination of the employment relationship on the basis of novation of

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<sup>161</sup> Case C-392/92 (n 159), para 6.

<sup>162</sup> J. Lewis, ‘When TUPE does apply?’ in J. Lewis, *Transfer of Undertakings* (Sweet and Maxwell Limited, London 2008) A 2.17-2.18.

<sup>163</sup> Case C-392/92 (n 159), para 17.

<sup>164</sup> *Ibid.*

<sup>165</sup> As Laulom observes, the response that the *Schmidt* received in Germany was not solely negative. Some commentators adopted a positive reaction to this judgment, while others noted that it would ‘cause considerable difficulties as regards restructuring’. In a similar vein, German courts were also divided, up to a certain extent, with some courts following ‘the line indicated by the ECJ, while others rejected it and still others opted for the preliminary reference procedure’, S. Laulom (n 142), 161.

employment contracts, the *Schmidt* case was welcomed for enabling those involved in the contracting out to know where they stood.<sup>166</sup>

The positive reception of *Schmidt* in the UK may be explained on the basis that it was more or less consistent with the case-law that the Court of Justice adopted between 1986 and 1994 with regard to the definition of transfers.<sup>167</sup> By contrast, as Davies observes, even before *Schmidt* the French and German courts had adopted an assets-transfer view with regard to outsourcing, while in *Schmidt* there was no transfer of assets since no assets were entailed in the work of cleaning.<sup>168</sup> As far as the reaction of French courts to *Schmidt* is concerned, until 1990 the *Cour de Cassation* (Supreme French Court) consistently held that the provisions implementing the ARD in the French Labour Code (Article L. 122-12 of the Code du Travail) did not apply ‘in the case of a straightforward loss of contract in competitive tendering, since the company concerned has thereby merely lost a customer whose activity was different from its own’.<sup>169</sup>

This position was later changed to reflect the Court of Justice’s view in *Schmidt*, that the transfer of service activities not accompanied by the transfer of assets falls under the transfer legislation.<sup>170</sup> However, as Laulom points out, while the *Cour de Cassation*

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<sup>166</sup> P. Davies, P ‘Taken to Cleaners? Contracting out of Services Yet Again’ (1997) 26 ILJ 193, 197; J. McMullen, ‘Contracting Out and Marketing Testing-the Uncertainty Ends?’ (1994) 23 ILJ 230-240.

<sup>167</sup> S. Laulom (n 142) 153.

<sup>168</sup> It is clarified that the assets based approach to outsourcing essentially entails that the transfer of an activity in itself may not amount to a transfer of undertaking, unless it is accompanied by the simultaneous transfer of tangible or intangible assets, P. Davies (n 166) 193, 197.

<sup>169</sup> S. Laulom (n 142) 158 (footnotes omitted).

<sup>170</sup> It was in *Schmidt*, in which the Court of Justice acknowledged the possibility of application of the Directive to contracting out on the basis of similarity of the pre and post-transfer activities, but, even before that, in *Rask and Christensen* paved the way for the application of the ARD, at least in principle, to the first round contracting out, Case C-209/91 *Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S*

formally acknowledged that a mere transfer of activity could possibly amount to a transfer of undertaking even without an asset transfer, nevertheless in practical terms, there is not a single judgment of the *Cour de Cassation* which applies the Code du Travail to cases in which there is a transfer of an activity without a simultaneous transfer of the ‘means of production’.

This refusal of the French Supreme Court to accept the rulings of the Court of Justice in terms of the definition of the term ‘transfer of undertaking’ might be contrasted with the substantial acceptance and the subsequent twist in its previous jurisprudence with regard to the definition of the term ‘legal transfer’ under the ARD. This may be another indication of the consistency characterizing the Court of Justice’s rulings on the definition of ‘legal transfer’.<sup>171</sup> This implies that what happened here could be seen as amounting to the nullification of the role of the Court in the interpretation of Community law, by failing to give effect in national law to Court of Justice’s jurisprudence.<sup>172</sup> The choice adopted by the French court to continue to follow French jurisprudence regarding the definition of transfers, effectively ignoring the case law of the Court of Justice on this particular point, represented a serious challenge to the role of the Court of Justice in the interpretation of Community law. The effective accomplishment of the role of the Court of Justice in the interpretation of Community law depends essentially on national courts, the expectation being that national courts will be ready to accept its interpretation. In this

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[1993] ECR-5755. It was by response to this case that the French Courts ‘only typically’ brought its case-law in line with Court of Justice’s case-law.

<sup>171</sup> S. Laulom (n 142) 153, 158.

<sup>172</sup> On this Sciarra observes that the process of sending references to the Court of Justice on questions of interpretation ‘permits Member States to engage in tacit bargaining with the Court, threatening to disobey or reduce the Court’s jurisdiction’, S. Sciarra (n 87) 7 (footnotes omitted).

particular instance, the lack of cooperation by the French courts posed a direct obstacle to the attempt of the Court of Justice to create a uniform interpretation of the term ‘transfer of undertaking’.

As regards Germany, *Schmidt* received heavy criticism from various commentators. However, instead of theoretically accepting this ruling while ignoring it in practice as the French courts did, the German courts preferred to get involved in an ‘active’ dialogue with the Court of Justice. This active dialogue entails, as Davies very illustratively explains, the reference of ‘second or further similar case to the ECJ, with additional supporting arguments, in effect suggesting to the ECJ that it should reverse or qualify its previous decision’.<sup>173</sup>

### ***5.3 The Commission’s response to the French-German Challenge***

This ‘passive’ dialogue preferred by the French courts and the ‘active’ dialogue chosen by the German courts led the Commission to suggest in its amending proposal that outsourcing should be excluded altogether from the scope of application of the ARD. The Commission, after paying its ‘ritual tribute’ to the Court of Justice by referring in the preamble of the proposal to the usual ‘in the light of the case-law of the Court of justice’,<sup>174</sup> proposed briefly and unambiguously that the ARD ‘shall not apply in cases where only an activity of an undertaking is transferred but there is no transfer of an economic entity which retains its own identity’.<sup>175</sup>

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<sup>173</sup> P. Davies (n 34) 139.

<sup>174</sup> A. Lo Faro (n 146) 217.

<sup>175</sup> Commission of the European Communities ‘Proposal for a council directive’ (n 151), para 18.

The sharp contrast between this proposal and the Court's previous jurisprudence, prompted the Commission to make a further statement recognising the Court's important role by observing that 'it must be emphasised that in the absence of explicit Community provisions on this specific point, the Court of Justice has continued its dynamic interpretation activities in a field which is becoming increasingly complex'.<sup>176</sup> These observations, to a certain extent, illustrate the dimensions of intra-Community and inter-Community dialogue that led to the adoption of the Commission's amendment proposal.

The intra-Community dialogue may be seen in two particular respects. First, the emphasis on additional flexibility and the role of social partners in shaping social policy, as expressed in the Social Chapter of the Treaty of Maastricht and in the Treaty of Amsterdam, prompted the Commission to propose amending the Directive in line with these trends. Second, the Commission developed a dialogue with the Court of Justice by directly opposing the Court's case-law, issuing an amending proposal only a few months after the delivery of *Schmidt* which advocated the exactly opposite outcome than the one suggested by the Court with regard to outsourcing.

As far as the inter-Community dimension of the dialogue is concerned, this illustrates the relation between, on the one hand, the Court of Justice and French-German courts, and, on the other, the response of the Commission to this dialogue. The French and German courts, by the means of the different techniques explained above, expressed their opposition to the approach of the Court of Justice to contracting out and the Commission responded by supporting the position of national courts and proposing what essentially amounted to a direct opposition to *Schmidt*.

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<sup>176</sup> Ibid.

#### ***5.4 Responses to the amendment proposals***

The proposal to exclude the mere transfer of activities from the scope of the ARD was met with the severe opposition by the European Parliament. It is important to note that the European Parliament did not object to any other of the proposed amendments. In 1996 the European Parliament issued a resolution rejecting the binary division between the transfer of undertakings and transfer of mere activities on the basis that it was not ‘in the interests of legal security and transparency’, which were ‘among the aims of’ the amending proposal.<sup>177</sup>

These reservations were shared and expressed, even more emphatically, by the Economic and Social Committee (ECOSOC). ECOSOC characterised ‘the distinction between ‘economic entity’ and the ‘activity’ of an undertaking’ as ‘highly ambiguous’. ECOSOC highlighted this ambiguity further by emphasising the inconsistency accompanying the Commission’s proposal, which, on the one hand, referred to changes in the light of the Court of Justice’s case-law, and, on the other, directly contradicted this case-law by proposing to exclude transfers of activity from the scope of the Directive. Finally, ECOSOC observed that this exclusion was inconsistent with the protective aim of the Directive and it could have indirect discriminatory effects on women, who were predominantly occupied in these sectors being excluded from the application of the ARD.<sup>178</sup>

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<sup>177</sup> Resolution on the proposal for a Council Directive 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 (COM (94)0300) OJ C 32, 05/02/1996.

<sup>178</sup> Opinion of the Economic and Social Committee on the Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the

ECOSOC, taking a stronger line of objection to the proposals than the European Parliament, expanded upon its objections in more detail as follows. Firstly, ECOSOC suggested that a definition of employees should be included in the Directive. Secondly, while it recognised that the ‘proposal’s new provisions on insolvency situations are a welcome attempt to introduce an element of flexibility’, it considered that it would be ‘necessary to include’ an explicit reference to the Collective Redundancies Directive<sup>179</sup> in order to ensure protection for employees affected by restructuring.

Thirdly, it expressed its fear that allowing collectively agreed variations in employees’ terms and conditions in the event of insolvency could undermine employees’ protection. This is due to the danger that employees’ agreement may be induced by the employer’s threat of dismissal. ECOSOC also objected that ‘the transnational dimension of information and consultation does not seem to be adequately developed’, suggesting that this could also be addressed by including a specific reference to the collective redundancies directive and the European Works Councils Directive (EWCD)<sup>180</sup>. ECOSOC also did not agree with the proposed derogations from information and consultation rights on the basis of the number of employees.<sup>181</sup>

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event of transfers of undertakings, businesses or parts of businesses (31/05/1995) OJ C 133, paras 1.2.3, 1.3, 2.2.3, 2.3.3-2.3.7.

<sup>179</sup> Council Directive (EEC) 75/129 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L48/29 as amended by Directive 92/56/EC [1992] OJ L245/3.

<sup>180</sup> Council Directive (EC) 94/45 (1994) OJ L 254 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, as amended initially by Council Directive (EC) 97/74/EC (1998) OJ L 10 and later by Council Directive (EC) 2006/109 (2006) OJ L 363.

<sup>181</sup> Opinion of the Economic and Social Committee on the Proposal for a Council Directive (n 178), paras 2.1, 2.10, 2.11, 2.13.1, 2.13.3, 2.14.

However, ECOSOC was not wholly opposed to the idea of amending the Directive, and agreed with the Commission's proposals in relation to extending the ARD to further categories of workers such as those employed by non-profit making undertakings, seagoing vessels, as well as atypical part-time, fixed duration and temporary employees. ECOSOC also welcomed the proposed idea of the joint liability of transferor and transferee.<sup>182</sup>

In response to the Opinion of ECOSOC delivered in 1995 and the European Parliament's Resolution in 1996, the Commission took a number of steps. It issued a second amending proposal on 24 February 1997, adopted a Memorandum 'explaining the acquired rights of workers' on 04 March 1997, and conducted a study on the legal consequences of cross-border transfers which was issued on the 28<sup>th</sup> of May 1998. Shortly thereafter the amended directive was adopted on 29 June 1998. We have analysed the views of ECOSOC and the European Parliament; the next section focuses on the final stages leading up to the amendment of the ARD.

### ***5.5. The Amended Proposal and the Memorandum on acquired rights***

Following the Opinion of ECOSOC and the Resolution of the European Parliament, the Commission issued a second amended proposal.<sup>183</sup> The new proposals abandoned the attempt to distinguish between transfers of 'undertakings' and transfers of mere 'activities', a distinction which had been designed to exclude transfers of activities from

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<sup>182</sup> Ibid. paras 2.5.2, 2.5.3, 2.6.2, 2.7, 2.9.

<sup>183</sup> Commission of the European Communities 'Amended Proposal for a Council Directive amending 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' COM (97) 60 final 24.02.1997.

the directive. The proposals strengthened the protection of employees during insolvency through measures preventing the use of fraudulent insolvency proceedings designed to defeat employees' rights. The proposals also addressed the possibility of limiting the obligations under the Directive to undertakings with 50 or more employees or undertakings meeting the workforce-size thresholds for information and consultation rights.<sup>184</sup>

Why did the Commission reconsider its initial proposal and propose these amendments? The explanation lies in the strong opposition of the European Parliament to the exclusion of contracting out from the scope of the ARD. This may not have been the sole factor that caused these changes to the initial Commission's amendment proposal, because, as Lo Faro reminds us, 'the Commission Proposal was presented pursuant to the Article 250 (ex Article 189a) consultation procedure, something that does not allow the Parliament to have a decisive role in the shaping of a legislative text'.<sup>185</sup>

However, it should also be remembered that the legal basis of the Directive, which was ex article 94 EC (now article 115 TFEU) providing for the approximation of such laws, regulations or administrative provisions of the Member States as directly affecting the establishment or functioning of the internal market, required unanimity for the adoption of decisions. Therefore, the European Parliament's opposition may have performed the role of an alarm to the Commission that, unless it did not amend its initial proposal, there was a realistic danger of failing to achieve the required unanimity.

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<sup>184</sup> Commission Proposal for a council directive (n 183) page 29.

<sup>185</sup> A. Lo Faro (n 146) 225.

A crucial role in these developments was also played by the dialogue between the Commission and the Court of Justice.<sup>186</sup> We have earlier referred to this dialogue at the stage between the delivery of *Schmidt* case and the initial amendment proposal, but it is important to follow this dialogue after this stage.

After the initial Commission proposal the Court of Justice in *Rygaard*<sup>187</sup> departed from its opinion in *Schmidt*, and then subsequently reverted to *Schmidt* in *Merckx*.<sup>188</sup> In *Rygaard* the Court of Justice qualified further the term ‘transfer of undertaking’ by ruling that in order to have a transfer under the meaning of the ARD, it has to be related: ‘...to a *stable* economic entity whose activity is not limited to performing one specific works contract’.<sup>189</sup> This statement clearly indicates a departure from *Schmidt* by almost excluding cases of contracting out from the scope of the directive, as proposed by the Commission.

Yet in *Merckx*, where no transfer of assets had taken place, the Court of Justice ruled that neither the absence of a transfer of assets, nor the change of location of the enterprise was deemed adequate to preclude the application of the Directive.<sup>190</sup> It is possible that the Court of Justice by making this twist intended to signal to the Commission that the issue was not yet settled.<sup>191</sup> It is significant that *Merckx* was

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<sup>186</sup> A. Lo Faro, *ibid.* 226-227.

<sup>187</sup> Case C-48/94 *Ledernes Hovedorganisation, acting for Ole Rygaard v Dansk Arbejdsgiverforening, acting for Strø Mølle Akustik A/S* [1996] ECR I-2745.

<sup>188</sup> Joined Cases C-171 and C-172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* [1996] ECR I-1253; A Lo Faro (n 146), 219.

<sup>189</sup> Joined Cases C-171 and C-172/94, *ibid.* para 20.

<sup>190</sup> *Ibid.* paras 20 and 30.

<sup>191</sup> S. Laulom (n 142), 162-163.

delivered in March 1996, just one month after the resolution of the European Parliament condemning severely the exclusion of contracting out from the scope of the Directive.

Thus, as the Court found ‘allies’ in its disagreement with the Commission with regard to the legal position of outsourcing, it signalled to the Commission through the ruling in *Merckx* that the debate remained open. The next stage in this ‘informal’ dialogue between the Court of Justice and the Commission was that the Commission withdrew its initial proposal and put forward an amended one. In the new proposal, as mentioned earlier, the Commission abandoned the attempt to exclude the transfer of mere activities from the scope of application of the ARD.

The Court of Justice responded by delivering its judgment in *Süzen*,<sup>192</sup> which offered an intermediate choice. While it did not entirely exclude contracting out from the scope of the Directive, it made it considerably more difficult to apply the directive to contracting out. This is because *Süzen* suggested that a mere transfer of an activity would not amount to a transfer unless it was accompanied by something more, such as the transfer of assets or of a major part of the staff, depending on the nature of the activity. The Commission responded positively to this judgement by endorsing it explicitly in the amended Directive, as will be shown later.

The discussion now turns to consider the memorandum explaining the acquired rights of workers, which constituted another attempt of the Commission to mitigate the effects of its previous sharp departure from the Court of Justice’s jurisprudence as

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<sup>192</sup> Case C-13/95 *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259.

reflected in the initial amendment proposal. In this memorandum, the Commission clarified that its main purpose was

to make it easier for representatives of employers and employees as well as for the public at large to understand Directive 77/187/EEC on the protection of workers in the event of a change of management, *in the light of the criteria established by the Court of Justice of the European Communities.*<sup>193</sup>

Indeed, it seems that the main reason why the Commission chose to issue this memorandum, approximately two weeks after the issue of its amended proposal, was so as to signal its confidence in the Court of Justice's interpretation of the ARD. This is expressed by Lo Faro who observes that

the history of the amendment process suggests, rather, that what the Commission constantly considered in its strategy was less the Council's potential position than the European Court's real voice: a voice that repeatedly raised throughout the years preceding the new Directive's adoption, as anyone can see by leafing through the past decade's European Court Reports.<sup>194</sup>

After having referred to the stages preceding the 1998 legislative amendment of the Directive with particular emphasis on the policy documents issued during this period and the dialogue that took place at both the inter and intra-community levels, we now move on to consider the study on legal consequences of cross-border transfers conducted by Bob Hepple on behalf of the Commission and issued just one month before the adoption of the amending 98/50 Directive.

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<sup>193</sup> Commission of the European Communities Memorandum on acquired rights of workers in cases of transfers of undertakings' (n 76) (emphasis added).

<sup>194</sup> A. Lo Faro (n 146) 226.

## *5.6 Cross-border transfers*

Two critical contexts in which the ARD operates are insolvency and cross-border transfers. These two contexts therefore constitute the overriding concern of the Community, particularly because the effects of regulating insolvency and cross-border operations are not restricted to the ARD, but extend more generally to the freedom of establishment, the freedom of mobility, and the freedom of movement.

The regulation of transfers of undertakings in the context of cross-border transfers formed the subject of a study conducted by Sir Bob Hepple on behalf of the European Commission.<sup>195</sup> By commissioning this study the Commission expressed its awareness that the Directive posed particular interpretative challenges in the context of cross-border transfers.

It also highlighted the significance of cross-border transfers in light of the Community's emphasis on mobility of production factors so as to match labour supply with demand in an attempt to promote 'professional and geographical mobility' as 'part of a coordinated response to the crisis, helping to redress labour market imbalances'.<sup>196</sup> However, the proposals made by Hepple were unfortunately not taken up in the amended Directive as will be seen below.

The Hepple study was concerned with cases where the transferor and the transferee are governed by the laws of different Member States, or when one is governed by the law of a Member State and the other by the law of a third country. When the ARD was first adopted cross-border transfers were not a major issue, but the situation changed

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<sup>195</sup> B. Hepple 'A Report for the European Commission DG-V' (n 70).

<sup>196</sup> EU Employment Summit – questions and answers (n 140).

after 1980 with increasing numbers of cross-border transfers. Hepple points out that cross-border transfers have significant advantages. They may improve the overall efficiency with which assets are used and may strengthen the competitive process at the EU level by generating, inter alia, the reallocation of employment or of managerial functions between countries.<sup>197</sup>

This is clearly important for a Community which is largely preoccupied with the achievement of a competitive economy. Deficiencies in the regulation of cross-border transfers would therefore risk not only leaving employees unduly exposed to risk, but they may also constitute a serious obstacle to the operation of cross-border transfers. In this context, related to the discussion earlier in this chapter about the nexus between social and economic rights, safeguarding employees during cross-border transfers might support and facilitate such transfers in two ways. First, transfers would be hindered by high levels of employee resistance if employees feel that their rights are not adequately safeguarded. Second, and more positively, if the legal status of their protection during cross-border transfers is clarified and safeguarded, this is likely to secure workers' co-operation in these transfers.<sup>198</sup>

ECOSOC expressed its concerns about the potential negative consequences of cross-border transfers, in its 1989 opinion on the Social Consequences of Cross-Frontier Concentrations between undertakings.<sup>199</sup> Such transfers typically entail substantial job losses and are often concerned not with improving productivity but instead with 'market

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<sup>197</sup> B. Hepple 'A Report for the European Commission DG-V' (n 70), para 6.1.

<sup>198</sup> *Ibid.* para 6.4.

<sup>199</sup> Opinion of the Economic and Social Committee on the Social Consequences of Cross-Frontier Concentrations between Undertakings [1989] OJ C 329, paras 2.3 and 2.6.

domination strategy' which has negative social and economic effects. ECOSOC also noted that in these situations workers rights of information, consultation and participation in decision-making are all too frequently abandoned.

The effect on employees, as noted by Hepple, is often a 'sense of loss and uncertainty, psychological problems, reduced commitment, loss of productivity and high staff turnover'.<sup>200</sup> The overall impression given by Hepple's study is that the design and content of the ARD allows it to operate quite satisfactorily at the level of cross-border transfers, enhanced by the simultaneous operation of other legal instruments such as the Posted Workers Directive,<sup>201</sup> European Works Council Directive and the Rome Convention.<sup>202</sup>

### ***5.7 The Amended Directive 98/50***

The lengthy process of discussion and debate, based on numerous policy documents and the multi-dimensional dialogue between various actors at different levels, eventually led to the adoption of the Directive 98/50. The changes introduced by this amending Directive are presented and evaluated in this part.

The extensive changes brought by the amending Directive are introduced in the preamble. The very brief preamble of the original Directive was replaced with a far more extensive preamble which clarifies that the ARD aims not only to protect employees in the event of transfer, but also to safeguard particular elements of employers' flexibility as

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<sup>200</sup> B. Hepple 'A Report for the European Commission DG-V' (n 70), para 6.4.

<sup>201</sup> Council Directive 96/71(EC) Posted Workers' Directive [1996] OJ L18/1.

<sup>202</sup> Rome Convention 1980 on the law applicable to contractual obligations (consolidated version) OJ C 027 (26/01/1998).

well. While the preamble of the original Directive was strongly preoccupied with employee protection, and the new preamble emphasises particular aspects of flexibility in transfers. The important differences between these two preambles are the following.

The new preamble makes reference to the Social Charter which may be explained, because Article 136 EC makes, for the first time in the main body of an EC Treaty, explicit reference to the Community Charter of Fundamental Social Rights of Workers. Although this Treaty had not entered into force at the time of the amendment of the Directive, it had been signed one year before the amendment.<sup>203</sup> The preamble also summarises the changes in EU social policy that had taken place since the adoption of the initial Directive. The need for greater flexibility is incorporated by broadening the non-application of the Directive in the event of insolvency.<sup>204</sup>

A further sign of flexibility in the preamble is the idea that the Member States should be allowed to promote the survival of companies declared to be in a state of economic crisis by disapplying the directive to such companies. In addition the reference in the initial directive to the need for improved working conditions and an improved standard of living for workers, was not repeated in the new preamble.

The requirement for enhanced participation of the social partners in transfers is reflected in the ninth recital of the preamble providing that ‘the circumstances in which the function and status of employee representatives are to be preserved should be

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<sup>203</sup> Article 136 EC made explicit reference to the Community Charter of Fundamental Social Rights of Workers, which, according to Shaw, is used as ‘an inspiration for EU social policy’, J. Shaw (n 35) 7.

<sup>204</sup> The possibility of non application of the ARD to insolvency concerns only the individual aspect of the Directive, i.e. the transfer of employment relations to the transferee with the same terms and conditions (article 4 (a)). Thus, the employees’ rights to information and consultation are safeguarded even in cases of insolvency.

clarified'. Similarly, the tenth recital incorporates the willingness to promote the role of social partners by explicitly providing that the employer cannot avoid this obligation on grounds that 'the decision leading to the transfer is taken by an undertaking controlling the employer'.

Hence these two recitals clearly demonstrate the attempt to strengthen the role of social partners in restructuring. Finally, the requirement for a greater degree of legal certainty is encapsulated into recitals 4 and 6 of the preamble providing for the need for clarification of the concepts 'legal transfer' and 'employees' accordingly. Moving on from the preamble, various changes are also made to the content of the substantive provisions.

To promote flexibility, article 4(a) provides for the possibility of non application of the Directive to cases of insolvency and more general to cases of serious economic crisis.<sup>205</sup> As Deakin and Morris explain, the implications of this additional flexibility in the context of insolvency are that it potentially lowers the price of the undertaking, so that a successful corporate rescue becomes a more likely outcome for the insolvent firm.<sup>206</sup>

Article 4(a) par. 2(b) enhances the participation of the social partners in transfers by providing that

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<sup>205</sup> In this way 'the 1977 Directive was amended in 1998 in such a way as to encourage greater flexibility in its application to insolvency': S. Deakin and G. Morris, *Labour Law* (5th edn, Hart Publishing, Oxford 2009) 506.

<sup>206</sup> 'Where the transferor is insolvent or approaching insolvency, the price paid for a business by the transferee may well be affected by whether or not it inherits the pre-existing liabilities of the transferor to its employees; these might take the form of common law obligations to pay accrued wages or damages for wrongful dismissal, or statutory obligations with regard to unfair dismissal, redundancy and other employment rights. Equally, the price might be higher if the transferee has a free hand, after the transfer, to employ whom it wishes, or to offer whatever terms it thinks fit' S. Deakin and G. Morris, *ibid.* 500.

the transferee, transferor, or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, insofar as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

Additionally, article 6 par. 4 provides that '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 order to clarify the legal concepts in the interest of legal certainty, article 1 (b) provides that:

... 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.

Finally, article 2 par. 2 qualifies the concept of 'employee' by providing that particular contracts of employment or employment relationships shall not be excluded from the scope of this Directive solely because they are part time, fixed-term or temporary employment relationships.

## **5.8 Overview of the Amended Directive**

Having presented the changes introduced by the amended Directive, this part comments briefly on these changes. The overall impression given by the amended Directive is that it attempts to balance flexibility with employment protection. All in all, the Directive restricts the scope of its application in the event of insolvency and allows Member States to extend this principle to cases of severe economic crisis.

However, the ARD does not restrict the intensity of its application in cases where it continues to apply: it restricts the width of cases being covered horizontally by the Directive, leaving untouched the vertical coverage of the ARD.<sup>207</sup> This issue concerning the intensity of review is particularly relevant to the proportionality analysis and will therefore be considered in more detail in chapter 3. At this stage it may be observed that the significance given to the vertical application of the protection offered by the ARD is demonstrated by restating that the automatic transfer of employment relations with the same terms and conditions to the transferee constitutes ‘the core’ of the Directive;<sup>208</sup> similarly the idea that the ‘contractual position of the original employer must be transferred to the transferee’ continues to reflect the ‘general traditions in most national legislative systems’.<sup>209</sup> Unfortunately, the meaning of the term ‘transfer’ is left in a state of great uncertainty despite the references in the preamble to the need for clarification. This will be discussed in more detail in the next chapter.

This section has presented the stages that led to the amendment of the initial version of the ARD and evaluated its contribution. The history of this amendment was characterised by heated debates between various actors as reflected in the various policy documents issued during this period. However, the amended directive does not, by any means, exhaust the potential evolution of the Directive; indeed this subject remained on the agenda of the EU social policy debates during the subsequent years. This is evident in

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<sup>207</sup> The horizontal concept of coverage is referred here so as to indicate the spectrum of cases being covered by the scope of application of the Directive; while, the idea of verticality encompasses the actual content of protection, when the Directive applies.

<sup>208</sup> Commission of the European Communities Proposal for a Council Directive (n 59), page 6; Commission of the European Communities Amended Proposal for a Council Directive (n 66), page 19.

<sup>209</sup> Commission Report to the Council on the progress with regard to the implementation of the Directive 77/187 (n 148), page 28.

the large number of policy documents issued after the 1998 amendment, which will be presented in the next section. Thus, we now move on to examine the next stages of the evolution of the EU social policy and the position adopted by the Community after the amended Directive.

## **6. The evolution of EU social policy after Directive 98/50**

Subsequent to the adoption of the 1998 amendments to the ARD, the evolution of the European social policy reflected ‘a continuing uncertainty as to how far and in what shapes and forms to develop EU social policy and the “European Social Model” within that general discourse of labour market regulation’.<sup>210</sup> Reliance on the idea of flexicurity continued to increase ‘in an attempt, both rhetorical and practical, to reconcile the enhancement of ‘security’ by means of social policy with the vindication of efficiency by means of ‘flexibility’.<sup>211</sup>

This is reflected in the conclusions of the European Employment Summit, in which flexibility is referred to as a basic tool in tackling the current financial crisis. However, as discussed in the previous section, the notion of flexibility remains contested, and it is important to consider how the Directive has been understood and interpreted in light of subsequent legal and policy instruments designed to introduce various forms of flexibility. In this context, it may be asked whether the Directive remains compatible with the currently evolving trends. Additionally, it will enable us to identify the particular areas of the Directive that remain highly problematic and need improvement.

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<sup>210</sup> P. Davies and M. Freedland, *Towards a Flexible Labour Market* (OUP, Oxford 2007) 231.

<sup>211</sup> *Ibid.* 232.

## ***6.1 The Lisbon Strategy***

In the Lisbon European Council launched in March 2000, the Union set the new strategic goal ‘to become the most competitive and dynamic knowledge based economy of the world capable of sustainable economic growth with more and better jobs and social cohesion’.<sup>212</sup> Three dimensions of this new strategy may be identified: an economic one (more competitive economy), an environmental one (sustainable development), and a social one (more and better jobs and social cohesion).

The principal aim in the social field was to enable the Union ‘to regain the conditions for full employment (not just a high level of employment, as the article 2 EC that was then in force provided) and to strengthen social cohesion’.<sup>213</sup> Finally, according to the Presidency Conclusions, the new open method of coordination was the appropriate means of ‘spreading best practice and achieving greater convergence towards the main EU goals’ by helping Member States ‘to progressively develop their own policies’.<sup>214</sup>

The Commission justified the resort to best practice by arguing that ‘good ideas should always be imitated’ and that by bringing together successful policy examples, even at the level of abstract ideas, this can bring positive results.<sup>215</sup> However, as Kahn

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<sup>212</sup> Lisbon European Council 23 and 24 March 2000 ‘Presidency Conclusions’.<[http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)> accessed 07 July 2012, para 5; Shaw considers that this European Council that was held in 2000 constitutes a characteristic example of ‘a shift towards mainstreaming social policy issues onto the agendas of key actors as the Commission and the Council Presidency’, J. Shaw (n 35) 4.

<sup>213</sup> Lisbon Presidency Conclusions (n 119), para 6; The parenthesis does not exist in the Presidency Conclusions and is added here to indicate the re-orientation from the objective of high employment to full employment after the launch of the Lisbon Strategy that is now explicitly included in the Treaty of Lisbon.

<sup>214</sup> *Ibid.* para.37.

<sup>215</sup> European Commission ‘Report on Ways of Improving the Comparability of Statistics to Monitor and Evaluate Progress Under the European Employment Strategy’ COM (98) 572.

Freund argues it is not always easy to ‘transplant’ legal and institutional concepts from country-specific settings. This diachronic statement seems particularly acute here.<sup>216</sup> This resort to best practice would be achieved by a stronger guiding and coordinating role for the European Council by means of indicators, benchmarks, exchange of experience, peer reviews and the dissemination of good practice. It is worthwhile noting that, despite the ambitious objectives of the Lisbon Strategy, the EU failed to achieve the significant aim of getting 70 per cent of employment by 2010, as the EU employment rate of persons of working age (15-64) fell in 2010 to 64.2% according to the official statistic of Eurostat.<sup>217</sup>

This observation does not intend to undermine the overall significance of the Lisbon Strategy, because, as Hatzopoulos points out, the Lisbon Strategy is the first big project that had a prominent social aspect.<sup>218</sup> This view is also taken by Shaw, who considers that the social aspects of the Lisbon strategy ‘were given equal prominence in public statements (...) as the economic aspects’.<sup>219</sup> Additionally, the Lisbon strategy verifies the shift in emphasis from employment protection to employment creation and it changes the focus from harmonisation towards co-ordination, under the direction of European Union.

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<sup>216</sup> O. Kahn-Freund, ‘On uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review* 1; this controversial aspect of the EES is also recognized by Szyszczak, who observes that ‘in the future a major political and legal issue will be how to blend the convergence mechanisms of the European Employment Strategy with the different national models of social policy and labour market regulation’, E. Szyszczak (n 99) 217.

<sup>217</sup> M. Wozowczyk, N. Massarelli, ‘Population and social conditions’ (Eurostat: Statistics in focus, 30/2011). <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-11-030/EN/KS-SF-11-030-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-030/EN/KS-SF-11-030-EN.PDF)> accessed 07 July 2012

<sup>218</sup> V. Hatzopoulos, ‘A (more) social Europe: A political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon’ (2005) 42 *Common Market Law Review* 1599, 1628, 1630.

<sup>219</sup> J. Shaw (n 35) 4.

This shift from harmonisation towards co-ordination is described by De Burca and Scott as the reasonable consequence of the expansion of the Community to new Member States, ‘whose aims have become more diverse and more ambitious’, and this highlighted the need not for ‘one inexorable path of integration implying harmonisation and gradual unification, but rather commitment to a broad commonality within which room exists for varying degrees of difference and diversity’.<sup>220</sup> Finally, according to Barnard, it intended ‘to improve the legitimacy of governance within the EU by involving a wider range of social actors, including not only the social partners, but also civil society more generally’.<sup>221</sup>

## ***6.2 The Consolidated version 2001/23 of the Directive***

The changes brought by the consolidated 2001/23 Directive were largely cosmetic and consisted in a renumbering and tidying up of its articles without affecting the substance of the provisions. Indeed the very aim of the ARD’s codification, according to the Commission proposal, was simply to consolidate the articles without introducing ‘any change in substance’.<sup>222</sup> Nevertheless, the Commission in the Presidency Conclusions of the Edinburgh Council emphasized the significant contribution of codification for the ‘people’s Europe’, in offering certainty, clarity, simplicity and transparency as to the applicable law.<sup>223</sup>

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<sup>220</sup> G. De Burca and J. Scott (n 97), 2-3.

<sup>221</sup> C. Barnard (n 32) 27.

<sup>222</sup> Commission of the European Communities ‘Proposal for a council directive 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’ (codified version) COM (2000) 259.

It is important to emphasize that the development of the ARD was not considered settled by the Commission after the 2001 codification. This is clearly illustrated by the 2004 Commission Memorandum ‘on rights of workers in cases of transfers of undertakings’<sup>224</sup> and the 2007 Commission’s implementation report.<sup>225</sup> These two documents will be discussed in the following two parts of this section.

### ***6.3 Memorandum on rights of workers during transfers of undertakings (2004)***

This memorandum issued by the Commission three years after the codification of the ARD indicates that the Commission continued to attach particular attention to the Directive as part of its policy agenda. Thus, the Commission considered it necessary to issue a new memorandum on the ARD, seven years after the previous one, because of the amendment of the Directive in 1998 and its codification in 2001.

Two additional reasons that rendered the delivery of this new memorandum necessary in the view of the Commission were, firstly, the handing down of ‘a number of important judgments interpreting the Directive’ and, secondly, the ‘enlargement of the EU’.<sup>226</sup> On the 1st of May 2004, a few months before this memorandum was issued, we saw the largest single expansion of the European Union (EU), both in terms of territory

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<sup>223</sup> Ibid. explanatory memorandum, paras 1-5.

<sup>224</sup> Commission Services’ Working Document ‘Memorandum on rights of workers in cases of transfers of undertakings’ (2004). < <http://ec.europa.eu/social/BlobServlet?docId=2444&langId=en>> accessed 07 July 2012

<sup>225</sup> Commission Report ‘on 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’ COM (2007) 334.

<sup>226</sup> Ibid. para 1.

and the number of states and population. This expansion resulted in a total number of twenty five Member States. The emphasis placed by the Commission on cross-border transfers and the significant issues that this expansion posed with regard to these transfers justifies the Commission's concerns.

The memorandum clarifies that the ARD applies to both public and private undertakings whether or not they operate for gain, as long as they are 'engaged in economic activities', in the sense that they provide 'goods or services on a market'.<sup>227</sup> This important qualification of the term 'economic activities' with the phrase 'goods or services on a market' does not exist either in the text of the Directive, or in the previous policy documents referring to the ARD, but it was added for the first time with this memorandum.

The memorandum also clarified that the protection of the Directive may not be excluded solely on the basis of 'the number of working hours' or in the cases of 'fixed-duration employment relationships' and 'temporary employment relationships' according to article 2(2) of the ARD.<sup>228</sup> Thirdly, the memorandum includes some significant clarifications as regards the retention of the identity of the undertaking, in accordance with the Court of Justice's jurisprudence. It clarifies that

the maintenance of the identity is marked both by the continuation by the new employer of the same activities and by the continuity of its workforce, its management staff, the way in which its work is organized, its operating methods or the operational resources available to it.<sup>229</sup>

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<sup>227</sup> Ibid. para 2.2.

<sup>228</sup> Ibid. para 2.3.

<sup>229</sup> Ibid. para 2.4.2 (footnotes omitted).

The memorandum also refers to the need for simultaneous transfer of assets, which may be either tangible or intangible, or the major part of the workforce depending on the type of the undertaking, in accordance with *Süzen*.

Laulom observes that the references of national courts to the Court of Justice regarding the definition of the term ‘transfer’ were significantly similar as to their articulation, and ‘were particularly precise, and not formulated in general terms’,<sup>230</sup> which suggests a certain degree of ambiguity of the case-law referring to transfers.<sup>231</sup> The memorandum underlined the broad interpretation given to the term ‘legal transfer’ by referring to indicative examples of the Court’s jurisprudence.

All these cases illustrate that a large number of incidents may be combined together to constitute a single ‘legal transfer’, as the completion of a transfer at one stage is not a requisite condition for the application of the Directive; on the contrary, the transfer may entail two or more stages.<sup>232</sup> Laulom’s comment on this jurisprudence was that it was successful in clarifying the meaning of the term ‘legal transfer’ at a relatively early stage and as a consequence this dialogue was brought ‘to a close fairly quickly’. This perspective may be justified by the fact that the answers given by the Court of Justice to these questions was ‘very precise’.<sup>233</sup>

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<sup>230</sup> S. Laulom (n 142) 155-158.

<sup>231</sup> For a detailed discussion of the inconsistencies of this case-law, see M. Jeffery, ‘European Union Developments, European Labor Laws Relating to Business Restructuring’, (2003) 24 Comparative Labor and Policy Journal 669- 695; McMullen, ‘Notes--TUPE--Sidestepping Süzen’ (1999) 28 ILJ 360-364; V. Shrubbsall, ‘Competitive Tendering, Out-sourcing and the Acquired Rights Directive’ (1998) MLR, 85-92; G. Barrett, ‘Light acquired on Acquired Rights: Examining developments in Employment Rights on Transfers of Undertakings’, (2005) 42 CML Rev 1053–1105; P. Davies (n 197) 193-197.

<sup>232</sup> Commission Services' Working Document Memorandum (n 224), para 2.4.3 (footnotes omitted).

<sup>233</sup> S. Laulom (n 142) 150.

The memorandum observed that ‘the protection conferred by the mandatory provisions of the Directive is a matter of public policy’ according to the Court of Justice and it stated that, in the light of this case-law

an employee cannot waive the rights conferred upon him by the Directive and that these rights cannot be restricted, even with his consent and even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position.<sup>234</sup>

Finally, the Commission emphasises the issue of cross-border transfers. The memorandum observes that the discretion left to national laws in defining fundamental concepts in the Directive may complicate its application to cross-border transfers. The Rome Convention may provide only a partial answer to the applicable law to the employment contract, but ‘this is not the case as to the continuation of collective agreements and information and consultation obligations’.<sup>235</sup>

In the light of the importance of cross-border transfers and by ‘taking into account that with the growing integration of the Member States economies, the number of cross border transfers is likely to increase’, the Commission expressed the willingness ‘to carry out an in depth analysis of the issue’ of cross border transfers.<sup>236</sup> Thus, it seems that the above study conducted by Hepple was not the end of the story, but a step towards the growing recognition of the importance of the issue of cross-border transfers in Commission’s view.

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<sup>234</sup> Commission Services' Working Document Memorandum (n 224) para 2.4.3 (footnotes omitted).

<sup>235</sup> Ibid. para 5.

<sup>236</sup> Commission Services' Working Document (n 224), para 5.

#### ***6.4 The Commission's 2007 report on the implementation of the ARD***

On 18 June 2007, in keeping with the trend of including the ARD in its social policy agenda, the Commission issued a new report on the implementation of the Directive.<sup>237</sup> In this report, despite the focus on co-ordination consistently followed by the Community after the EES and onwards, the aim of harmonisation is emphasised. The report highlights the ARD's aim of ensuring 'comparable protection of employees' rights in the Member States' and approximating the obligations placed on European undertakings.<sup>238</sup>

The Commission expressed its approval of the broad meaning given to the term 'transfer',<sup>239</sup> and reiterated that 'the rules of the Directive are to be regarded as mandatory, in that it is not permitted to derogate from them in a manner which is detrimental to employees.' However it rejected the proposal of the European Confederation of Trade Unions to extend the directive to share transfers.<sup>240</sup> This was the first time that the Commission expressed its view on the question of share transfers. In this report the Commission invited consultation by the social partners on the issue of cross-border transfers.<sup>241</sup>

Further issues which were recognized as requiring further debate included outsourcing, information and consultation procedures, and collectively agreed alterations to employment terms and conditions. The overall conclusion of the Commission with

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<sup>237</sup> Commission Report on Council Directive 2001/23/EC (n 225).

<sup>238</sup> Ibid. para 1.

<sup>239</sup> Ibid. para 2.2.2.

<sup>240</sup> Ibid. para 2.2.1.

<sup>241</sup> Ibid. para 2.3; Norway, Finland and Portugal underlined the ambiguity characterizing the application of the Directive to cross-border transfers, Commission Report 'on Council Directive 2001/23/EC' (n 256) page 26.

regard to the role of the ARD ‘nearly 30 years after its adoption’ was that it ‘continues to play a key role in protecting employees’ rights’ and ‘has made a major contribution to ensuring that numerous restructuring operations in Europe are socially more acceptable’ ‘by achieving the correct balance between the protection of employees and the freedom to pursue an economic activity’.<sup>242</sup>

### ***6.5 The European Employment Summit of 2009***

The Employment Summit of 2009 may be taken as a good illustration of how the current trends in EU social policy have influenced the interpretation of the ARD. The Employment Summit of 2009 is a good example because at least two of the ten strategic action points set by this Summit to ‘mitigate the worst effects of the crisis’ and to improve the employment situation for the future<sup>243</sup> were connected with the role of the ARD.

As the Commission observed in its consolidated report on the preparatory workshops for the Employment Summit of May 7, 2009 ‘restructuring continues during crisis, indeed probably at a much faster pace than before, but the negative employment and social consequences could be much worse’.<sup>244</sup> In its view the principal aim of the

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<sup>242</sup> Ibid. para 6

<sup>243</sup> European Employment Summit - 7 May 2009, Main messages (n 138).

<sup>244</sup> European Commission ‘the preparatory workshops for the Employment Summit of May 7, 2009’. <<http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=173&furtherEvents=yes>> accessed 07 July 2012.

Directive was to mitigate the negative effects of restructuring and this aim renders the ARD relevant due to the increased significance of restructuring during the crisis.<sup>245</sup>

The second relevant aim which was identified was the need for increased labour mobility so as to match labour supply with demand. The Summit observed that ‘promoting professional and geographical mobility is part of a coordinated response to the crisis, helping to redress labour market imbalances’.<sup>246</sup> Clearly, the cross-border transfers may have an important role to play in the field of the mobility of the production factors. Additionally, the Summit focuses on the notion of ‘flexicurity’, which is considered as one among the key principles of tackling the economic crisis by combining the aims of ‘strengthening the EU’s competitiveness and growth potential’ with the modernisation of the ‘social protection systems’.<sup>247</sup>

Finally, the Summit emphasised the role of the EES and OMC, as the appropriate framework for the accomplishment of these objectives. It observes that the co-ordination safeguarded by the EES ‘has already saved millions of jobs in the context of the crisis’. In a similar context, it considers that ‘the Renewed Lisbon Strategy for Growth and Jobs and its targets still provide the right framework for action’ and that the OMC ‘can help mitigate the impact of the economic crisis on the most vulnerable in Europe and on the economy as a whole’.<sup>248</sup>

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<sup>245</sup> The significant role of restructuring ‘in the current environment’ of ‘the financial and economic crisis’ is also suggested by S. Laulom, ‘The Flawed Revision of the European Works Council Directive’ (2010) 39 *ILJ* 202, 202 (Translated by C. Kilpatrick).

<sup>246</sup> EU Employment Summit – questions and answers (n 140).

<sup>247</sup> European Employment Summit - 7 May 2009, Main messages (n 138).

<sup>248</sup> EU Employment Summit – questions and answers (n 140).

Thus, the current trends of the EU social policy, as reflected in the Employment Summit, highlight ‘flexicurity’, the OMC and the role of social partners as the appropriate tools for the necessary modernisation of labour markets so as to tackle economic crisis. The relationship between the ARD and the reflexive elements existing within the OMC will be evaluated in the final chapter of the thesis. In the next section, the position of the ARD in the light of the role of social partners will be evaluated.

### ***6.6 The increased participation of social partners***

The first issue that needs to be examined is the relation between the ARD and the need for a strengthened role of social partners for the modernisation of labour markets. The current EU social agenda from the OMC and onwards encourages the active participation of social partners in the shaping of EU social policy, and it seems that the Directive indeed safeguards an enhanced role for social partners in the following ways.

The Directive grants information and consultation rights to employees in order to enhance co-operation between the employers and employees. The prominent role of information and consultation rights is indicated by the fact that these rights are preserved even in the context of insolvency. The directive also provides for the right of social partners to improve freely above the minimum protection safeguarded by the Directive.

One issue that has generated a lot of debate is the actual scope for collectively agreed variations of terms and conditions of employment after the transfer. The Court of

Justice in the *Daddy's Dance Hall*<sup>249</sup> line of cases formulated a broad principle according to which 'any subsequent variation would be ineffective if the reason for it was the transfer itself', even if collectively agreed and even if favourable to the employees:<sup>250</sup>

employees are not entitled to waive the rights conferred on them by the directive and that those rights cannot be restricted even with their consent. This interpretation is not affected by the fact that, as in this case, the employee obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before.<sup>251</sup>

The legal effect of this broad principle is, as Deakin and Morris explain, that 'the pre-transfer contract terms are entrenched against even a consensual variation for a certain period of time following the transfer, unless the variation can be understood to take place for a reason other than the transfer itself'.<sup>252</sup>

Deakin and Morris criticize this principle, because they consider that such changes should not be rendered ineffective by 'the anti-waiver provisions of the Directive and Regulations; because the legislation cannot confer any greater rights upon the employees than they had before, what would have been a valid variation pre-transfer will also be effective post-transfer'.<sup>253</sup> They also suggest that this 'view has much to commend it in terms of logic and clarity'.<sup>254</sup>

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<sup>249</sup> Case 324/86 *Daddy's Dance Hall* [1988] (n 153), para 17; McMullen argues that 'the rationale of *Daddy's Dance Hall* is to insulate employees from a detriment suffered as a result of the transfer and to protect them from having to waive any of their rights', J. McMullen (n 30) 335, 365.

<sup>250</sup> See also *Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S* [1993] IRLR 133; Case C-305/94 *Roisaert de Hertaing v J Benoidt SA* [1997] IRLR 127.

<sup>251</sup> Case 324/86 (n 153), para 15.

<sup>252</sup> S. Deakin and G. Morris (n 205), 209 (footnotes omitted).

Conversely, in the event of insolvency, Deakin and Morris observe that the 1998 amendment of the Directive aimed at allowing scope for agreed derogations in the interests of flexibility.<sup>255</sup> This issue will be analysed in the second chapter, as one of the central implementation issues that arose from the presentation of the historical evolution of the ARD. Suffice it to say here that restrictive framework within which the ARD currently operates under the Court of Justice's case-law on collectively agreed derogations may be overcome by an alternative implementation of the Directive, which is consistent with the wording of the Directive.

## **7. Conclusion**

This chapter has argued that the evolution of EU social policy was characterized by changes in both the extent of intervention in the social field, as well as the content of that intervention. The restricted autonomy of the Community under the Treaty of Rome was increased over time by subsequent Treaty amendments in Maastricht and Amsterdam. However, this competence remained qualified by the principle of subsidiarity introduced by the Treaty of Maastricht, according to which the Union may only intervene where the action of individual countries is insufficient.

Additionally, the form of intervention was modified from hard-law measures to softer forms of governance with a simultaneous shift of emphasis from the protection of employees, to a concern with unemployment (those outside the labour market) and an

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<sup>253</sup> Ibid. 208

<sup>254</sup> Ibid. 208

<sup>255</sup> Ibid. 506 (footnotes omitted).

associated emphasis on the need for flexibility to promote job creation and mobility for workers. However, the thesis takes the view that the pursuit of these various and evolving goals should be viewed as complementary rather than substitutive, a theme which will be revisited in discussing methods of regulation in the final chapter.

In terms of the substantive content of social policy interventions, the ARD was conceptualized at a time when job security was largely about keeping one's particular job, in contrast with the modern focus on employability or security in the transition between jobs. The current policy thinking in this regard is illustrated by the recent Europe '2020' Communication,<sup>256</sup> which emphasizes mobility and constant training of workforce.<sup>257</sup> As was shown above, this trend strongly influenced the amendment of the ARD in 1998, and elements of it can also be discerned in earlier developments in the Court of Justice's case law. Uppex and Hardy observe that the broad construction initially given to the term 'transfer' of undertakings was later substituted by a far more limited one that narrowed the scope of the application of the Directive.<sup>258</sup> While the mere similarity of activities between transferor and transferee was initially sufficient in finding a relevant transfer, later this was supplemented by requiring a going concern that retains its identity, which in essence required the simultaneous transfer of assets.

Related to this, the form of protection accorded by the Directive, prohibiting dismissals by reason only of the transfer, seems at first sight inconsistent with the concept of employability, which emerged as part of flexicurity agenda. This suggests that the

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<sup>256</sup> European Commission 'Communication From the Commission Europe 2020: A Strategy For Smart, Sustainable and Inclusive Growth' COM (2010) 2020 (Brussels, 3.3.2010).

<sup>257</sup> W. Njoya, 'Job Security in a Flexible Labour Market: Challenges and Possibilities for Worker Voice' (2012) *Comparative Labour Law and Policy Journal* 459, 461.

<sup>258</sup> R. Uppex and S. Hardy (n 30), 69.

emphasis should be placed not on the particular job, but the easy transition between jobs within labour market. However, despite the fact that the implementation of the ARD is today characterized by an enhanced level of flexibility, the Commission has continued to see article 3, providing for the automatic transfer of the employment relationship with the same terms and conditions to the transferee, as the ‘the core’ of the Directive.<sup>259</sup> This creates an impression of incompatibility between the ARD and the notion of employability.

Additionally, the concept of concrete ‘employee’s’ rights accorded by the Directive seems irreconcilable with the requirement for softer forms of intervention under the Lisbon Strategy.<sup>260</sup> However, the apparent incompatibility between hard law ‘rights’ and soft law intervention can be resolved by identifying ways in which they complement, rather than contradict, each other:

OMC does not mean throwing the legislative baby out with the bathwater; rather the OMC and legislative serve different functions. While OMC tools are particularly suited to the area of employment or labour market *policy* (i.e. job creation and combating unemployment), legislation (hard law) is more suited for the creation of employment *rights* intended to protect workers.<sup>261</sup>

For these reasons, as will be analysed later in the thesis, the emphasis on ‘softer’ tools may not perform a mutually exclusive role with hard-law regulation, such as the ARD, but rather a complementary one. Hence the view of Deakin and Wilkinson that the empowerment ‘of “outsiders” may take numerous forms which do not involve the

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<sup>259</sup> Commission of the European Communities Proposal for a Council Directive (n 59), page 6; Commission of the European Communities Amended Proposal for a Council Directive (n 66), page 19.

<sup>260</sup> C. Barnard (n 32) 61.

<sup>261</sup> *Ibid.* 61.

removal of protection for “insiders”: it is one thing to strengthen the hand of outsiders relative to insiders and quite another to strengthen the hand of employers relative to insiders’.<sup>262</sup> This underlines the need to identify a formula for the achievement of a better balance between employees’ and employers’ interests.

The ARD includes a fundamental safeguard for managerial prerogative in this regard, by allowing dismissals ‘for economic, technical or organisational reasons entailing changes in the workforce’ (ETOR).<sup>263</sup> The ETOR defence available to employers clearly indicates an attempt to balance the conflicting interests of employee and employer.<sup>264</sup> However, the Directive does not offer any clarification of the ETOR justification of dismissals and there is almost no European case-law on this issue.<sup>265</sup> This is not, in itself, surprising. The courts tend to be reluctant to second-guess the decisions of management so it would be unusual for a body of case law to develop whose primary purpose was to assess whether the courts agree or disagree with the employer’s view that ETOR changes were necessary. The issue with which the courts have been concerned has been, not whether there is an ETOR justifying dismissals, but whether the dismissal falls within the purview of the ARD at all (i.e., whether there has been a relevant ‘transfer’). It is precisely this preoccupation with the ‘transfer’ test which this thesis suggests has

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<sup>262</sup> S. Deakin and F. Wilkinson (n 78) 54 (footnotes omitted).

<sup>263</sup> Article 4 par. 1.

<sup>264</sup> The need for a reconciliation of employees’ security with employers’ freedom to dismiss is expressed by Njoya: ‘The need to reconsider the nature of the employment relationship in the firm is imperative in the ongoing debate over how to balance job security with flexibility, competitiveness and profitability. It is understood that there cannot be an absolute right to job security, but at the same time the social cost of dismissing thousands of workers en masse points to the need to strike a better balance between jobs and profits’, W. Njoya, *The Property in Work, The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing Limited, England 2007) 5.

<sup>265</sup> C. Barnard (n 32) 665.

obscured the employment protection goals of the ARD. However, the concern of the thesis is not to argue that employment protection can somehow be enhanced through the ETOR (e.g. by construing ETOR strictly and narrowly), but rather to argue that statutory tests no matter how they are formulated can only take us so far. The policy history of the ARD indicates that national courts have significant difficulties in dealing with the definition of transfer, which is illustrated by the numerous references sent to the Court of Justice on this issue. What is needed, then, is a change of focus; a fundamental rethinking of the underlying goals of the legislation and the feasibility of reconciling these goals when they appear to be mutually in conflict.

In the next chapter, this argument will be developed further by focusing on the interpretative history of the ARD, as well as the case law developed by the Court of Justice and the national Greek and UK courts.

## Chapter 2: The problematic teleology of the ARD

### 1. Introduction

The previous chapter described the legislative history of the ARD as influenced and shaped by the evolving social policy agenda in the EU. The chapter also suggested that the confusion surrounding the definition of the term ‘transfer of undertaking’ is a major obstacle in achieving the coherent and effective application of the Directive. The chapter concluded that to achieve such coherence it is necessary to step back and rethink the underlying conceptual nature of the rights and obligations represented in the ARD. To advance this argument and focus more clearly on the conceptual framework of the ARD, this chapter turns to an interpretative history of the ARD, demonstrating how these difficulties are reflected in the implementing regulations, as well as the case law developed by the Court of Justice and the member states. This jurisprudence reveals the fundamental lack of coherence in understanding or explaining the aims of the directive.

These underlying uncertainties are more clearly appreciated by a comparative study of UK and Greek law. In Greek law there is a history of more than ninety years of effecting the automatic transfer of employment relationships from the transferor to the transferee in the event of change of employer; conversely, in the English common law the change of employer entailed the termination of the employment relationship, as employment contracts could not be transferred automatically to a new owner or business operator without the consent of both the new owner/operator and the employee and the creation of what is in effect a new contract of employment.<sup>266</sup> The comparison of two Member States

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<sup>266</sup> The classical statement of this view consists in the decision of the House of Lords, *Nokes v. Doncaster Amalgamated* [1940] AC 1014 (HL).

with quite different histories in relation to the ARD offers fruitful insights into the challenges facing the implementation of the Directive.

The chapter also sets the stage for the analysis of proportionality and legitimate expectation later in the study, by identifying the ways in which Greek and UK law have dealt with workers' 'acquired rights' in contexts where the notions of proportionality and legitimate expectation are not expressly articulated, as a prelude to considering, in the subsequent chapter, what ameliorations might be realised by explicit use of those conceptual tools.

Greek law offers a particularly interesting national framework for observing the potential of the Directive in times of economic crisis where transfers of undertakings and the opportunity for employers to defeat the legitimate expectations of employees become more frequent and acute. Recent legal developments in Greece, adopted as a response to the financial crisis, have caused a significant watering down of protection in core areas of labour law such as the autonomy of the social partners, collective bargaining and protection against dismissal.<sup>267</sup> A study of the Greek law on transfers demonstrates the extent to which the deregulation of core areas of labour law has had an influence upon the implementation of the ARD. The adoption of analogous measures in other Member States, such as Portugal, makes the findings of the study on Greek law regulating transfers even more significant in terms of the challenges that European labour law is going to face in the near future.

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<sup>267</sup> For a fuller discussion see A. Koukiadaki and L. Kretsos 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 ILJ 276 et seq.

The idea of proportionality has been explicitly relied upon by Greek courts as a doctrinal basis for employee claims and as a test in deciding whether defeating what might be termed the legitimate expectation of the employees is justified. For example, in case 599/12 of the District Court of Athens a challenge was brought by some employees of Attiko Metro (the company responsible for train services in Greece) against laws that reduced their income below the level provided by the collective agreement that was then in force.<sup>268</sup> The new law significantly watered down the protection against dismissal by reducing the compensation payable in event of dismissal by up to 50%.<sup>269</sup> This law was adopted as part of a broader legislative initiative designed to tackle the financial crisis. The court considered that these legislative measures contravened the constitutional right of the social partners' autonomy by violating the principle of proportionality. The decision referred to the reasons justifying the adoption of the legislative measures in issue, namely tackling the financial crisis, avoiding national bankruptcy, and reorganizing the national expenditure so as to make it sustainable. These justifications were evaluated as incomplete in terms of the necessity stage of proportionality, as it was not proven that they constituted the least restrictive measure in terms of their effects on employees, for the attainment of the stated goals. Hence the court restored salaries to the level provided by the collective agreement. This provides a striking illustration of the reliance that has been placed on the idea of proportionality in Greek law. With no similar doctrinal basis of analysis in English employment law, Greek law provides a useful contrast in assessing

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<sup>268</sup> District Court of Athens Case 599/12 available at <<http://www.lawnet.gr>> accessed 07 July 2012.

<sup>269</sup> Article 75(2) of Act 3863/2010; for a fuller discussion, see A. Koukiadaki and L. Kretsos (n 267) 276, 286.

the use that might be made of, and the reliance that might be placed on, the notion of proportionality as a broader overarching principle.

There are other significant differences between Greek and UK law of which three may be highlighted here. The first relates to the readiness of the courts to find that the case falls within the scope of the ARD. Here, it will be suggested that English courts are much more ready to apply the ARD than Greek courts, which is surprising given their respective histories. Greek courts focus on the preservation of the identity of the transferred entity and the retention of the organisational unity of the transferred elements in such a way that they disapply the Directive in situations where the British courts try to safeguard the effective application of the Directive by deploying innovative methods of interpretation. Thus, the ARD appears to have enhanced the rights of UK workers, but eroded those of Greek workers in terms of the first element of comparison. The readiness of the UK courts to accept the application of the ARD may be explained, as Davies argues, as recognition of the need for legal certainty in the field of transfers.<sup>270</sup> It is suggested here that evaluating these different approaches requires a coherent standard or benchmark, which may be represented in the ideas of proportionality and legitimate expectation.

The second element of comparison will focus on the definition of ‘employee’ in Greek and English law. The qualifying test in Greek law is that of ‘subordination’ arising from the employment relationship, even in cases of an invalid contract of employment, while in English law the test depends upon the existence of a ‘contract of employment’.

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<sup>270</sup> ‘Thus, the UK courts paid close attention to the decisions of the Court of Justice in developing the domestic law and, as stated, welcomed *Schmidt* as settling the controversy between *entreprise-organisation* *entreprise-activité*’, P. Davies, ‘Transfer of Undertakings’ in S. Sciarra (ed.), *Labour Law in the Courts – National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 140 (footnotes omitted).

Thus, Greek law seems much more permissive. It appears that it is easier for Greek than English workers to be protected under the ARD, but it may be that this is counterbalanced by the greater strictness of Greek courts in determining the material scope of the legislation. Again, it can be seen that in each case a more instructive approach would be to consider the rights vested in the claimant (the legitimate expectation) and the appropriateness of the remedy sought (proportionality) in assessing the validity of the different approaches taken by Greek and UK law in delineating the material scope of the Directive.

The third element of comparison considers the remedies for breach of the ARD. Although both jurisdictions have remedies of reengagement and reinstatement, this must be seen in the context of the readiness of the courts to find that the ARD is 'engaged' in the first place. The argument is that the ARD may be said to become relevant whenever a legitimate expectation is breached in circumstances and with effects which cannot be justified as proportionate. Thus, the comparison of the way that the Directive is implemented in these two Member States reveals the kinds of difficulties which national laws face in implementing the ARD, and how these difficulties can be approached from the theoretical stand point proposed in this thesis.

To the extent that the laws of these member states are different, it is important to consider whether this poses an insuperable challenge for the harmonisation aims of the Directive, namely the aim of establishing a minimum floor of protection in the event of transfers within the Union. Such a challenge would potentially impede the overall effectiveness of the ARD,<sup>271</sup> though we shall consider in subsequent chapters whether

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<sup>271</sup> Case C-382/92 *Commission v UK* [1994] ECR I-2435.

this may be redeemed by the adoption of the proportionality test and the shift to reflexive interpretations. In the field of sanctions for violation of the Directive, the absence of any degree of harmonisation constitutes a further challenge to the overall effectiveness of the ARD.

The chapter proceeds as follows. Section two discusses the meaning of the terms ‘undertaking’ and ‘transfer’, which are central to the interpretation of the directive. Section 3 deals with the ‘ETOR’ justification of dismissals and the scope for collectively agreed derogations. Sections 4, 5 and 6 compare Greek and UK law implementing the ARD, and section 7 considers the implications of this comparison for the harmonization aims of the ARD.

## **2. The terms ‘undertaking, business, or part of an undertaking or business’**

### ***2.1 The ‘transfer’ test***

The legislative history of the ARD indicated that the definition of the term ‘transfer of an undertaking, business, or part of an undertaking or business’ was the issue that preoccupied most the national courts and generated a large number of references. Hence Laulom observes that ‘the definition of the Directive’s scope has, without question, been the major issue confronting all the Member States studied’.<sup>272</sup> The controversy characterizing the definition of these terms resulted in the addition of the following paragraph in the 1998 amendment of the Directive:

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<sup>272</sup> S. Laulom, ‘The European Court of Justice in the dialogue on the transfers of undertaking: A fallible interlocutor?’ in Sciarra (ed), *Labour Law in the Courts, National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 148 (footnotes omitted).

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.<sup>273</sup>

This did not clarify matters. Hardy's comment on this provision is that 'such an inexpansive definition seeks only to return the enquirer to the case law and the morass of complexity surrounding it'.<sup>274</sup>

The controversy over the exact meaning of the 'transfer of an undertaking' has predominantly affected the question of whether outsourcing is covered by the ARD.<sup>275</sup> For Upex and Hardy 'the starting point' in answering the question of the meaning of 'transfer' is *Spijkers v Gebroeders Benedik Abattoir*.<sup>276</sup> In this landmark case, which predates the amendment of the ARD, the Court of Justice for the first time clarified that in identifying the existence of a 'transfer of undertaking' the decisive criterion was: 'whether the business in question retains its identity inasmuch as it is transferred as a going concern, which may be indicated in particular by the fact that its operation is actually continued or resumed by the new employer with the same or similar activities'.<sup>277</sup> It also set out a range of criteria relevant in deciding whether an economic entity retains its identity or not:

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<sup>273</sup> Article 1 par. 1(b).

<sup>274</sup> S. Hardy, 'The Acquired Rights Directive: A case of economic and social rights at work' in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 485.

<sup>275</sup> P. Davies (n 270), 135-136 (footnotes omitted).

<sup>276</sup> R. Uppex and S. Hardy, *The Law of Termination of Employment* (8<sup>th</sup> ed Bristol, Jordan Publishing Limited 2012) 78.

<sup>277</sup> Drafting actually taken for para 18 of Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro* [1987] ECR 5456, approving Case 24/85 *Jozef Maria Antonius Spijkers v*

- the type of business;
- whether the tangible assets of the business are transferred;
- the value of its intangible assets;
- whether the majority of the employees were taken over by the new employer;
- whether the customers were transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the time elapsed between the end of the old activity and the beginning of the new one.

Finally, the Court observed that: ‘...All those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation’.<sup>278</sup>

## 2.2 From ‘Labour law test’ to ‘Company law test’

The evaluation of these criteria formed the basis of two different judicial tests, which were utilised by the Court of Justice in evaluating whether the transferred entity retained its identity, ‘the labour law approach’ and ‘the commercial law approach’.<sup>279</sup> On the basis of the *labour law approach* ‘the Court focused less on the employer and more on the similarity between the activity performed by the new employer compared with those carried out by its predecessor’.<sup>280</sup> Conversely, the *commercial approach* is based on the concept of ‘economic entity’.

As Barnard explains ‘following *Rygaard*, the Court said that, for the Directive to be applicable, the transfer had to relate to a stable economic entity’ referring ‘to an

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*Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV* [1986] ECR 1119; see also case C-29/91 *Dr. Sophie Redmond Stichting v Hendrikus Bartol and others* [1992] ECR I-3189.

<sup>278</sup> *Ibid. Spijkers*, para 13.

<sup>279</sup> C. Barnard, *EC Employment Law* (3<sup>rd</sup> edn OUP, Oxford 2006) 638-644.

<sup>280</sup> *Ibid.* 638

organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'.<sup>281</sup> This was exemplified in *Süzen*:

the mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it.<sup>282</sup>

The evaluation of the existence of a transfer according to the *company law approach* is verified in the recent *CLECE SA*.<sup>283</sup> The implication of this case, according to McMullen is that 'the answer to the question whether TUPE applies on a service provision change' essentially depends 'on whether assets are transferred or employees taken over'.<sup>284</sup> Barnard identifies the following further implications arising from the case-law implementing the 'commercial approach' to transfers:

In the case of an *assets-based* business the Court said that there was a transfer of an undertaking only where there was a transfer of 'significant tangible or intangible assets'. On the other hand, in the case of a *non-assets based* business (i.e. a business based essentially on manpower such as cleaning or security), the Court said that 'the maintenance of its identity following the transaction affecting it [could] not, logically, depend on the transfer of such assets'. Therefore, (...) in certain labour-intensive sectors (such as services) a group of workers engaged in a joint activity on a permanent basis could themselves constitute an economic entity.<sup>285</sup>

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<sup>281</sup> Ibid. 638, 641 (footnotes omitted).

<sup>282</sup> Case C-13/95 *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259, para 15.

<sup>283</sup> Case C-463/09 *CLECE SA v María Socorro Martín Valor, Ayuntamiento de Cobisa* [2011] IRLR 251.

<sup>284</sup> J. McMullen 'Employment: The golden goose?' (2011) 161 NLJ 1008, 1009-1010.

<sup>285</sup> C. Barnard (n 279) 641-642 (footnotes omitted).

This distinction between ‘assets-based’ and ‘non-assets based’ activities is indeed crucial for the implementation of the ARD after *Süzen*. One of the more recent cases addressing the significance of this distinction is *Ivana Scattalon v Ministero dell Istruzione*<sup>286</sup> where the Court of Justice makes it clear that:

in certain sectors the economic activity carried out is essentially based on manpower. In such circumstances a structured group of workers may, despite the absence of significant assets, amount to an economic entity, thereby giving employees rights under the Directive against their new employer.<sup>287</sup>

The distinction between ‘assets-based’ and ‘manpower-based activities’ has prompted the criticism of various commentators<sup>288</sup> mainly because the ‘company’ test renders the application of the Directive dependent, to a great extent, on the employer, as it may refuse to take on the assets or a part of the workforce in order to avoid the obligations imposed by the Directive.<sup>289</sup> In other words, the intended result of the ARD, namely to ensure that the employment contract is taken over by the transferee, is altered into a condition for the application of the Directive.

This is described by the Latin phrase ‘*Petitio principii*’, which refers to the logical fallacy in which the proposition to be proved is assumed implicitly or explicitly in the

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<sup>286</sup> Case C-108/10 *Ivana Scattalon v Ministero dell Istruzione* OJ C 134, 22.5.2010.

<sup>287</sup> J. McMullen, ‘Employment: TUPE or not TUPE?’ (2012) 162 NLJ 49, 50.

<sup>288</sup> For a detailed discussion of problems surrounding the distinction between ‘assets-based’ and ‘manpower-based’ activities, see G. Barrett, ‘Light acquired on Acquired Rights: Examining developments in Employment Rights on Transfers of Undertakings’ (2005) 42 CML Rev, 1053, 1065; V. Shrubbsall, ‘Competitive Tendering, Out-sourcing and the Acquired Rights Directive’ (1998) 61 MLR 85.

<sup>289</sup> M. Jeffery, ‘European Union Developments, European Labor Laws Relating to Business Restructuring’, (2003) 24 Comparative Labor and Policy Journal 669, 691; P. Davies, ‘Transfers—The UK will have to make up its own mind’ (2001) 30 ILJ 231, 234; McMullen, ‘Notes--TUPE--Sidestepping Süzen’ (1999) 28 ILJ 360-364; P. Davies ‘Taken to Cleaners? Contracting out of Services Yet Again’ (1997) 26 Industrial Law Journal 193, 197.

premises (ie begging the question). The first known definition in the West is by the Greek philosopher Aristotle around 350 BC, in his book ‘Prior Analytics’, where he classified it as a material fallacy. Aristotle argues that ‘begging the question is proving what is not self-evident by means of itself’.<sup>290</sup>

In *Vidal*<sup>291</sup> AG Cosmas makes the same point:

It could be argued that this cannot be a decisive criterion in determining the protection to be afforded by the Directive because, as some Member States have rightly pointed out in their written observations, it begs the question: the result achieved by applying the Directive becomes a condition determining whether it is to apply.<sup>292</sup>

AG Cosmas agrees that in manpower based activities, the decisive criterion for the application of the ARD should be the ‘presence of a group of workers engaged in a joint activity on a permanent basis ... rather than the unimportant issue of whether or not a certain number, or even the majority, of the staff have been re-engaged by the new employer’.<sup>293</sup>

A second reason why commentators criticise this distinction is that it is often difficult to correctly classify some ambivalent cases in one of these categories.<sup>294</sup> Indeed,

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<sup>290</sup> Aristotle, *Prior Analytics*, Book II, 16 (translated by A. J. Jenkinson). <<http://ebooks.adelaide.edu.au/a/aristotle/a8pra/book2.html#book2>> accessed 07 July 2012

<sup>291</sup> *Joined Cases C-127/96, C-229/96 and C-74/97 Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96), Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97) [1998] ECR I-8179.*

<sup>292</sup> AG Cosmas in *Joined Cases C-127/96, C-229/96 and C-74/97 Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96), Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97) [1998] ECR I-8179, par 79.*

<sup>293</sup> *Ibid.* para 84.

<sup>294</sup> G. Barrett (n 288) 1059 et seq.

a great number of activities are equally dependent on staff and assets, and no guidance is offered to the national courts as to the way in which this distinction should be made. An indication of this difficulty is offered in *Oy Liikenne*,<sup>295</sup> where the Commission considered the bus route as a manpower-based activity, while the Court ruled that it was an assets-based activity.<sup>296</sup> Moreover, in *Abler*,<sup>297</sup> Barnard characterises the opinion of the Court of Justice that catering is an assets-based activity as ‘somewhat surprising’.<sup>298</sup>

These criticisms are certainly well-placed and merit attention. As McMullen argues:

it is true that the cases since *Kenmir Ltd v Frizzell*, whatever provision is in question, frequently adopt the test of whether there is a transfer of a ‘going concern’. It should not, however, be forgotten that this is a gloss and is not part of any legislation; use of this phrase should not blinker an industrial’s tribunal’s approach in looking at the situation in the round to assess whether, in all the circumstances, there has been a business transfer.<sup>299</sup>

This is a commendable approach to avoid over-emphasising the transfer of a going concern retaining its identity, and instead adopting a more flexible evaluation of whether there has been a relevant transfer. However, the 1998 amendment of the ARD, which, as was shown above, inserted the requirement of the transfer of a going concern retaining its identity as an essential condition for the application of the Directive arguably has reduced the judicial prospects of such a flexible interpretation.

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<sup>295</sup> Case C-172/99 *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen* [2001] ECR I-745.

<sup>296</sup> *Ibid.* paras 36 and 39.

<sup>297</sup> Case C-340/2001 *Carlito Abler and Others v Sodexo MM Catering Gesellschaft mbH* [2004] ECR I-14023.

<sup>298</sup> C. Barnard (n 279) 643.

<sup>299</sup> J. McMullen, *Business Transfers and Employee Rights* (2<sup>nd</sup> ed Butterworths, London 1992) 45-46 (footnotes omitted).

### 3. ETOR and Collectively Agreed Derogations

#### 3.1 The Meaning of ETOR

Under the ARD dismissals taking place for an economic, technical or organizational reason (ETOR) entailing changes in the workforce are justified.<sup>300</sup> The meaning of the ETOR is therefore crucial. An overly broad reach of this justification would undermine the very purpose of the Directive.<sup>301</sup>

However, despite the central role accorded to the ETOR justification, the Directive does not include a clarification of the scope and meaning of the ETOR defence. The meaning of the words themselves does not present undue difficulties, as Upex and Hardy suggest:

The words ‘economic technical or organisational’ in regulation 7(2) have been considered in a number of cases. The preferred approach now seems to be that of the EAT in *Wheeler v Patel*. It said that the word ‘economic’ is to be construed *ejusdem generis* with the other two adjectives and is to be given a limited meaning relating to the conduct of the business. It said that it does not include broad economic reasons for a sale, such as the desire to obtain an enhanced price or a desire to achieve a sale. The EAT has followed this approach in later cases. This approach is consistent with the House of Lords’ decision in *Litster v. Forth Dry Dock & Engineering Co Ltd (in receivership)*.<sup>302</sup>

More difficult is how this applies to the cases, i.e. whether it justifies dismissals that are by reason only of the transfer if those dismissals have ETOR elements, or whether it only

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<sup>300</sup> Article 4 par. 1.

<sup>301</sup> H. Collins, ‘Dismissals on Transfer of a Business’ (1986) 15 Industrial Law Journal 244.

<sup>302</sup> R. Upex and S. Hardy (n 276) 217 (footnotes omitted); regulation 7 (1) and (2) provides that: ‘(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is (a) the transfer itself; or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. (2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer’.

applies when the dismissal is unrelated to the transfer. Advocate General Van Gerven in *D'Urso*<sup>303</sup> made the following observation as regards the meaning that should be given to the ETOR:

I do not share the view that the directive allows any kind of dismissal on economic, technical or organizational grounds. The directive expressly prohibits such dismissals where they occur as a result of the transfer of the undertaking. It is only where the dismissals have already taken place, for example if they had already been decided on before the question of any transfer of the undertaking arose, that they come under that derogation. Article 4 of the directive cannot therefore be used as an argument to dismiss some of the employees on account of the transfer of the undertaking.<sup>304</sup>

This does not appear to advance matters much further, as the AG is observing that in a case where the dismissals are by reason only of the transfer, the ETOR cannot be relied upon to justify those dismissals. Clearly, if dismissals are instigated for an ETOR then they are, by definition, not by reason only of the transfer. In this regard it is significant that the ARD provides that the transfer *in itself* may not constitute a valid reason for employees' dismissals.<sup>305</sup>

In this sense, dismissals not being related solely with the decision to transfer are not, in principle, prohibited. Thus, there would be no need for the ETOR exception to the prohibition of dismissals, if the purpose of this provision was to allow for dismissals unrelated with the transfer, as these dismissals are not, in any event, covered by the

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<sup>303</sup> Opinion of AG Van Gerven in Case 362/89 *Giuseppe d'Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* [1994] ECR I-2435.

<sup>304</sup> *Ibid.* para 35.

<sup>305</sup> Article 4 par. 1.

Directive. However, the position remains unclear as there is almost no Court of Justice's case-law on this issue.<sup>306</sup>

This may well be because litigation has focused on whether there is a transfer, and the Court may be finding that there is no relevant transfer in cases where it would have found an ETOR to exist. This is adverted to by Lord Templeman in *Litster*:<sup>307</sup>

It would, of course, still be open for a new owner to show that the employee had been dismissed for "an economic, technical or organisational reason entailing changes in the workforce," but no such reason could be advanced in the present case where there was no complaint against the workers, they were not redundant and there were no relevant reasons entailing changes in the workforce.<sup>308</sup>

In other words, in cases such as *Litster* where the ARD should apply and the employer is attempting by various machinations to avoid its application, then the facts are extremely unlikely to support an ETOR defence. After all, if an ETOR defence was sustainable then the employer would have no need for such subterfuge to avoid the ARD.

In *Litster* this entailed firing the employees one hour before formally completing the transfer,<sup>309</sup> in order to argue that they were not fired by reason only of the transfer but had already been dismissed prior thereto. Lord Oliver of Aylmerton was highly critical of the employer's conduct in *Litster*, observing that the fact the employer 'was asked

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<sup>306</sup> 'the ECJ up to now has not ruled directly on this issue': S. Hardy (n 302) 486; See also C. Barnard (n 279) 665.

<sup>307</sup> *Litster and Others Appellants v Forth Dry Dock & Engineering Co. Ltd. (In Receivership) and Another Respondents* [1990] 1 AC 546 (HL). The employer also argued that the employees were not employed 'immediately before' the transfer.

<sup>308</sup> *Ibid.* 559.

<sup>309</sup> 'The receivers agreed to sell the business assets to the transferee and one hour before the transfer took place the workforce were told by the receivers that the business was to close down and that they were dismissed with immediate effect', *ibid.* 546

specifically whether the business was being taken over by Forth Estuary’ and ‘said that he knew nothing about a company called Forth Estuary Engineering (...) indicates a calculated disregard for the obligations imposed by regulation 10 of the Regulations’.<sup>310</sup> Similarly in *Apex Leisure*<sup>311</sup> the dismissals took place two days before the completion of the transfer and the EAT affirmed the tribunal’s decision that ‘a gap of two days was so small that it could be disregarded’ and hence the employees should be deemed employed ‘immediately before’ the transfer.

In practice, of course, it is not easy to draw such neat distinctions because the facts or events (i.e. the dismissals unrelated with the transfer, and the transfer itself) may take place at the same time and in the same broader context of the firm making strategic decisions to cope with fast-changing economic realities. This complexity is recognized by the UK Court of Appeal in *Warner v Adnet Ltd*.<sup>312</sup> As Uppex and Hardy observe, this case emphasizes that ‘the [TUPE] Regulations must be read as a whole’.<sup>313</sup>

In that case Mummery LJ held that ‘if the transfer was not the reason, there is no need to inquire further. If it is the reason, regulation [7] (2) *may* apply. If it does, regulation [7] (1) is disapplied and the dismissal is not *automatically* unfair’.<sup>314</sup> In other words, questions only arise where it appears that the transfer was the reason for the dismissal; in that case the court will consider the validity of an ETOR defence.

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<sup>310</sup> *Litster and Others Appellants v Forth Dry Dock & Engineering Co. Ltd. (In Receivership) and Another Respondents* (n 307), para 565.

<sup>311</sup> *Apex Leisure* [1984] ICR 452 (EAT).

<sup>312</sup> *Warner v Adnet Ltd* [1998] ICR 1056 (CA).

<sup>313</sup> R. Uppex and S. Hardy (n 276) 212.

<sup>314</sup> *Warner v Adnet Ltd* (n 312), para 1064, as quoted in R. Uppex and S. Hardy, *ibid.* 212.

Questions also arise in relation to the nature or degree of change in workforce that is required as part of the ETOR. McMullen has argued that ‘this means, according to the Court of Appeal in *Berriman v Delabole Slate Limited*<sup>315</sup> ‘a change in the overall numbers or functions of the employees’.<sup>316</sup> Additionally, according to McMullen the implication of the *Nationwide Building Society v Benn*<sup>317</sup> case is that legislation ‘does not require that the organisational reason entails changes in the entirety of the workforce. It was enough if the organisational change affected a body of transferring employees, as in this case’.<sup>318</sup>

### ***3.2 Collectively Agreed Variations to Employment Terms and Conditions***

As was indicated in the first chapter the actual scope for collective bargaining allowed by the ARD is severely restricted due to the exclusion by the Court of Justice of the possibility of collectively agreed variations of terms and conditions of employment after the transfer for the safeguarding of the employment positions.<sup>319</sup> According to the Court of Justice’s settled case-law<sup>320</sup> the employees could not waive the rights conferred upon them by the Directive and that these rights could not be restricted, even with the consent

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<sup>315</sup> *Berriman v Delabole Slate Limited* [1985] IRLR 305 (CA).

<sup>316</sup> J. McMullen ‘Employment: Out on your own?’ (2010) 160 *New Law Journal* 1665, 1667.

<sup>317</sup> *Nationwide Building Society v Benn* [2010] IRLR 922 (EAT), para 72.

<sup>318</sup> J. McMullen (n 316), 1665, 1667.

<sup>319</sup> Case 324/86 *Daddy's Dance Hall* [1988] ECR I-739; Case 362/89 *Giuseppe d'Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* [1994] ECR I-2435.

<sup>320</sup> Case 324/86 *Daddy's Dance Hall*, *ibid*; Case C-209/91 *Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S* [1993] ECR-5755; Case 362/89 *Giuseppe d'Urso*, *ibid.* and case 132/91 *Katsikas* [1992] ECR I-6577.

of employees' representatives and even if the disadvantages resulting from such waiver are offset by such benefits that, taking the matter as a whole, the workers are not placed in a worse position. In this section, we will analyse this issue further. This analysis of the dimensions of the limited scope for employees' participation in transfers arising from the Court's absolutist position on the exclusion of collectively agreed derogations is important so as to be able to indicate in the following chapter how the proportionality framework may allow for a greater involvement of social partners in transfers' decisions safeguarding a greater reflexive potential for the ARD in this way.

The 1998 amendment of the Directive aimed at granting social partners more extensive participation in transfers occurring during insolvency:

the 1977 Directive was amended in 1998 in such a way as to encourage greater flexibility in its application to insolvency. Article 5(2) (...) now provides for two derogations which may be applied to 'insolvency proceedings (...)'. The first derogation allows the Member State to specify that debts of the transferor which arise from contracts of employment or employment relationships are not transferred to the transferee, as long the employees have protection (in respect of their claims against the transferor) equivalent to that laid down in the Insolvency Directive. The second derogation permits a Member State to make a provision according to which "the transferee, transferor, or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business".<sup>321</sup>

It is noteworthy that the ARD also provides for the possibility of extending the scope for collectively agreed variations to employment terms and conditions in national law not

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<sup>321</sup> S. Deakin and G. Morris *Labour Law* (5th edn, Hart Publishing, Oxford 2009) 506 (footnotes omitted).

only in insolvency cases, but more generally ‘when the transferor is in a situation of serious economic crisis...’<sup>322</sup>

Therefore the prospect of agreed alterations to the employment terms and conditions allows for a greater participation of social partners in transfers taking place in the event of ‘insolvency’ or ‘serious economic crisis’. However, outside this area the restrictive case-law of the Court of Justice in terms of social partners’ participation continues to apply. This is clearly indicated, as discussed in the first chapter, by the Commission's reiteration in a number of documents issued after 1998<sup>323</sup> that the pre-amendment jurisprudence of the Court is still in force.

As was said above, Deakin and Morris criticize the principle formulated in *Daddy's Dance Hall*, according to which ‘any subsequent variation would be ineffective if the reason for it was the transfer itself’<sup>324</sup> for various reasons. They particularly consider that individually or collectively agreed derogations should not be rendered ineffective by ‘the anti-waiver provisions of the Directive and Regulations; because the legislation cannot confer any greater rights upon the employees than they had before, what would have been a valid variation pre-transfer will also be effective post-transfer’.<sup>325</sup> Deakin and Morris suggest that this ‘view has much to commend it in terms of logic and clarity’.<sup>326</sup>

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<sup>322</sup> Article 5 par. 3.

<sup>323</sup> See for example, Commission Services' Working Document ‘Memorandum on rights of workers in cases of transfers of undertakings’ (2004), para 3.8.  
< <http://ec.europa.eu/social/BlobServlet?docId=2444&langId=en> > accessed 07 July 2012

<sup>324</sup> Case 324/86 *Daddy's Dance Hall* (n 319), para 17, as cited in S. Deakin and G. Morris, *Labour Law* (n 330), 208 (footnotes omitted).

<sup>325</sup> S. Deakin and G. Morris, *Labour Law* (n 321) 207-208.

<sup>326</sup> *Ibid.* 208

Additionally, the Court of Justice's position has given rise to the irrational outcome that a dismissal for an ETOR entailing changes in the workforce is permissible under the Directive, while a contractually agreed variation of the employment terms and conditions under the transferee towards the safeguarding of employment relationships is prohibited. This is captured well by McMullen, who argues that

it is odd that those dismissed as surplus to requirements will not be able to claim the automatic unfairness under reg 8 (since a change in the workforce will be entailed) whereas those kept on by the transferee but who suffer action short of dismissal by changes in their contract can.<sup>327</sup>

The Court of Justice may of course be concerned to prevent the abuse or exploitation of employees, an approach reflected in its interpretation of other directives such as the Working Time Directive where the Court very forcefully expressed the need for a 'free' genuine and not coerced agreement on behalf of employees for the derogation from minimum standards of protection provided by this Directive to be valid, because employees are the weaker party to agreement.<sup>328</sup>

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<sup>327</sup> J. McMullen (n 299), 207.

<sup>328</sup> Directive 2003/88/EC Working Time Directive (2003) OJ L299/9; 'That interpretation derives from the objective of Directive 93/104, which seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually have the benefit of, inter alia, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard': Joined Cases C-397/01 to C-403/01 *Pfeiffer v. Deutsches Rotes Kreuz* [2004] ECR I- 8835, para 82; the safeguarding of free and genuine workers' agreement to derogations from the minimum requirements provided by the Working Time Directive (WTD) is very significant, because, as Barnard, Deakin and Hobbs' case study on WTD and Corporate Social Responsibility (CSR) indicated 'the high hopes invested in reflexive law in general and the 'new CSR' in particular as a mode of regulation have not so far been borne out by the experience of the implementation of the WTD. Thanks to the wide derogations contained in the Directive and the parallel UK regulations, the new statutory limits on working time have been easily

However, despite the fact that this judicial policy may be justified by employment protection considerations, this approach could arguably result in the opposite outcome, as it forces the employers to dismiss employees, when an ETOR covers this dismissal, even in cases in which a less intensive measure against employees might be sufficient in the light of this ETOR. This is recognized by the consultation document on TUPE which was issued by the DTI in March 2005.

Deakin and Morris draw attention to the distinction in this document, between ‘purported variations ‘for which the sole or principal reason is the transfer itself or a reason connected with the transfer which is not an ETO reason’, and variations for which there is an ETOR’.<sup>329</sup> The first variation should be considered void, while the latter remains effective according to the consultation document. The reasons why these changes are considered consistent with the ARD, according to the consultation document, are the following:

Without an ETOR exception for variations given the possibility of a fair dismissal based upon an ETOR, there would be a ‘perverse incentive for employers to dismiss employees and then offer to re-engage them (with loss of continuity), or recruit new staff, on different terms and conditions, contrary to the employment protection aims of the legislation’.<sup>330</sup>

Upex and Hardy explain how the TUPE regulations on this issue combine the aim of employee protection with the possibility for agreed variations as follows:

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avoided in many workplaces’, C. Barnard, S. Deakin and R. Hobbs, ‘Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time’ in O. De Shutter and S. Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant, Brussels 2005) 243.

<sup>329</sup> S. Deakin and G. Morris (n 321) 210 (footnotes omitted).

<sup>330</sup> Ibid. 210 (footnotes omitted).

Regulation 4(4) and (5) now expressly protects rights which the employee has against the transferor so that they cannot be varied on a transfer to the transferee. Regulation 4(4) provides that any purported variation of the employee's contract will be void if the sole or principal reason is the transfer itself or a reason connected with the transfer that is not an economic, technical or organizational reason entailing changes in the workforce. Regulation 4(5), however, permits the employer and employee to agree a variation if the sole or principal reason for the variation is a reason connected with the transfer that is an economic, technical or organizational reason entailing changes in the workforce or is a reason unconnected with the transfer.<sup>331</sup>

Indeed, it is worthwhile allowing scope for collectively agreed derogations, as TUPE does, because there are a number of examples illustrating how collective bargaining has safeguarded workers in cases of outsourcing. For instance, in Belgium the works council of OPEL agreed with the employer to proceed with the outsourcing of material handling activity with the obligation not to dismiss any employee.

Subsequently, OPEL created a new company NV-Plant 3, in which 654 employees of OPEL were transferred while keeping their previous working terms and conditions. Additionally, in Italy in 1998 the works councils and the management of twenty two companies that worked on an outsourcing basis with FIAT agreed to harmonise the working conditions of the employees of these companies in relation to a variety of matters, such as apprentices and the increase of night work bonus, in order to avoid dismissals. Finally, in the UK in 1998 the works council of Vauxhall UK, which is a part of the company GM, agreed with the employer to proceed with outsourcing to third parties, both members and non members of GM, so as to avoid dismissals.<sup>332</sup>

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<sup>331</sup> R. Uppex and S. Hardy (n 276) 101-102.

<sup>332</sup> All these three examples were taken from the study of María Caprile, CIREM Foundation and Clara Llorens, QUIT-UAB 'Outsourcing and industrial relations in motor manufacturing' (2000). <<http://www.eurofound.europa.eu/eiro/2000/08/study/tn0008201s.htm>> accessed 07 July 2012.

Despite these positive examples, one should not be oblivious to the challenges presented by the operation of the ARD, which may cause the entire rescue deal of an ailing firm to collapse altogether. Indeed, Armour and Deakin highlight perfectly the danger that severe liabilities arising from the implementation of the ARD may cause the enterprise to collapse. As they note, while referring to the implications of the protection awarded by Directive: ‘in some cases, it can be seen to have negative implications for efficiency, in the sense that it leads to the failure of reorganizations which might otherwise have preserved employment’.<sup>333</sup>

They use two illustrative examples, where TUPE entailed liabilities that prevented the completion of the sale of the ailing enterprises so as to indicate that ‘the two cases discussed offer clear evidence of the existence of inefficiencies when novation of employee entitlements is combined with an attempted sale of assets by an insolvent business’.<sup>334</sup> In *Shipbuilders Ltd.* (fictional name), a shipyard in Northeast England a going-concern sale was not possible, because

the ARD’s effect was that any buyer would inherit the acquired contractual rights of employees against Shipbuilders. Many of the employees had very long service records, and the receivers estimated the total potential liability—if all 2500 employees had to be made redundant—to be in the region of £25 million.<sup>335</sup>

Similarly, in *Clothing Manufacturer Ltd* that processed textiles to make clothing ‘the employees had on average been working for the firm for about 5 years, meaning they had built up significant redundancy entitlements, plus rights to payment in lieu of notice—

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<sup>333</sup> J. Armour, S. Deakin, ‘Insolvency and employment protection: the mixed effects of the Acquired Rights Directive’ (2003) 22 *International Review of Law and Economics*, 443, 444.

<sup>334</sup> *Ibid.* 457

<sup>335</sup> *Ibid.* 457 (footnotes omitted).

giving a maximum possible liability of £750,000'.<sup>336</sup> Hence, as Armour and Deakin observe 'perhaps unsurprisingly, this proved to be a significant stumbling block to a going-concern sale'.<sup>337</sup>

However, it is also important that Armour and Deakin seem to acknowledge that a wider scope for bargaining over the extent of the provided by the ARD rights could reduce the negative effects of the legislation upon the rescue deals:

In principle, this potentially negative effect of the ARD could be avoided if it were possible for the employee representatives to waive all or part of [employees' aggregate redundancy entitlements including the protective award and other claims arising from the restructuring] in order to keep the enterprise going.<sup>338</sup>

This is the reason why this study places particular emphasis on proportionality so as to offer an additional reflexive potential to the ARD in terms of collective self-regulation, as will be explained in the third chapter. Proportionality constitutes an appropriate framework for this bargaining procedure against 'disproportionate' outcomes, as will be indicated in the following chapter. The role performed by proportionality in this context is important, because free bargaining in itself is not the ultimate solution and we also need some guarantees against the dangers of free bargaining, such as the employees' rights that Armour and Deakin regard as 'channeling the bargaining process in favour of an inclusive, stakeholder-orientated outcome'.<sup>339</sup>

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<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid. 454

<sup>339</sup> Ibid. 461

This discussion illustrates that there are challenging interpretative issues characterising the definition of the ETOR under the ARD and the scope for collectively agreed derogations to employment terms and conditions. There have been commendable attempts in the UK to interpret these issues within the wider context of the legislation. However, the lack of useful guidance from the Court of Justice constitutes an obstacle for the national courts of the other Member States.

Unclear jurisprudence, originating from a Court whose words, as Sciarra observes, ‘are spoken loudly and listened to very carefully, even by those who are not direct interlocutors’<sup>340</sup> undermines the supremacy of Community Law. For example, Garde underlines the fact that the uniformity and effectiveness of Community Law can be endangered by the fact that the Court of Justice allows wide scope for interpretation to Member States regarding the right of employees to object to a transfer.<sup>341</sup> This challenge becomes greater due to the character of the ARD, as a partial harmonisation directive.<sup>342</sup> In the following section these underlying uncertainties are more clearly appreciated by a comparative study of UK and Greek law.

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<sup>340</sup> S. Sciarra, ‘Integration Through Courts: Article 177 as a Pre-federal Device’ in S. Sciarra (ed), *Labour Law in the Courts, National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 4 (footnotes omitted).

<sup>341</sup> A. Garde, ‘Partial harmonisation and European social policy: a case study on the Acquired Rights Directive’ (2002-2003) 5 *Cambridge Yearbook of European Legal Studies* 181.

<sup>342</sup> Barnard considers the ARD a typical partial harmonization measure by arguing that ‘from the earliest days of EC social policy Directives have aimed at only partial harmonization. Directive 77/187/EEC on transfers of undertakings and Council Directive 75/129/EEC on collective redundancies provide a good example’, C. Barnard, ‘Flexibility and Social Policy’ in G. De Burca and J. Scott (eds.) *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, Oxford 2000), 206 (footnotes omitted).

#### **4. Material Scope of Application of UK and Greek law**

The comparison of Greek and UK law will indicate the potential diversities with regard to the material scope of the application of the ARD. In this section, we will compare the material scope of application of the Presidential Decree 178/2002 (PD) and Transfer of Undertakings (Protection of Employment) Regulations (TUPE) constituting the national implementation of the ARD in Greek and UK national laws.

The term Presidential Decree in Greek law refers to a rule of law issued by the president of the republic, who is the head of the state, according to particular procedures provided by the Greek constitution (articles 43 and 44 of the constitution) and has the same legal force as any other piece of legislation that is voted by the parliament, according to the Greek constitutional procedure.

##### ***4.1 Material Scope of Greek Law***

The fate of employment relationships in case of change of the employer and particularly the need to protect the working positions from risks arising from change of an employer received legislative attention in Greece at a very early stage.<sup>343</sup> The law regulating termination of contracts for an indefinite duration stipulates that ‘the change of the employer, in every possible way that it may come, it does not affect the application of the current law to the employee benefit’.<sup>344</sup>

The current provisions of the PD constitute a mere translation of the relevant articles of the ARD. However, a noticeable departure is the use of the word

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<sup>343</sup> D. Travlos-Tzanetatos, ‘Transfer of Undertaking and transfer of the workforce to the transferee’ (1997) 56 Labour Law Review 769 [in Greek].

<sup>344</sup> Article 6 § 1 of the statute 2112/1920.

‘establishment’ cumulatively to the terms ‘undertakings’ and ‘parts of undertakings’ deployed by the Directive. This suggests that Greek law expands the scope of application of the ARD in a way being permissible under the more favourable provisions of national laws provided by article 8 of the Directive.

Thus, the first legal issue that arose regarding the material scope of application of the PD concerned the exact meaning of the terms ‘undertakings’, ‘establishment’ and ‘part of undertakings and establishments’. The second requirement for the application of the PD is for the transfer to be ‘contractual or legal’ and the third requirement is for the transferred ‘undertaking’, ‘establishment’ or ‘part of undertaking’ or ‘establishment’ to retain its identity after the transfer.<sup>345</sup>

Starting from the definition of undertaking in Greek labour law, this is not identical to the definition accepted by the economic theory, but has been expanded by the theory and case law of labour law according to its special character.<sup>346</sup> This broad definition is attributed to the effort to remove any obstacles to the protective function of labour law in relation to employees. Indeed, the concept of the undertaking as an entity pursuing solely ‘economic’ purposes would exclude from the protective scope of labour law every legal entity (foundations, associations etc.) that does not pursue ‘economic purposes’ but that still employs workers.<sup>347</sup>

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<sup>345</sup> Article 2 par. 1 of the PD 178/2002.

<sup>346</sup> I. Koukiadis, *Labour Law, Personal Employment Relationships and the law of flexibility* (3dn ed Athens-Thessaloniki, Sakkoulas Publications 2005) 320 [in Greek]; V. Douka, *Transfer of Undertaking and personal employment relationships* (Thessaloniki, Sakkoulas Publications 1997) 50 et seq. [in Greek].

<sup>347</sup> V. Douka, *ibid* 50 et seq. [in Greek].

According to Greek case-law, the term ‘entity’ refers to an organised grouping of persons and staff that has the objective of pursuing an economic activity, which has some duration.<sup>348</sup> The term ‘establishment’, which is not used by the Directive but is found in the PD, is typical in the context of Greek labour law and is different from the term undertaking. ‘Establishment’ is defined as the area of production of both goods and services. According to Karakatsanis, the term establishment refers to the area within which employment relationships are organised and operate.<sup>349</sup>

Thus, the use of the term ‘establishment’ by the PD renders the application of the protective legislation entirely independent from the pursuit of any economic purpose. In this sense, it expands the protection accorded by the Directive. ‘Part of establishment’ is an organized set of technical resources, personnel etc aiming at a specific technical purpose within the general productive aim of the establishment. Lixiouriotis clarifies that the application of the PD to a particular transfer does not require the transfer of the whole business, but it also covers the transfer of an autonomous ‘establishment’ and ‘part of undertaking’ or ‘part of establishment’, as long as they are organizationally independent and they aim at a more specific productive objective.<sup>350</sup>

This is in conformity with case-law<sup>351</sup> according to which ‘part of an establishment’ constitutes an organised subsystem within the establishment and it

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<sup>348</sup> AP 647/2003 available at the Greek forum of case-law NOMOS; Court of Appeal of Thessaloniki (CAT) 2039/2003 (2003) Armenopoulos 1997 [in Greek]

<sup>349</sup> A. Karakatsanis, *The legal order of the establishment: The powers of the Employer* (Library of the University of Athens, Athens 1969) 53 [in Greek].

<sup>350</sup> I. Lixiouriotis, *Labour Law, Personal Employment Relationships* (Athens, Nomiki Vivliothiki 2005), 473 [in Greek].

<sup>351</sup> Court of Appeal of Athens (CAA) 326/1987 (1987) Labor Legislation Bulletin (DEN) 422 [in Greek].

achieves a part of the overall productive aim of the establishment. Thus, part of the establishment does not constitute a separate operation, but it forms part of the overall establishment. However, it should be technically possible to become independent from the establishment without disrupting the operation of the establishment and it may therefore constitute a new independent establishment or be incorporated into another already existing establishment.<sup>352</sup>

Additionally, the number of workers employed in the part of establishment is not decisive, as it may be constituted by one single worker. The degree of importance attached to the aim pursued by the part of establishment is not determinative, as it may aim at an activity which is secondary or ancillary to the primary purpose of the undertaking.<sup>353</sup> As far as the requirement for the existence of a contractual or legal transfer or merger is concerned, the method of the transfer is not crucial for the existence of a transfer under Greek law.<sup>354</sup> In this sense, a transfer under the PD may be the result of divestiture, acquisition, absorption, merger, separation of functions of a business division, donation, inheritance, auction, or be imposed by legislation.

In a transfer by legislation the restructuring is done by the government, and the new undertaking becomes the ‘legal successor’ of the previous undertaking, for example the legislative merger of the flight operation branch of Olympic Airlines with

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<sup>352</sup> G. Leventis, ‘Transfer of Undertaking and consequences for the employment relationships’ (1989) Labor Legislation Bulletin (DEN), 1169 [in Greek].

<sup>353</sup> S. Vlastou, *Personal Employment Relationships* (Athens-Komotini, Sakkoulas Publications 2005), 327 [in Greek].

<sup>354</sup> As Leventis and Papadimitriou observe ‘the means of the transfer, as well as the existence and the legal cause of the transfer are indifferent. The actual fact that the ‘old’ employer loses its capacity as the bearer of the enterprise and the transferee acquires this capacity, even temporarily’ is adequate for the existence of the transfer, G. Leventis and K. Papadimitriou, *Individual Labour Law* (DEN, Athens 2011) 775 [in Greek].

Makedonikes Airlines. This merger was imposed by legislation<sup>355</sup> which provided for the termination of the collective agreements that covered the transferred employees and, instead, the issue of a joint decision by the ministers of labour and transportation and communications, which is indeed a possibility for the determination of employment terms and conditions for employees of public undertakings.

This joint ministerial decision provided for a reduction in salaries compared to the salaries provided by the collective agreement. The Supreme Greek Court ruled that this reduction contravened the PD that provides for the transfer of employment to the transferee on the same terms and conditions and restored the salaries to the amount provided by the collective agreement.<sup>356</sup> In this sense, the Supreme Court verified the application of the Decree with its full rigour to cases of legislative transfer between public undertakings.

The third requirement of Greek law for the existence of a transfer under the Decree is that the transferred ‘undertaking’, ‘establishment’ or ‘part of undertaking or establishment’ must retain its identity after the transfer. Thus, a transfer of undertaking within the meaning of the ARD takes place only in cases when a change of employer occurs, but not in the event of a change of the identity of the business.

According to the settled case-law of the Greek courts, the existence of a transfer under the PD requires the transferee to undertake and continue the business of the transferor, provided that the company continues as an economic entity retaining its

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<sup>355</sup> Article 27 of Law 3185/2003; Leventis and Papadimitriou observe ‘it is notable that the procedure of this transfer was determined by legislation’, *ibid.* 775.

<sup>356</sup> Hellenic Supreme Court of Civil and Penal law (AP) 466/2007 available at the legal forum <<http://lawdb.intrasoftnet.com/index.php>> accessed 07 July 2012.

identity under the same or different name or form.<sup>357</sup> However, apart from this general wording, the case-law has neither provided a more specific and clear definition of the elements of the identity, nor has it clarified the conditions that should be met in order for the identity to be maintained.

Greek legal theory has attempted to define the term ‘preservation of the identity of the economic entity’. It is suggested that the identity is retained when the undertaking is transferred as an organised entity so that the transferee is able to continue the same or similar activity. This is possible when the characteristics of the transferred elements are such that they retain their organisational unity under the transferee and the accomplishment of the aim of the undertaking remains possible even after the transfer.

In this context, the transfer of all the elements of the undertaking is not necessary in order to have a transfer under the meaning of the PD. The essential elements that should be transferred in each particular case may be evaluated solely on a case by case basis. The absence of the organisational unity among the transferred elements, which means that the transfer at issue concerns independent parts and elements of the undertaking (i.e. tools, buildings, machines etc), excludes the existence of a transfer under the PD.

Additionally, based on *Spijkers*, Greek labour lawyers suggest that the conclusion as to whether there is indeed a transfer of an economic entity retaining its identity requires a global assessment of the transaction at issue on the basis of the *Spijkers* criteria

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<sup>357</sup> *AP 842/1983* (1984) 43 Labour Law Review 268; *AP 121/1987* 1987 (46) Labour Law Review 921; *AP 1867/1987* 1988 (48) Labour Law Review 65; *AP 939/1988* 1988 (48) Labour Law Review 793; *AP 229/1990* 1990 (49) Labour Law Review 723; *AP 610/1991* 1991 (51) Labour Law Review 136; *AP 18/1991* 1991 (51) Labour Law Review 125; *AP 891/1992* 1992 (52) Labour Law Review 454; *AP 889/1992* 1992 (52) Labour Law Review 456; Court of Appeal of Athens (CAA) *9846/1988* 1988 (48) Labour Law Review 403; CAA *14612/1988* 1988 (32) Greek Justice 611.

(i.e. the type of business; whether the tangible assets of the business are transferred; the value of its intangible assets; whether the majority of the employees were taken over by the new employer; whether the customers were transferred; the degree of similarity between the activities carried on before and after the transfer; and the time elapsed between the end of the old activity and the beginning of the new one). In this regard, it is also accepted, as the Court of Justice held in *Süzen*,<sup>358</sup> that the type of the undertaking is crucial, as in assets-based activities the transfer of assets is important; whereas for enterprises in the field of provision of services, the non-asset based elements (such as clients, know-how, reputation etc) are of utmost significance for the existence of a transfer under the PD.

The preservation of the identity of the transferred undertaking, establishment or part of undertaking or establishment has proven the most controversial for Greek courts. In this sense, the examination of the case-law indicates lack of consensus as regards this requirement and a strict adherence to this requirement in such a way that makes the application of ARD difficult. Hence there are wide diversities over the exact meaning of transfer among Greek courts that have resulted in different approaches adopted by the Courts of First Instance, the Courts of Appeal and the Hellenic Supreme Court of Civil and Penal Law (AP) with regard to the necessary requirements for the retention of identity.

On the one hand, Greek courts in some cases adopt a broad approach to the requirement for the preservation of identity of the transferred business by ruling that the Decree applies irrespective of whether the transferee indeed continues the same activity

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<sup>358</sup> Case C-13/95 (n 282).

of the economic unit under the same operation and purpose, as long as the transferred elements were such that offers him the possibility to do so.<sup>359</sup> On the other hand, this case-law may not be considered by any means as settled with regard to the meaning of the requirement of the ‘preservation of the identity’ of the transferred business, as the broad meaning given to the requirement of retention of identity by the Supreme court in some cases cannot be verified in other judgments of the same court.

The case *1553/2002*<sup>360</sup> of the Greek Supreme Court (AP) is momentous for the narrow definition given to the requirement of ‘preservation of the identity’ under the Decree. It is worthwhile mentioning the facts of this case and the rulings of the Court in some detail so as to illustrate the extent of the narrow reading given to the term ‘retention of identity’. In this case the Supreme Court considered the question whether the contractual transaction between a consumer association and a company with regard to the operation of a supermarket that was previously operated by the association constituted a transfer within the meaning of decree.

The consumer association concluded a contract with ‘Company D’ that stipulated that: a) The association would evacuate the seven buildings, in which the operation of the supermarkets took place and it would ensure that the owners of these building would conclude new leasing contracts with ‘company D’, which would continue the operation of the supermarkets; b) Company D would re-employ seventy three of the employees of the association, who would initially be dismissed by the association, for the operation of the supermarkets; c) the association would undertake the responsibility to promote the

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<sup>359</sup> *AP 466/2007* July 2012; *AP 1692/2007* available at the legal forum <<http://lawdb.intrasoftnet.com/index.php>> accessed 07 July 2012.

<sup>360</sup> *AP 1553/2002* (2003) 59 Labor Legislation Bulletin (DEN) 10 et seq. [in Greek].

products of Company D and to provide trade marketing services to Company D, while Company D would pay three per cent of its annual profits for the promotion of its products and the trade marketing services to the consumer association; d) Company D may use the title ‘Consumer’ that was previously deployed by the association.

Two months after the conclusion of this contract, Company D indeed reached leasing agreements with the owners of the buildings, proceeded with the essential maintenance works and the purchase of the essential equipment and continued the operation of the super markets by re-employing an important part of the workforce of the association. It is also used the association’s title ‘Consumer’ by adding the words ‘AMI’ to the existing title.

However, the Greek Supreme Court did not consider that the circumstances of this agreement were adequate so as to amount to a transfer under the Decree. The court took the view that the operation of the supermarket in the same premises, the use of the same title that was also written to the plastic bags used by the Company, the transfer of clients, the use of the major part of the workforce of the association and the only two months suspension of the operation of the supermarkets before Company D began its own operation did not entail the preservation of the undertaking identity.

This ruling was justified on the basis that the premises were not transferred by the association to Company D, but new leasing agreements were concluded between the Company and the owners of the buildings. It should be observed that this ruling is inconsistent with the Court of Justice’s ruling in *Abler*<sup>361</sup>, which held that the important

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<sup>361</sup> Case C-340/2001 *Carlito Abler and Others v Sodexo MM Catering Gesellschaft mbH* [2004] ECR I-14023, para 41.

parameter for the existence of a transfer under the ARD is the use of the transferor's assets to become actually available to the transferee, while the ownership status of these premises is indifferent. Secondly, AP held that the use of the same title and the transfer of clients is not connected with the operation of the transferred undertaking, but is a condition of the contract signed between the association and company D. It is noteworthy that the Court of Appeal of Athens (CAA)<sup>362</sup> reached the opposite conclusion for the same case, namely that there was a transfer within the meaning of the Decree and, thus, Company D was obliged to take on the employees of the association.

This conclusion, which was overturned by the judgment *AP 1553/2002*, was based on the assumption that the transferred elements retained their organisational unity after the transfer, and, thus, the identity of the undertaking was preserved. More precisely, the elements of the transaction that indicated the preservation of identity, according to the Court of Appeal, were the transfer of clients, the use of the same title, the use of the same premises and buildings and the transfer of the major part of the workforce. It was exactly these criteria that were not capable, according to the Supreme Court, to give rise to a transfer under the Decree.

Greek courts are even more unwilling to permit the application of the Decree to outsourcing. It is true that Greek courts have not dealt with an adequate number of outsourcing cases, because as Leventis and Papadimitriou argue in the majority of cases 'the involved parties (i.e. transferor enterprise, transferee enterprise and workforce) settled the relevant issue by means of agreement'.<sup>363</sup> However, the case *1799/2007* of the

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<sup>362</sup> CAA 7159/2000 (2003) 59 Labor Legislation Bulletin (DEN) 10 et seq [in Greek].

<sup>363</sup> G. Leventis and K. Papadimitriou (n 354) 783 [in Greek].

Court of Appeal is interesting, because it referred to a legislative transfer of an activity to another contractor.<sup>364</sup>

The bus transport in the municipality of N. Thessaloniki, which was initially provided by the company 'Ktel N. Thessaloniki', was transferred to the organization of urban transportation of Thessaloniki (OASTH) according a joint decision of the ministers of Economy and Infrastructure, Transport and Networks that was issued under the authorisation of the statute 2898/01. The Court ruled that no transfer of undertaking within the meaning of PD 178/202 took place, because the transfer within the meaning of PD 178/2002 requires the transfer of an organised grouping of resources.

The Greek court also ruled the quantity and the way of the transferred elements must safeguard their organisational unity under the transferee. In the light of this observation, the Court concluded that the legislative transfer of an activity to a third party without the simultaneous transfer of tangible and intangible assets does not amount to a transfer under the PD. Finally, the Court took the view that this conclusion is not affected by the existence of a provision in the same legislation that the transferee company is obliged to employ a part of the workforce of the transferor under certain conditions.

It is observed that it was an unjustifiable omission of the Greek court not to refer to the already known *Oy Liikenne AB*<sup>365</sup> case that also concerned bus transport. In this case, the Court of Justice did not exclude the application of the Directive to transfers of bus transport activities, but it highlighted that bus transport is an assets-based activity and

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<sup>364</sup> CAT 1799/2007 (2008) 56 Labor Legislation Bulletin (DEN) 727 et seq. [in Greek].

<sup>365</sup> Case C-172/99 *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen* [2001] ECR I-745.

the lack of transfer of assets in such a case is a crucial factor that should be taken into account.

Even more characteristic of the unwillingness of the Greek courts to apply the decree to outsourcing is a judgment of the Court of First Instance of Athens.<sup>366</sup> In this case, the concerned company decided to transfer the activities of its office in Piraeus regarding the provision of its vessels with fuels to another company and to close its office for the future. The Court did not refer at all to the existing at the date of the dispute Decree and it concluded that there was no transfer of undertaking, but only a commercial cooperation between enterprises on the basis of article 479 of the Greek Civil Code (GCC).<sup>367</sup>

This judgement should be criticized on two grounds. First, there is a general interpretative rule that the more specific rule excludes the more general one as to its application to a particular case. Thus, the existence of the decree, as a more specific piece of legislation excludes the more general rule of article 479 GCC and the Court should have interpreted solely the provisions of the Decree with regard to the case at issue. Secondly and most importantly, the courts of the Member States are required to interpret national law in a manner consistent with European law, according to the interpretative principle that was established by the Court of Justice in *Von Colson*.<sup>368</sup> Hence the

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<sup>366</sup> Case 3404/1991 Court of First Instance of Athens available at the legal forum <<http://lawdb.intrasoftnet.com/index.php>> accessed 07 July 2012.

<sup>367</sup> Article 479 GCC provides that ‘If a property or business is transferred by contract, the acquired is liable to the lender for a sum equal to the value of the assets for the debts belonging to the estate or business. The responsibility of the transferor remains. Alternative agreements between the parties that worsen the position of the creditors are void against them’.

<sup>368</sup> In this case, the Court of Justice explicitly provides that the national courts ‘are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result

absence of any reference to the decree implementing the ARD into the Greek law violated this fundamental interpretative principle of European law.

#### ***4.2 The Material Scope of TUPE***

TUPE 2006 provides for its application in two different cases defined as ‘relevant transfer’: i) transfers of an undertaking, business or part of an undertaking or business and ii) service provision changes.<sup>369</sup> These two cases will be analysed in turn. Regulation 3 (1) (a) provides that: ‘These Regulations apply to a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity’. Thus, TUPE repeats the content of article 1 (1) (a) of the ARD with the omission of the wording of ‘as a result of a legal transfer or merger’.

##### *4.2.1 Transfer of an undertaking, business or part of an undertaking or business*

The initial requirement for the existence of a transfer under TUPE is the existence of change of employer’s identity. British courts emphasise the need for the actual change of responsibility for or management of undertaking in this regard.<sup>370</sup> The second requirement for the application of TUPE is the existence of an economic entity that is

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referred to in the third paragraph of Article 189’, Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1509, as cited in P. Davies, ‘The European Court of Justice, National Courts and the Member States’ in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996), 108-109.

<sup>369</sup> Regulation 3 (1) (a) and (b).

<sup>370</sup> C. Wynn-Evans, *The New Transfer of Undertakings Legislation* (OUP, Oxford 2006) 21; *Charlton v Charlton Thermosystems (Romsey) Ltd* [1995] IRLR 79 (EAT); *Birch v Nuneaton and Bedworth BC* [1995] IRLR 518 (EAT).

transferred, based on the criteria set out by the EAT in *Mr P Cheesman and Others v R Brewer Contracts Ltd*:

- i) ...there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective.
- (ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible...
- (iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower..
- (iv) An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity ...
- (v) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.<sup>371</sup>

This suggests that UK courts concentrate on the criteria arising from Court of Justice case-law to evaluate whether there is an economic entity. However, especially with regard to the requirement that the transfer of an economic entity cannot be constrained to the performance of one specific work contract that was raised by *Rygaard*<sup>372</sup>, the EAT in *Argyll Training Ltd v Sinclair*<sup>373</sup> interpreted this requirement narrowly.

The particularity of *Rygaard* lay in that an employee was laid off after the completion of the task that had been outsourced. The plaintiff's claim was rejected by the Court of Justice, which qualified further the term 'transfer of undertaking' by ruling that

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<sup>371</sup> *Cheesman and Others v R Brewer Contracts Ltd* [2001] IRLR 144 (EAT), para 10.

<sup>372</sup> The lack of a stable economic entity in this case served as an exclusion criterion from the Directive, Case C-48/94 *Ledernes Hovedorganisation, acting for Ole Rygaard v Dansk Arbejdsgiverforening, acting for Strø Mølle Akustik A/S* [1996] ECR I-2745.

<sup>373</sup> *Argyll Training Ltd v Sinclair* [2000] IRLR 630 (EAT), para10.

in order to have a transfer under the meaning of the ARD, it has to be related: ‘...to a stable economic entity whose activity is not limited to performing one specific works contract’. This was the first time that the duration of the outsourced activity emerged as a decisive factor that co-determines the existence of a transfer within the meaning of the ARD in the event of outsourcing.

As far as the response of the British courts to *Rygaard* is concerned, Wynn-Evans observes that the EAT in *Argyll* accepted that single contracts do not ‘necessarily lack the autonomy and stability to come within the scope of transfer legislation’.<sup>374</sup> This narrow reading of the approach adopted by the Court of Justice in *Rygaard* was necessary so as to safeguard the protection of employees in case of single contracts that have both the autonomy and stability required to amount to a TUPE transfer. This may happen, for example, when these single contracts have a particular duration.

The third requirement for the application of TUPE is the retention of the identity of the economic entity after the transfer. British courts apply, in principle, the *Spijkers*<sup>375</sup> criteria to evaluate whether the transferred undertaking retains its identity. However, the British courts are ready to apply a narrow reading of these criteria so as to avoid a situation where the transferee may refuse to take over the transferor’s employees and, in this way, avoid the application of the Directive.

Hence English courts safeguard the application of the Directive in cases in which the sole or principal aim of this decision was the avoidance of the legislation. The British

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<sup>374</sup> C. Wynn-Evans (n 370) 26.

<sup>375</sup> Case 24/85 *Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV* [1986] ECR 1119.

courts apply a narrow reading of *Süzen*<sup>376</sup> as to the requirement that the lack of employees' transfer may exclude the application of the ARD to labour intensive fields. This narrow reading suggests that 'whether or not the majority of employees are taken on by the new employer is only one of all the facts which must be considered by the national court in making an overall assessment of the facts characterising the transaction' and 'single factors must not be considered in isolation'.<sup>377</sup>

Additionally, British courts consider that the willingness of the transferee to employ the workforce of the transferor should be taken into account 'as a factor supporting the retention of the identity of' the undertaking. Thus, the English courts take the view that TUPE applies, in cases where the transferee refuses to take over the transferor's employees with a view to avoiding TUPE. In this way, British courts by applying a narrow reading of *Süzen* in line with the *Spijkers* multi-factorial test and by focusing on the transferee's motive as to its decision not to take on the transferor's employees tried to avoid the legally problematic result of the non application of TUPE on the basis of the transferee's willingness not to employ the transferor's workforce.<sup>378</sup> However, the overall positive impression given by this case-law may be undermined by the additional requirement found in some cases that TUPE should apply only when the avoidance of the TUPE was the 'principal purpose' of the employer and not merely a purpose. This potentially allows the parties to structure their arrangements in such a way

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<sup>376</sup> Case C-13/95 (n 282).

<sup>377</sup> *RCO Support Services Ltd v UNISON Aintree Hospital Trust v UNISON* [2002] EWCA Civ 464 [2002] IRLR 40, paras 26 and 36; *ECM (Vehicle Delivery Services) Ltd v Cox* [1999] IRLR 559 (CA); *ADI v Willer* [2001] EWCA Civ 971 [2001] 3 CMLR 8.

<sup>378</sup> *Ibid.*

that allows them to successfully argue that avoiding TUPE was not the ‘principal purpose’ for the transactions.

Additionally, UK courts recognise the dangers presented by the distinction drawn by the Court of Justice between assets-based and manpower-based activities, because a large number of activities are equally dependent on assets and the workforce and it is difficult to find activities based purely on either assets or manpower. The *Scottish Coal* case<sup>379</sup> constitutes an illustrative attempt of the UK courts to overcome these difficulties.

In the words of Lord Penrose:

We do not read either [*Oy Liikenne* or *Abler*] as laying down an invariable requirement that, in the context of a claimed TUPE transfer, a given business must necessarily be characterised as either “asset-reliant” or “labour-intensive”, as if those were mutually exclusive categories that defined exhaustively the range of possibilities that could arise. The range of intermediate possibilities appears, a priori, to be unlimited. The cases illustrate the position at one end of the spectrum when a transfer must include the production assets of the entity. In intermediate cases, it must always be an issue for the fact-finding tribunal whether, on an appreciation of all relevant facts and circumstances, the undertaking in question can be said to have been transferred for the purposes of the 1981 regulations.<sup>380</sup>

This approach suggests that the transfer test is heavily fact-dependent.<sup>381</sup> This emphasis on all the factors characterizing the transaction arguably constitutes an attempt to overcome the difficulties presented by the strict binary division between ‘assets-based’ and ‘manpower-based’ activities. This interpretation of the distinction between manpower and assets-based activities adopted by the Court of Justice is a commendable

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<sup>379</sup> *Scottish Coal Co Ltd v Crouch Mining Ltd* [2005] CSIH 68 [2006] SC 105.

<sup>380</sup> *Ibid.* para 52, as quoted in R. Uppex and S. Hardy (n 276) 98.

<sup>381</sup> R. Uppex and S. Hardy, *ibid.* 98.

attempt of the British courts to avoid the dangers presented by this false dichotomy and a step in the right direction of enhancing the protection offered by TUPE.

#### 4.2.2 Service Provision Changes

As was argued before, the controversy over the exact material scope of application of the ARD has predominantly affected the field of contracting out of activities. This was acknowledged by the UK and the response was the inclusion of a provision for the application of the TUPE to service provision changes (SPC). Regulation 3 (1) (b) applies

to a service provision change, that is a situation in which (i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”); (ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

Additionally, Article 3 (3) provides that

the conditions referred to in paragraph (1)(b) are that (a) immediately before the service provision change (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.

Thus, the requisite conditions that must be satisfied in order a service provision change to occur under TUPE could be summarised to two positives and two negative ones. i) the activities at issue must be performed by ‘an organised grouping of employees situated in

Great Britain...’; ii) the performance of the activities must be the principal purpose of the organized grouping of employees; iii) the activities at issue must not be connected with a single specific event or task of short-term duration; iv) the activities at issue must not consist wholly or mainly of the supply of goods for the client’s use.

The significance of these provisions is clearly illustrated by DTI, which in its 2005 consultation paper advocated in favour of the adoption of the concept of service provision changes, as ‘in the absence of further Court of Justice’s jurisprudence to resolve this case law conflict, it is a moot point to what extent the Directive and the Regulations already apply to the category of ‘problem cases’ described above’.<sup>382</sup> As McMullen argues

reg 3(1)(b) on service provision change is to be given a broad application without the restrictions applicable to standard transfers under reg 3(1)(a), for it is the intention to put as many service provision changeovers under TUPE as possible. It remains that dialectic on this provision remains poor. This is, however, possibly because reg 3(1)(b) has achieved its aim, that is to say putting most service provision changes within the scope of TUPE 2006.<sup>383</sup>

McMullen reaches a positive conclusion as regards the role of SPC by analyzing its impact upon the necessity of litigation, since the introduction of this concept in 2006:

Indeed, many employment practitioners would agree that, since 2006, transaction costs have been driven down; and litigation has in many cases been made unnecessary. Of course, there will always be unfinished business until each and every legal provision relating to the SPC definition is tested in the courts. But the recent decisions, discussed below, add to our knowledge, are admirably clear, and put the case against the need for further, unsettling, legislative intervention.<sup>384</sup>

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<sup>382</sup> ‘Tupe Draft Revised Regulations: Public Consultation Document Employment Relations Directorate Department of Trade and Industry’ URN 05/926 (London, 15 March 2005) annex D para 1 available at <[http://www.delni.gov.uk/the\\_transfer\\_of\\_undertakings\\_%28protection\\_of\\_employment%29\\_regulations\\_2005\\_%28tupe%29.pdf](http://www.delni.gov.uk/the_transfer_of_undertakings_%28protection_of_employment%29_regulations_2005_%28tupe%29.pdf)> accessed 07 July 2012.

<sup>383</sup> J. McMullen, ‘Employment: Shifting staff’ (2009) vol. 159 *New Law Journal* 1274, 1275-1276.

<sup>384</sup> J. McMullen, ‘Employment: Hard to crack?’ (2012) vol. 162 *New Law Journal* 407, 408.

McMullen’s positive evaluation of the introduction of the concept of service provision changes in TUPE arises from the belief that this was essential in order to avoid the complexities presented by the ECJ case-law in cases of contracting out, which were analysed above. It was exactly in order to avoid this fact-complexity that TUPE is gold-plated in the UK in the field of outsourcing, as it is easier to assume it applies than to dive into the complex facts and get tied up in a state of great legal uncertainty like the courts of other member states do.<sup>385</sup>

The introduction of the concept of service provision changes in TUPE indicates that there is no need for transfer of assets or workforce or the retention of the activities’ identity, as no relevant reference is made to the provision at issue. However, the case law is divided on the topic. On the one hand, as was suggested by Judge Burke QC in the EAT case *Metropolitan Resources Ltd v Churchill Dulwich Ltd – in Liquidation, Martin Cambridge & Others*:<sup>386</sup>

“Service provision change” is a wholly new statutory concept that is not defined in terms of economic entity or of other concepts which have developed under TUPE 1981 or by community decisions upon the Acquired Rights Directive prior to April 2006 when the new Regulations took effect.<sup>387</sup>

However, this approach to service provision change was not adopted by EAT in *OCS Group UK Ltd v Mrs S Jones, Miss N Ciliza*.<sup>388</sup> This case considered whether the

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<sup>385</sup> ‘In Britain, the flexibility of Süzen is perceived to have brought with it inefficiency in operation of the law through uncertainty and high litigation and transaction costs’, J. McMullen, ‘Some Problems and Themes in the Application in Member States of Directive 2001/23/EC on Transfer of Undertakings’ (2007) vol. 23/3 *The International Journal of Comparative Labour Law and Industrial Relations*, 335, 344.

<sup>386</sup> *Metropolitan Resources Ltd v Churchill Dulwich Ltd (In Liquidation)* [2009] ICR 1380 (EAT).

<sup>387</sup> *Ibid.* para 27.

reallocation of catering services from one company to another amounted to a service provision change under TUPE.

The crucial issue in this case, according to the tribunal and the EAT, was that the provided service changed from hot food preparation to the provision of salads and sandwiches. Hence the tribunal concluded that ‘the operation had changed from the provision of a full canteen service where the Claimants were chefs to them becoming sales assistants in a kiosk’<sup>389</sup> and this finding was upheld by the EAT. This interpretation may not be justified by the service provision change requirements that do not require the similarity of pre-transfer and post-transfer activity.

Additionally, the scrutiny on the exact provisions of the contract so as to evaluate whether the performed activity was similar after the transfer that was applied by the courts in this case produces the same problems that TUPE intended to eliminate, namely it makes the application of TUPE far too ambiguous and uncertain and allows scope for the articulation of the relevant employers’ agreement in such a way so as to avoid TUPE.

The first positive requirement for the SPC concept to apply is the performance of the activity by an organized grouping of employees. As far as this condition is concerned, it entails the existence of an identifiable grouping of employees assigned to a particular activity performed for the client.<sup>390</sup> British courts require accordingly that the activity

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<sup>388</sup> *OCS Group UK Ltd v Mrs S Jones, Miss N Ciliza* [2009] UKEAT/0038/09/CEA.

<sup>389</sup> *Ibid.* para 6.

<sup>390</sup> *C. Wynn-Evans* (n 370) 45.

must not be fragmented to such an extent that it was not possible to identify an organized grouping of employees performing this activity.<sup>391</sup>

The second requirement for the existence of service provision change is the performance of the activities at issue to be the principal purpose of the organized grouping of employees for a particular client. As Wynn-Evans explains ‘an established team of staff providing services to a variety of clients or customers will fall outside the scope of the concept of a service provision change’.<sup>392</sup> One should also be cautious that the performance of the activity must be the principal but not the exclusive purpose of the concerned group of employees.

Indeed, it is a difficult evaluation to make whether an activity is the principal purpose of some particular employees.<sup>393</sup> Wynn-Evans suggests that ‘percentage tests as to the amount of time spent by a group of employees on a relevant client’s business or the revenue which is attributable to a client’ might be helpful, but not conclusive, indicators as to the fulfillment of this condition.<sup>394</sup> British courts have not so far dealt with this aspect of the service provision change so it is not clear how important it is in practice.

The third requirement, namely that the performed activities should not be connected with a single specific event or task of short-term duration has not concerned British courts so far either. It could be observed that the inclusion of the additional dimension of short-term duration together with the single event contracts was crucial for TUPE to apply to service provision changes of large projects on the basis of one-off

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<sup>391</sup> *Clearsprings Management Ltd v Ankers* [2009] UKEAT/0054/08/LA.

<sup>392</sup> C. Wynn-Evans (n 370) 47.

<sup>393</sup> *Ibid.* 47

<sup>394</sup> *Ibid.* 47

contracts. In this sense, it is important that the courts should interpret the terms ‘single specific event or task’ and ‘short-term duration’ accumulatively and not alternatively. However, even this interpretation, may not eliminate the danger identified by Wynn-Evans of structuring of ‘the parties’ commercial arrangements by way of ostensibly one-off contracts to avoid regulation 3(1)(b)’.<sup>395</sup>

Finally, the requirement that the activities constituting the subject of service provision change must not consist wholly or mainly of the supply of goods for the client’s use has not yet been considered by British courts. The puzzling point with regard to this requirement is the way in which to evaluate whether a particular contract aims at the supply of goods ‘wholly or mainly’ for the client’s use. Percentage tests of the various activities performed in the context of the contract may be helpful in this regard.

An identifiable danger of this requirement is the potential articulation of the contract in such a way as to suggest that it aims at supplying goods ‘wholly or mainly’ for the client’s use, even in cases in which in reality the contract constitutes a broader service-based relationship not being caught by the exemption. In this context, the courts should not be restrained by the provisions of the contract so as to assess the actual content of the provided services, but, rather, to focus on the activities actually performed on the basis of this contract.

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<sup>395</sup> Ibid. 49

### *4.3 Comparison of the material scope of application of Greek and UK laws*

Despite the fact that the automatic transfer of employment relationships in the event of a transfer of undertakings has a long history in Greek law, the Greek courts have focused on the preservation of identity of the transferred entity and the retention of the organizational unity of the transferred elements and decided against the application of the PD 178/2002 implementing the ARD to the majority of cases that arrived before them. In other words, the strict approach adopted by Greek courts with regard to the relevant requirements has resulted in the refusal of the relevant protection in many cases.

Especially in the specific context of outsourcing, despite the fact that we do not have an adequate number of cases so as to reach a safe conclusion, it seems that the approach adopted by the Greek courts leads to the exclusion of contracting out from the protective scope of PD 178/2002. This may be justified, because Greek courts had developed a clear jurisprudence on transfers long before the introduction of the ARD.<sup>396</sup> In this sense, in a similar way as in France, Italy and Germany, Greek courts did not easily accept the Court of Justice's rulings to the extent that it contravened their previous rulings.<sup>397</sup>

Conversely, English courts, despite the fact that the automatic transfer of employment contracts following the transfer of business is a relatively new concept for

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<sup>396</sup> 'Greek courts had developed long before the introduction of the ARD the general rule that 'the person, who succeeds or substitutes the employer or continues the operation of the enterprise (i.e. in whatever legal method this takes place e.g. transfer, leasing, transfer due to death), takes the legal responsibility of the employment relationships- as they were at the time of succession- and the consent of the employees, the transferor and the transferee were not required', G. Leventis and K. Papadimitriou (n 384) 775 [in Greek].

<sup>397</sup> See Davies, who argues that 'By contrast with the French, Italian and German courts the UK courts accepted the Schmidt decision with equanimity, and even welcomed it as providing a level playing field for contracting', P. Davies (n 270) 139-140.

English law, attempted to apply TUPE broadly through innovative interpretative methods.

As Davies observes:

at first sight this response may seem strange, since the pre-Directive position of the law in the UK was based on freedom of contract, so that the British judiciary might have been expected to be unhappy with a decision which maximised the level of the Directive's interference with that doctrine. However, that argument assumes a high level of attachment on the part of the British courts to freedom of contract in the area of social policy. In fact, since the domestic courts had no reason to question the British government's decision to override freedom of contract by agreeing to Directive 77/187 within the Community's legislative process, what appears to have happened is that the domestic courts felt they could follow the ECJ's guidance on the scope of a transfer without any sense that the ECJ was stamping on established domestic understandings about the transfer principle.<sup>398</sup>

First, English courts highlighted the multi-factorial character of *Spijkers* test in order to avoid the blurred distinction between assets-based and manpower-based activities. Secondly, they adopted a narrow reading of *Rygaard*<sup>399</sup> as to the non application of the ARD to single work contracts in order to avoid situations, in which employers deploy the technique of subsequent single contracts as an avoidance mechanism of TUPE.

Thirdly, English courts recognised the circular character of the test applied to decide whether TUPE applies to manpower-based activities arising from the transferee's refusal to voluntarily take over the transferor's employees so as to avoid TUPE. Thus, they were prepared to evaluate the transferee's intention with regard to its choice not to take over transferor's employees so as to avoid this danger. In this sense, in cases in

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<sup>398</sup> P. Davies, *ibid.* 139-140.

<sup>399</sup> Case C-48/94 *Ledernes Hovedorganisation, acting for Ole Rygaard v Dansk Arbejdsgiverforening, acting for Strø Mølle Akustik A/S* [1996] ECR I-2745.

which the intention behind the transferee's choice not to take over the transferor's workforce was to avoid TUPE, the courts ruled in favour of TUPE application.

However, even under this sophisticated judicial interpretation of TUPE and the relevant attempts to by-pass employer's avoidance mechanisms of legislation, the ambiguity of the *Spijkers* criteria continues to obscure the application and operation of TUPE. For example, it is difficult to ascertain the subjective transferee's intentions, when it decides not to take over the transferor's employees, especially because, according to some judgements, it is not sufficient for the avoidance of TUPE to be one of the transferee's intentions, but it is required to be its principal intention. Finally, in the context of UK law the majority of cases of outsourcing are covered by TUPE, due to the explicit reference to the concept of 'service provision change'.

## **5. Personal Scope of Application**

### ***5.1 Personal Scope of Greek Law***

Article 2 par. 1 (d) of the ARD provides that 'for the purposes of this Directive employee shall mean any person who, in the Member State concerned, is protected as an employee under national employment law'. In this regard, article 3 par. 1 (d) of the PD 178/2002 stipulates that 'employee is deemed every natural person that is affiliated with an undertaking on the basis of an employment relationship'.

The use of the phrase 'employment relationship', instead of the term 'employment contract' in the context of article 3 par. 1 (d) PD 178/2002 is very crucial, because it extends the prescribed protection offered by the PD beyond the context of the contract of

employment. In this sense, the absence of the strict contractual analysis of employment relationships constitutes a vital step towards the substantial protection of employees involved in transfers.

Thus, the protection of the PD is accorded even in cases where the contract of employment is invalid, on the basis of the existence of the employment relationship, for which the provision of employees' services at the employer's disposal is adequate.<sup>400</sup> The Greek Supreme Court has ruled accordingly that in cases of invalid contracts of employment, as long as the employee provided his services, the protection against dismissal is applicable on the basis of the employment relationship.<sup>401</sup>

In Greek law the determination of employee is strongly connected with the theory of employee's subordination and more precisely the personal subordination of employee. According to this theory, the factor which makes the employee dependent upon the employer is that this person puts his effort into the service of someone else. According to Greek legal theory, the classical subordinated employment relationship is characterised by a supplier of work who has particular commitments with regard to the time and place of performance, resulting either from the terms of the individual employment contract, or from the employers' managerial prerogative.<sup>402</sup>

Secondly, the supplier of work has the obligation to follow instructions on how to perform the work, subject to verification of compliance with them. Thirdly, the work is, in principle, performed in an organized company, which is established and managed by a

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<sup>400</sup> A. Karakatsanis, S. Gardikas, *Individual Labour Law* (5th ed Athens-Komotini, Sakkoulas Publications 1995), 122-123 [in Greek].

<sup>401</sup> *AP 192/1962* (1962) 49 *Labour Law Review*, 453 [in Greek]; *AP 66/1971* (1971) 30 *Labour Law Review* 432.

<sup>402</sup> I. Koukiadis (n 346) 182 et seq.

third party. Finally, the employee has the obligation to perform his work in person. However, this subordination theory is not clearly defined, nor is there any provision to specify its content. Thus, the role of the courts was crucial as to the determination of its exact meaning. According to the stereotypical expression repeated by the Greek courts<sup>403</sup> there is a contract of employment when the employer determines bindingly and in accordance with the contractual or statutory provisions, the location, time, mode and extent of work that will be provided by the employee, who is required to follow the employer's instructions.<sup>404</sup>

## ***5.2 Personal Scope of TUPE***

The protection of TUPE only applies to employees and according to Regulation 2 (1)

“employee” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly.

Additionally, regulation 4 (3) provides that

Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1) (...).

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<sup>403</sup> Article 648 GCC provides that ‘By the employment contract the worker has the obligation to provide for a fixed or indefinite period his work and the employer has the obligation to pay the agreed salary. A contract of employment also exists when the salary is calculated per unit of the work, provided that the worker is engaged or employed for a specified or indefinite period’.

<sup>404</sup> AP 177/99 (40) Greek Justice 1055; CAA 7633/01 (58) Labor Legislation Bulletin (DEN), 88.

Thus, the crucial interpretative issues that arise with regard to the personal scope of TUPE application are: the definition of employee under UK employment law, the requirement to be employed by the transferor and the requirement of assignment to the transferor's enterprise.

As far as the essential characteristics of employees are concerned, UK courts require mutuality of obligations and the bilateral character of the contract of employment.<sup>405</sup> As Barnard explains 'in English law, an "employee" means an individual who has entered into or works under a "contract of employment" and a contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.<sup>406</sup>

However, there are certain inconsistencies with labour law created by this strictly contractual understanding of the employment relationship. It reinforces the problems that the employment law tries to solve, because it reinforces the employer's prerogative created by the inequality of bargaining power between the employer and employee.<sup>407</sup> One overriding objective of labour law is to eliminate this inequality through collective bargaining and social protection of employees. As Bogg aptly observes

Where freedom of contract remains the dominant ideology, and where individuals supplying their labour remain in a position of unequal bargaining strength vis-à-vis employers, the manipulation of contractual terms to exclude the operation of

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<sup>405</sup> For more details on these requirements which fall outside the scope of the current thesis, see M. Freedland, *The personal Employment Contract* (OUP 2006, Oxford), 36 et seq.

<sup>406</sup> C. Barnard (n 279) 624 (footnotes omitted.)

<sup>407</sup> 'Inequality of bargaining power between worker and employer is cemented by the common law presumption that a contract is binding because freely entered into. The result is to give binding effect to employer prerogative', S. Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 ILJ 299, 306 (footnotes omitted).

statutory rights will be difficult to prevent. Indeed, it is endemic to the contractual frame of reference.<sup>408</sup>

In this regard, Freedland criticizes the Regulations which confine themselves to employees under contracts of employment and exclude the application of TUPE Regulations to semi-dependent workers.<sup>409</sup> This is the reason why labour lawyers suggest that the employment relationship should be interpreted in a more flexible way and not in strict contractual terms. In this regard, reference should be made to some cases from the UK jurisprudence that may indicate a relaxation of the requirement of existence of mutuality of obligation in the context of the contract of employment in order that someone is awarded the protection of labour law.

The significant implication of *Cornwall CC v Prater*, is captured well by Davies:

The fact that there was no mutuality of obligations between contracts was irrelevant. All that Mrs Prater had to show was that she was an employee during each individual contract to teach a pupil. Section 212(1) could then be used to link each of these separate contracts of employment together into a continuous employment relationship.<sup>410</sup>

The significance of this decision is that it represents a useful recognition of the fact that it is not always appropriate to import contractual concepts into the construction of statutory provisions.<sup>411</sup> However, it does not go that far as to suggest that the protection of labour law should be awarded even in the case of an invalid employment contract by rendering

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<sup>408</sup> A Bogg, 'Sham self-employment in the Court of Appeal' (2010) 126 Law Quarterly Review [Case Note] 166, 169.

<sup>409</sup> M. Freedland (n 405) 515.

<sup>410</sup> *Cornwall CC v Prater* [2006] EWCA Civ 102 [2006] IRLR 362 [40]; A. Davies, 'Casual Workers and Continuity of Employment' (2006) 35 ILJ 196, 197.

<sup>411</sup> S. Anderman, 'The Interpretation of Protective Statutes and Contracts of Employment' (2000) 29 ILJ 223, 223.

the concept of employment relationship the cornerstone of employment protection. In other words, as Davies observes:

Although Prater is a positive decision, it is important not to exaggerate its significance. Casual workers continue to face a number of problems. First, the section 212 approach only works where the individual contracts or work-wage bargains can be classified as contracts of employment.<sup>412</sup>

This fact is also highlighted by Freedland, who suggests that the protection afforded by employment legislation would require the re-conceptualisation of employment law protection around a new notion of the ‘personal work contract’, broader than the notion of ‘contract of employment’. The provisions and regulatory regimes that apply to personal work relationships should in various ways, according to Freedland and Kountouris, depart from the definitional parameters of the ‘contract of employment’ notion.<sup>413</sup>

A step towards the direction of approaching the employment relationship by interpreting employment contract in a less strictly contractual manner can be found in *Curr*, where the Court of Appeal held that: ‘the arrangement need not be contractual but does require a “meeting of minds” in the form of some kind of agreement between the parties’.<sup>414</sup> This flexibilisation of the requirement of approaching employment

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<sup>412</sup> A. Davies (n 410) 196, 199.

<sup>413</sup> Memorandum by Professor M R Freedland FBA and Dr N Kountouris ‘Flexibility of the Labour Market’ in House of Lords, *European Union Committee Modernising European Union labour law: has the UK anything to gain?* (London 2007), 156, 158.  
< <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/120/120we18.htm>> accessed 07 July 2012.

<sup>414</sup> *Curr v Marks & Spencer* [2002] EWCA Civ 1852 [2003] ICR 443, as cited in A. Davies (n 410) 196, 200.

relationships in strict contractual terms is necessary in order to avoid the following danger.

It is possible for employers to articulate their agreements in such a way so as to exclude from the employment protection vulnerable parts of workforce. Unfortunately, the jurisprudence of British court offers many instances where the abovementioned techniques were used by employers so as to avoid the application of protective labour law legislation. Especially, as regards the requirement of mutuality of obligations, this argument has been accepted in a series of cases, such as *Hellyer Brothers Ltd v McLeod*<sup>415</sup>, *Clark v. Oxfordshire HA*.<sup>416</sup>

In these cases English courts took the view that the fact that the worker did not have to accept work in conjunction with the fact that the employer did not have to offer work indicated the lack of mutuality of obligations. Consequently, the courts did not consider the abovementioned contracts as contracts of employment with the necessary continuity of employment, which resulted in the refusal of employees' protection during the time in between contracts. As a result of these rulings, workers in some cases were refused redundancy compensation despite having worked on a series of separate contracts for up to 25 years.<sup>417</sup>

Thus, it is important that English courts adopt a flexible interpretation of the employment contracts. In the specific context of TUPE, the inclusion of the words 'or otherwise' after the phrase 'who works for another person whether under a contract of

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<sup>415</sup> *Hellyer Brothers Ltd v McLeod* [1987] IRLR 232 (CA).

<sup>416</sup> *Clark v Oxfordshire HA* [1998] IRLR 125 (CA).

<sup>417</sup> S. Fredman (n 407), 313.

service or apprenticeship or' may permit the expansion of the protection outside the scope of employment contract by rendering the existence of an employment relationship adequate for the protection accorded by TUPE. This would be consistent with the drafting of the ARD, according to which the award of the Directive's protection is offered on the basis of the existence of an employment relationship, even in the absence of a contract of employment.<sup>418</sup>

However, one may not draw safe conclusions in this direction, as this possibility has not so far been explored by British courts. The significant potential of the employment relationship in the determination of the personal scope of labour law is highlighted by Bogg:

reference to "employment relationship" shares much in common with Professor Hepple's seminal contribution to this perennial problem of labour law's personal scope, where he argued powerfully for the need to move beyond contract and to focus on the substantive reality of the relationship (...). This was linked to a purposive approach to determining personal scope of statutory employment rights.<sup>419</sup>

As regards the requirement for employees to be employed by the transferor so as to qualify for TUPE protection, this sets difficult issues, as Wynn-Evans observes, 'in circumstances where the transferor of the business (...) is not the company or other legal person which actually employs the employees who work in the relevant business or on the relevant activities'. This issue may arise in the case of group of undertakings, in

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<sup>418</sup> Article 3 par. 1 of the ARD provides that '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'.

<sup>419</sup> A. Bogg (n 408) 166, 171.

which ‘the relevant employees may be employed by a central management services company and will therefore not formally be employed by the transferor’.<sup>420</sup>

Wynn-Evans argues that the intention of ‘the legislation in terms of its employment protection purposes’ would hardly be for these employees to fall outside the scope of application of TUPE, as may be suggested by a literal interpretation of this requirement. This issue is captured well by the EAT in *Sunley Turriff Holdings Ltd v Thomson*.<sup>421</sup> In this case, the EAT ignored the formal legal position that Mr Thomson's contract was with the parent company and not the subsidiary which was transferred and ruled that the employee was actually employed in the latter undertaking for the purposes of TUPE, because he was substantially involved in the day to day business of the subsidiary before the transfer took place.

The outcome of this case should be welcomed, because the EAT simply focused on the part of the undertaking for which the employee worked in order to conclude that a TUPE transfer took place. A similar view is taken by Collins, who observes that this approach requires the ‘tribunal to ask in a practical way if the employee was actually working for that part of the business which was transferred, whether or not his formal contract of employment was with the formal transferor or some other legal entity in the business group’.<sup>422</sup>

The third requirement of regulation 4(1) is for the concerned employee to be ‘assigned to the organised grouping of resources that is subject to the relevant transfer’.

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<sup>420</sup> C. Wynn-Evans (n 370) 61.

<sup>421</sup> *Sunley Turriff Holdings Ltd v Thomson* [1995] IRLR 184 (EAT).

<sup>422</sup> H. Collins, ‘Employment Rights in Connection with Transfers of Parts of Groups of Companies’ (1996) vol. 25 ILJ 55.

The requirement of assignment is not found in the provisions of the ARD, but it was established by the Court of Justice in *Botzen* case.<sup>423</sup> The Court held in this case that it is sufficient to focus on ‘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 establish to which part of the undertaking or business the employee was assigned.<sup>424</sup>

In this vein, the Court did not accept the argument of the Dutch company that the satisfaction of the assignment condition further requires the concerned employees to work ‘full-time or substantially full-time in the transferred part of the undertaking’.<sup>425</sup> Thus, the Court of Justice stated clearly that the assignment of an employee to a particular part of undertaking is sufficient for the ARD to apply, but it did not offer any guidance as to the applicable criteria that will indicate whether the employee is indeed assigned to this part.

In the context of English law, the EAT in *Duncan Web Offset (Maidstone) Ltd v Cooper*<sup>426</sup> offered a variety of factors that should be taken into account to evaluate whether an employee is assigned to a particular part of undertaking:

the amount of time spent on one part of the business or the other; the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business.<sup>427</sup>

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<sup>423</sup> Case 186/83 *Arie Botzen and others v Rotterdamsche Droogdok Maatschappij BV* [1983] ECR 519.

<sup>424</sup> *Ibid.* para 15.

<sup>425</sup> *Ibid.* para 13.

<sup>426</sup> *Duncan Web Offset (Maidstone) Ltd v Cooper* [1995] IRLR 633 (EAT).

<sup>427</sup> *Ibid.* para 15.

However, the EAT explained that this is not ‘an exhaustive list’ and that some other ‘matters may well fall for consideration by an Industrial Tribunal which is seeking to determine to which part of his employers' business the employee had been assigned’.<sup>428</sup>

There is a rich case-law with regard to the assignment requirement,<sup>429</sup> in which basically UK courts apply the criteria set by the EAT in *Duncan Web Offset (Maidstone) Ltd v Cooper*. A worthwhile mentioning case is *Buchanan-Smith v Schleicher & Co. International Ltd*.<sup>430</sup> In this case, the EAT expressed the view that *Botzen* does not restrict the fulfilment of the assignment condition solely to employees working ‘exclusively’ in one undertaking.

On the basis of this finding, the EAT concluding by allowing the appeal that

an employee may in fact be regarded as assigned to an employer's business, even though that employee spends time looking after another business, even the business of someone other than the employer. In the case of one employer carrying on two undertakings, an employee *may* be assigned to one of the undertakings, even though engaged in the activities of the other undertaking.<sup>431</sup>

This broad reading of the *Botzen* principle is important in safeguarding employees’ rights, even in cases where they provide their services to multiple undertakings, as long as they work predominantly for the transferred business.

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<sup>428</sup> Ibid. para 15.

<sup>429</sup> *Anderson v Kluwer Publishing Limited* COIT 15068/85, as cited in C. Wynn-Evans (n 400) 63; *Cliff Williams v Advance Cleaning Services Limited, Engineering and Railway Solutions Limited (In Liquidation)* [2005] UKEAT/0838/04/DA.

<sup>430</sup> *Buchanan-Smith v Schleicher & Co. International Ltd* [1996] IRLR 547 (EAT).

<sup>431</sup> Ibid. 622-623.

This is a commendable understanding of the assignment requirement, as very often employees principally assigned to a part of undertaking offer services, under the employer's directions, to other parts of undertakings as well. In these cases, the refusal of employees' protection under TUPE would run counter to the protective aim of the legislation.

### ***5.3 Comparing the personal scope of Greek and UK laws***

The definition of the term employee in Greek law does not require the existence of a contract of employment, but the protection of employment law is conferred upon the existence of a mere employment relationship. Thus, employees are protected within the scope of application of the ARD, even in the absence of an employment contact, as long as they provide personally their services to an employer under a certain degree of subordination, a situation which in effect amounts to the creation of an employment relationship.

Conversely, in English law, the existence of a contract of employment is required for the protection of TUPE to be applicable. This requirement may mitigate, to a certain extent, the effect of the additional readiness of UK courts to apply the ARD compared to the Greek courts, because the protection offered by TUPE addresses a smaller number of recipients than the protection accorded by the Decree. In this sense, the flexibilisation of the requirement of approaching employment relationships in strict contractual terms is required in order that the protective aim of TUPE is fulfilled.

The award of ARD's protection on the basis of the existence of an employment relationship, even in the absence of a formal contract of employment, and the phrase

‘who works for another person whether under a contract of service or apprenticeship or *otherwise*’ (emphasis added) could justify the expansion of the prescribed protection outside the scope of employment contract by rendering the existence of an employment relationship adequate.

## **6. Available Remedies under Greek and UK laws**

### ***6.1 Available Remedies under Greek law***

On the basis of the PD, it is possible to distinguish two different cases of transfer-related dismissals.<sup>432</sup> First, the PD provides that transfer related dismissals without economic, technical or organisational reasons (ETOR) entailing changes in the workforce are automatically unfair and there is no need to evaluate whether the general conditions rendering a dismissal unfair under the Greek law are satisfied. Secondly, the PD provides that transfer-related dismissals justified by an ETOR are not automatically unfair; however, they might still turn out to be unfair on the basis of the general law on unfair dismissals.

In the context of Greek labour law, the termination of the employment relationship by the employer is valid when it takes place in writing and the employee receives the appropriate compensation.<sup>433</sup> However, even if these formal requirements have been met, dismissal may be declared void by the court if the employer exercised his

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<sup>432</sup> Article 5 of the PD 178/2002.

<sup>433</sup> Article 5 par. 3 of the statute 3198/55.

right abusively, namely, where the exercise of this right exceeds the boundaries of good faith, morality and the social or economic purpose of the right.<sup>434</sup>

Examples of abusive exercise of the right to terminate employment include the refusal of the employee to accept an illegal demand of the employer.<sup>435</sup> The invalid character of such a termination means that the employment relationship is considered as never having been terminated. In practical terms, the invalidity of the termination renders the employer liable for the payment of salary in arrears in favour of the employee for the duration of this pending state and until the contract is terminated in a lawful manner.<sup>436</sup>

Additionally, where the dismissal took place in circumstances that constitute an insult to the employee's personality, the employee may claim compensation for moral damage.<sup>437</sup> Finally, if the termination is declared void by a court's decision, the judgement may also oblige the employer to re-employ the employee.<sup>438</sup> However, this is a very rare order that has not so far taken place in the field of transfer-related dismissals. It is only with regard to dismissals taking place in circumstances insulting the employee's personality that an order for re-employment has been issued by the Greek courts.<sup>439</sup>

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<sup>434</sup> Article 281 GCC.

<sup>435</sup> AP 141/2010 and AP 1748/2008, available at <[http://enelerg.gr/index.php?option=com\\_content&task=view&id=287&Itemid=67](http://enelerg.gr/index.php?option=com_content&task=view&id=287&Itemid=67)> accessed 07 July 2012

<sup>436</sup> Article 656 par. A GCC; I. Koukiadis (n 346) 733-734 [in Greek].

<sup>437</sup> Articles 57 GCC on the right to personality and 932 GCC; CAA 2815/1990 (1990) 49 Labour Law Review 646 [in Greek].

<sup>438</sup> A. Karakatsanis, S. Gardikas (n 400) 568 [in Greek].

<sup>439</sup> AP 820/1983 (1984) 43 Labour Law Review 99 [in Greek].

A very significant legal issue with regard to the remedies for transfer-related dismissal arises from a recent law<sup>440</sup> that was adopted in the context of tackling the financial crisis. One of the basic principles of dismissal in Greek labour law, which was the immediate payment of the full amount of the corresponding compensation so as to allow the employee to have the necessary resources until he is able to find a new job, is now repealed.<sup>441</sup>

It is notable that, until 2010, the payment of partial compensation could not be less than the equivalent of six months' salary, whereas the payment of less than this amount entailed the nullity of the dismissal, which according to the case-law could not be cured even if the compensation was paid later by the employer;<sup>442</sup> unless, this was accepted by the employee.<sup>443</sup> Under the new law, the amount of compensation that the employer is obliged to pay at the time of the dismissal is severely restricted to the amount of the salary of two months and the rest of compensation should be paid in installments once every two months.<sup>444</sup>

Practically, it is highly unlikely that the employee will receive any further installments of the compensation and his protection has therefore been significantly reduced, as the employee may not claim that the dismissal was invalid on grounds of part-payment of compensation limited to the salary of two months. In this regard, the employees have lost the very significant right to claim the invalidity of the dismissal for

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<sup>440</sup> Law 3863/2010; G. Leventis and K. Papadimitriou (n 354) 775 [in Greek].

<sup>441</sup> Article 74 par. 3 of Law 3863/2010.

<sup>442</sup> Article 5 § 3 of Law 3198/55; I. Koukiadis (n 346) 733-734 [in Greek].

<sup>443</sup> AP 1290/2001, as cited in (2003) *Employment Law Review*, 13 [in Greek].

<sup>444</sup> Article 74 par. 3 of Law 3863/2010; G. Leventis and K. Papadimitriou (n 354) 841-842 [in Greek].

the non-payment of compensation that in the past put significant pressure on employers to pay the full amount of compensation in time.

## **6.2 Available Remedies under UK law**

The remedy provided in where the employer fails to meet the obligations arising from TUPE is an unfair dismissal claim. The complicated drafting of Regulation 7 in reality recognises three different cases, as these are categorised by Wynn-Evans.<sup>445</sup>

- 'Dismissals for which the reason is a relevant transfer or which are connected with a relevant transfer' without an ETOR reason justifying them are automatically unfair;
- Transfer related dismissals being justified by an ETOR reason which are 'potentially unfair subject to the normal test of unfair dismissal pursuant to ERA 1996';
- Dismissals that are 'not in any way connected with a transfer', even if they 'contemporaneous with a relevant transfer' will 'assessed under the usual unfair dismissal principles rather than regulation 7'.

Chapter II of Part X of Employment Rights Act 1996 provides the remedies for unfair dismissal. These remedies according to sections 112 et seq. are: an order for reinstatement (in accordance with section 114), an order for re-engagement (in accordance with section 115) and compensation (sections 117 et seq.). The leading authority dealing with the available remedies for breach of TUPE rights is *British Fuels v Baxendale and Wilson v St Helens*.<sup>446</sup>

One of the several issues that arose in this case was whether the only remedy for dismissals taking place in violation of the TUPE regulations should be compensation, or

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<sup>445</sup> C. Wynn-Evans (n 370) 115-116.

<sup>446</sup> *British Fuels Ltd Appellant v Baxendale and Another Respondents-Wilson and Others Appellants v St. Helens Borough Council Respondents* [1999] 2 AC 52 (HL).

whether these dismissals should be annulled. One of the preliminary points made by Lord Slynn was that:

The United Kingdom has chosen to implement the Directive by giving employees dismissed in connection with a transfer the remedies available under its unfair dismissal legislation, i.e. the right to bring proceedings in an industrial tribunal for reinstatement, re-engagement or compensation. It has not chosen to provide that such dismissals should be a nullity.<sup>447</sup>

This interpretation does not contradict the partial harmonisation aims of the Directive, as the Member States remain free to adopt the appropriate remedies consistently with the effectiveness of Community Law. This is clear in the *Commission v UK*<sup>448</sup>, in which the Court of Justice stated that

Where a Community directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.<sup>449</sup>

The issue of the available remedies under national law in the event of a violation of the ARD was considered by the Court of Justice in the *Juuri* Case.<sup>450</sup> In this case, the Court

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<sup>447</sup> Ibid. Page 56.

<sup>448</sup> Case C-382/92 (n 271).

<sup>449</sup> Ibid. para 55.

<sup>450</sup> Case C-396/07 *Mirja Juuri v Fazer Amica Oy* [2008] ECR I-8883.

considered whether Article 4(2) of Directive 2001/23<sup>451</sup> requires Member States to guarantee employees the right to financial compensation identical to the compensation provided by the national law for the unlawful termination of the employment contract or the employment relationship.

The Court of Justice at first clarified that the Directive is a measure of partial harmonization aiming to extend ‘the protection guaranteed to employees independently under the laws of the individual Member States to cover the case where an undertaking is transferred’ and it does not intend ‘to establish a uniform level of protection throughout the Community on the basis of common criteria’.<sup>452</sup> It went on to observe that

although the employee’s termination of his contract of employment must be treated as if it were due to the action of his employer, the legal consequences involved, such as severance payment or compensation, must be prescribed by the laws, regulations and administrative provisions of the Member States.<sup>453</sup>

Furthermore, the Court of Justice reiterated that despite the freedom to choose the appropriate legal tools, each member state remains fully responsible for adopting ‘all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it pursues’.<sup>454</sup>

The Court concluded that the Directive does not oblige member states to guarantee any particular compensation to employees who elect not to transfer due to

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<sup>451</sup> Article 4 par. 2 provides that: ‘If the contract of employment or the employment relationship is terminated because the transfer 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’.

<sup>452</sup> Case C-396/07 (n 450), para 23.

<sup>453</sup> *Ibid.* para 24.

<sup>454</sup> *Ibid.* para 26.

substantial changes to working conditions or to treat those employees in the same way as those unfairly dismissed.<sup>455</sup> However, the national courts are obliged to ensure, at the very least, that

the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.<sup>456</sup>

Thus, in the light of the Court's ruling in *Juuri*, the provision of compensation is, in principle, an appropriate remedy for transfer related dismissals under TUPE. However, an additional condition required by the Court of Justice in *Commission v UK*<sup>457</sup> was the adoption of '*effective, proportionate and dissuasive*' penalties for the infringement of community measures.<sup>458</sup>

The Court of Justice in this case concluded that the UK failed to fulfil its ARD obligations by providing that 'the employer will be penalized financially pursuant to the UK Regulations only to the extent that the amount of the penalty exceeds the amount of the 'protective award' and 'by the imposition of a ceiling on the amount which an employer may be ordered to pay by way of compensation under the UK Regulations'.<sup>459</sup> Thus, although compensation is an appropriate remedy for enforcing TUPE according to

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<sup>455</sup> C. Wynn-Evans, 'Substantial Changes and the Right Not to Transfer' (2009) *Employment Law Journal* 9, 11.

<sup>456</sup> Case C-396/07 (n 450), para 30.

<sup>457</sup> Case C-382/92 (n 271).

<sup>458</sup> *Ibid.* para 55.

<sup>459</sup> *Ibid.* para 57.

the Court of Justice's case-law, the provided ceiling on the amount that an employer may be ordered to pay by way of compensation by the law on unfair dismissal, which is currently about £72,000.00, renders the overall effectiveness of this penalty questionable in the light of the judgment delivered by the Court of Justice in *Commission v UK*.

### ***6.3 Comparing the Remedies provided by Greek and UK laws***

Despite the fact that the concept of unfair dismissal is considerably different in Greek and UK law, with the former providing for the invalidity of dismissal and the second not, both systems result in the award of compensation for dismissals taking place in violation of the transfer protective legislation. Greek law provides for the payment of salary in arrears in favour of the employees being dismissed in violation of the PD 178/2002 and the UK law provides directly for compensation on the basis on unfair dismissal. Thus, in both cases, irrespectively of the legal characterisation, employees in practice receive an amount of money in return for being unfairly dismissed.

However, the examination of the recent amendment of the Greek law regulating transfers revealed a serious challenge to the implementation of the ARD. Additionally, in UK law the fact that 'the employer will be penalized financially (...) only to the extent that the amount of the penalty exceeds the amount of the 'protective award' and 'the imposition of a ceiling on the amount which an employer may be ordered to pay by way of compensation'<sup>460</sup> may reduce the effectiveness of the sanction.

The evaluation of these remedies through the lens of 'effectiveness' requiring the penalties to be 'proportionate and dissuasive' provides a partial, although not absolute,

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<sup>460</sup> Ibid. para 57.

response to this problem. The more general implication of this comparison is that the absence of any degree of harmonization in terms of the sanctions arising from economic dismissals undermines the minimum harmonization aim of the Directive. This is a real challenge for the effectiveness of the legislation, because the rich litigation existing in the field of transfers indicates that the Directive usually develops its protective function indirectly by the provision of effective sanctions for employers who breach the rights of their employees.

## **7. Implications for the operation of the Directive**

The comparison of the way that the Directive is implemented in Greece and the UK has shed light on the way different jurisdictions interpret the material scope and personal scope of national laws implementing the ARD. In this regard, the Directive, as was shown in the first chapter, despite its legal basis, should not be approached as aiming at creating a static ‘parity of costs’, as this constitutes a misunderstanding of its real function.

However, these wide diversities that were revealed by the comparison of the Greek and UK national laws in transfers constitute a challenge to the minimum harmonisation aim of the Directive referring to the establishment of a minimum floor of protection in the event of transfers within the Union. Thus, the overall effectiveness of the ARD, which is a basic requirement for European legislation in general, according to the rulings of the Court of Justice in the *Commission v UK*, is jeopardised.<sup>461</sup>

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<sup>461</sup> Case C-382/92 (n 271).

Community legislature preferred the personal scope of the ARD to be determined by national law, rather than to give a European-wide definition of the term ‘employee’. Additionally, the ARD does not offer a definition of the crucial terms ‘contracts of employment’ and ‘employment relationships’, which are included in the Directive. The justification offered by the Court for the deference of these definitions is based on the partial harmonization aim of the Directive.<sup>462</sup> However, this is not absolutely convincing, because, as Garde suggests, partial harmonization ‘can cut both ways’.<sup>463</sup>

Hepple criticises the absence of a definition of fundamental terms for having ‘frustrated the aims of those who drafted the Directive’.<sup>464</sup> He also proposes an appropriate European-wide definition of employment relationship to include ‘any agreement in return for gain to do or perform personally any work or services for another person’.<sup>465</sup> Garde takes a similar view and she characterizes the lack of definition of key terms regarding the personal scope of the ARD as legally problematic, because it gives rise to great diversities regarding ‘the coverage *ratione personae* of the laws implementing the Directive in the Member States’, which in turn ‘may ultimately distort competition by favouring those countries where the coverage of the Directive is less extensive...’.<sup>466</sup>

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<sup>462</sup> Case 105/84 *Danmols Inventar* [1985] ECR 2639, paras 26 and 28.

<sup>463</sup> A. Garde (n 341) 193.

<sup>464</sup> B. Hepple ‘Report for the Commission of the European Communities Directorate-General Employment, Industrial Relations and Social Affairs—Main shortcomings and proposals for revision of Council Directive 77/187/EEC’ (Commission: OOPEC 1990), para 72.

<sup>465</sup> *Ibid.* at 75.

<sup>466</sup> A. Garde (n 341) 187.

She also suggests that the Court could have adopted the broad judicial definition of the term worker found in article 45 TFEU concerning the free movement of workers, which would have maximized the level of protection guaranteed by the ARD in accordance with the purpose of the Directive. Indeed, the Court of Justice has given a broad definition to the term worker and employment relationship under article 45 TFEU:

Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.<sup>467</sup>

Hence this definition of worker seems independent of the existence of a formal contract of employment focusing rather on the actual provision of personal services under the direction of another person.

What Hepple and Garde suggest seems promising as way of reconciling, to some extent, uniformity and national autonomy. Their suggestion for a least requisite meaning attached to the terms 'employment relationship' and 'employees' attempts to interpret the partial aspect of harmonization through the lens of minimum harmonization. In other words, they ask for some degree of harmonization as regards the least requisite definition of these crucial terms. This does not infringe upon the substance of the national autonomy of Member States, as the definition of these terms beyond this minimum and common level remains within their discretion.

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<sup>467</sup> Case C-337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, para 13.

Indeed, we have already seen in the first chapter how Article 2 par. 2 of the ARD, introduced by the 1998 amendment, attempts to bring some degree of uniformity with regard to the determination of employees by providing that particular contracts of employment or employment relationships shall not be excluded from the scope of this Directive solely because: (a) of the number of working hours performed or to be performed, (b) they are employment relationships governed by a fixed-duration contract of employment Directive, (c) they are temporary employment relationships. However, something more may be required in this regard, such as the adoption of the broad judicial definition of worker found in Article 45 TFEU concerning the free movement of workers, which according to Garde, would have maximized the level of protection guaranteed by the ARD in accordance with the purpose of the Directive.<sup>468</sup>

Similarly, in the field of sanctions, as was shown in this chapter, the Court of Justice allows for the application of the sanctions provided by each national law, when the provisions of the ARD are violated. However, the examination of the recent amendment of the Greek law on dismissal revealed a serious challenge to the effective implementation of the Directive by the watering down of the relevant protection. Arguably, the indirect evaluation of the provided remedies in light of the principle of effectiveness, which, according to the *Commission v. UK* case,<sup>469</sup> requires that the penalties must be ‘effective, proportionate and dissuasive’,<sup>470</sup> does not eliminate this danger.

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<sup>468</sup> A. Garde (n 341)187.

<sup>469</sup> Case C-382/92 (n 271).

<sup>470</sup> *Ibid.* para 55.

Again, in conformity with the minimum harmonization aim of the ARD, the European legislator could provide for the least requisite content of sanctions in the event of violation of the Directive and leave the Member States free to improve upon this minimum. In *Juuri*,<sup>471</sup> the Court of Justice adopts a similar approach as regards the minimum requirements of sanctions provided by national law in the event of violation of the Directive.

On the one hand, the Court rules that the Member States ‘are not required to guarantee the employee a right to financial compensation (...) in accordance with the same conditions as the right upon which an employee can rely where the contract of employment or the employment relationship is unlawfully terminated’,<sup>472</sup> but, on the other, it held that national courts are required to ensure ‘*at the very least*’ (emphasis added) that

the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.<sup>473</sup>

This ruling as regards the ‘very least’ content of sanctions is similar to the minimum harmonization of the content of sanctions suggested here.

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<sup>471</sup> Case C-396/07 (n 450).

<sup>472</sup> *Ibid.* para 30.

<sup>473</sup> *Ibid.*

## **Part Two: Conceptual Framework of Proportionality and Legitimate Expectations**

Part One of the thesis explained the tensions and uncertainties in defining and implementing the goals of the ARD in two interlinked levels, the legislative and the interpretative. Part Two now proceeds to the conceptual study of legitimate expectations and proportionality, presenting these general principles as a theoretical and normative framework within which the difficulties outlined in Part One can be effectively understood and resolved.

Having described the policy history and identified some problematical aspects of the working of the ARD, the thesis will in the second part concern itself with the ameliorative potential of the notions of proportionality and legitimate expectations. The idea of proportionality is presented in chapter 3 as a more fruitful approach in understanding and developing the jurisprudence under the ARD both legislatively and interpretatively.

Given the social policy elements which played a crucial role in the history of the ARD, the conceptual framework in this part is constructed in such a way as to offer a normative improvement in the interpretation of the ARD. However, it is not sufficient to propose that proportionality balancing should be the guiding principle in this area of law; it is necessary to offer a conceptual understanding of the precise legal nature of the interests safeguarded by the ARD. The thesis therefore suggests in chapter 4 that the interest conferred upon employees by the ARD is best defined as a legitimate expectation.

It is important to clarify here the way in which proportionality and legitimate expectations, as general principles of law, will be deployed in this thesis. As Tridimas explains, general principles of law are those which ‘transcend specific areas of law and underlie the legal system as a whole. It may also refer to the degree of recognition or acceptance...it must express a core value of an area of law or the legal system as a whole’.<sup>474</sup> It is this dominant characteristic of proportionality and legitimate expectations as general principles of law, core values that enjoy general recognition in European legal systems, that confers on them the potential to resolve the problematic teleology of the ARD.

As Tridimas explains, general principles of law have significance even beyond contexts in which they are explicitly specified as the appropriate legal test. They constitute the ‘why’ rather than the ‘how’ of the law, in that they offer the underlying rationale and justification for the rules of law: ‘principles do not set out legal consequences that follow automatically from them. A principle states a reason which gives arguments in one direction but does not necessitate a particular result’.<sup>475</sup> This potentially transforms the way such rules of law are understood and interpreted.

The ARD, with which this thesis is concerned, would be understood from the starting point that it is intended to protect employees’ legitimate expectations, and that this protection will be implemented by reference to the principle of proportionality. The ‘fundamental justification’ of this kind of judicial recourse to general principles of law, according to Tridimas, has the additional advantage that it would ‘enable the Court to

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<sup>474</sup> T. Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn OUP, Oxford 2006) 2.

<sup>475</sup> *Ibid.*

develop a notion of the rule of law appropriate to the Community polity and at the same time ensure conceptual and ideological continuity with the legal systems of the Member States'.<sup>476</sup> This helps to safeguard the 'common constitutional heritage' between the legal systems of Member States and the Community, in the sense that the emergence of the Community and the Union legal system is not something alien to its Member States.

### **Chapter 3: Proportionality Review under the Acquired Rights Directive**

#### **1. Introduction**

This chapter explores the role which can be played by the principle of proportionality in responding to the problematic teleology of the ARD. The chapter explores ways in which proportionality review may constitute an appropriate legal mechanism for a more effective reconciliation of employment protection with employers' economic freedom to restructure.

Proportionality is a 'general head of review' in EU law, meaning that it offers a standard by which to assess the legality or validity of decisions which affect the rights of citizens generally.<sup>477</sup> In the context of this thesis, the main advantage of proportionality as a standard of reviewing the validity of decisions which have an adverse impact of workers' rights or entitlements is that it allows an assessment of the conflicting claims of both employer and employee, and allows a measure of flexibility in constraining the managerial prerogative to ensure that profitability and competitiveness are safeguarded.

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<sup>476</sup> Ibid. 20

<sup>477</sup> G. de Burca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 YEL 105.

It is worth mentioning that the potential value of proportionality as a test in unfair dismissal has already been recognized by Collins: ‘My own suggestion for a route to avoid the pitfalls of the range of reasonable responses test of fairness in unfair dismissal is to imitate the move in administrative law towards a test of proportionality’.<sup>478</sup> The suggestion becomes even more compelling in relation to the ARD where, as will be explained in the fourth chapter, there is no difficulty (such as there might be under the Employment Rights Act-ERA) in finding the ‘right’ or ‘legitimate expectation’ to be balanced against the ‘legitimate aim of efficient production’.

Proportionality offers a flexible and malleable balancing framework, in that it ‘can readily apply to all types of case, irrespective of whether they are concerned with rights or not.’<sup>479</sup> Proportionality review in this context has the advantage that it would usefully shift the emphasis in cases construing entitlements under the ARD away from asking whether there is a transfer of an economic entity retaining its identity, with which the case law has been preoccupied, to the issue of whether there is a proportionate justification for the dismissal.<sup>480</sup> In this part of the test, the courts could assess whether the decision to dismiss the employees constitutes a suitable, necessary and proportionate interference with the employment relationship.

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<sup>478</sup> M. Freedland and H. Collins, ‘Finding the right direction for the “industrial jury”’. *Haddon v Van den Bergh Foods Ltd/Midland Bank plc v Madden* (2000) 29 (3) ILJ 288, 295-296.

<sup>479</sup> P. Craig, ‘Proportionality, Rationality and Review’ (2010) *New Zealand Law Review* 265, 266.

<sup>480</sup> Similarly, Collins argues that proportionality should be the applicable test in the field of unfair dismissal and if so: ‘in the context of employment, the test of proportionality would assume that the employer needs to exercise a disciplinary power over the workforce for the legitimate aim of efficient production, but should subject dismissal decisions both to the question whether the employer was in fact pursuing such a goal of efficiency, and to the question whether dismissal was a necessary and proportionate means for achieving that goal in the circumstances’, M. Freedland and H. Collins (n 478) 280, 296.

The proportionality test is particularly attractive in so far as it appears to be compatible with flexibility; it promises not to unduly restrict the employer's freedom to restructure the enterprise by targeting only those limitations of this interest that are disproportionate having regard to the social goals of the ARD. This is consistent with the view of Tridimas that proportionality is a general principle of law, and such general principles of law 'are flexible, lend themselves to an evolutive interpretation of the law, and make for a judiciary more responsive to social change'.<sup>481</sup>

And yet so far there has been no attempt to explain the ARD jurisprudence by reference to proportionality as a conceptual lens through which to scrutinize more closely the conflicting interests of employer and employee during transfers. The central contribution made by this thesis is therefore to present the doctrine of proportionality as the most promising legal framework within which to understand the challenges of balancing employment protection with employers' economic freedom to restructure, and the different ways in which labour law can respond to those challenges.

Before embarking on the normative investigation with which this study is concerned, it must be conceded that the reputation of proportionality has generally not been one favourable to employee interests. In relation to case law that is developed on the basis of proportionality, the proportionality test has been criticized on grounds that it renders outcomes unpredictable in the sense that parties cannot predict how the court will assess the requirements of necessity and suitability. There is a fear that the courts would simply be second-guessing the decision-maker. This would lead to a lack of legal certainty, which is problematic in terms of the rule of law. There is also the criticism that

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<sup>481</sup> T. Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn OUP, Oxford 2006) 11.

a proportionality test would lead to courts holding all decision-makers to the same standard, so that in the context of this inquiry it would suggest that all employers were held to the same standard of suitability and necessity with insufficient regard for the particular circumstances of each employing entity.

These concerns will be addressed more specifically in the discussion which follows in this chapter; at this stage, however, it is necessary to consider the normative arguments in favour of proportionality which might counterbalance these potential criticisms. Normative considerations which support the adoption of proportionality as a test in this context may be drawn from Craig's study which, although it is primarily concerned with administrative law, usefully identifies the normative foundations of proportionality. The first normative argument in favour of proportionality 'rests ultimately on the belief that exercise of power requires reasoned justification of the kind provided for by the proportionality inquiry'.<sup>482</sup>

The second argument is based on the three-tiered structure of the proportionality test which, as observed by Lord Steyn in *Daly v Home Secretary*,<sup>483</sup> is a more sophisticated and elegant approach than simply trying to 'balance' conflicting interests in an intuitive or imprecise fashion. As Craig argues, 'the structural component of the normative argument rests on the benefits that flow from the three-part proportionality inquiry, which focuses the attention of the [decision-maker] and of the court undertaking the review'.<sup>484</sup>

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<sup>482</sup> P. Craig (n 479) 265, 271.

<sup>483</sup> *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532

<sup>484</sup> P. Craig (n 479) 272.

The third normative argument put forward by Craig is that of ‘simplicity’. The assertion is not that proportionality ‘will always be straightforward or uncontentious in its application’ but rather that ‘it would be advantageous for the same type of test to be used to deal with all claims’.<sup>485</sup> The advantage of this simplicity in the context of the ARD is that much less emphasis needs to be placed on the characteristics of the enterprises such as whether it was asset-based or manpower-based, a distinction which has rightly been strongly criticized for its incoherence. Instead a simple and single test would apply, in the same way, to all cases.

#### *Overview of the discussion*

A proportionality analysis, based on Craig’s formulation, would require dismissals to be first ‘suitable or appropriate to achieve the desired end’; second, ‘necessary to achieve that objective’, requiring a consideration of ‘whether this could have been attained by a less onerous method’; and third, *stricto sensu* proportionate.<sup>486</sup> In the context of rights conferred by the ARD and similar directives, the thesis argues that the standard of proportionality review requires us to ‘construe limits to such rights strictly, with the consequence that there will be a searching inquiry into the suitability and necessity elements of proportionality.’<sup>487</sup>

Therefore, this chapter will first focus on the *suitability* and *necessity* stages of proportionality before considering the third limb of ‘proportionality in the strict sense’. Following recent work by Catherine Barnard, the discussion argues that emphasis should

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<sup>485</sup> Ibid. 273

<sup>486</sup> Ibid. 268

<sup>487</sup> Ibid. 269

be placed on *procedural* proportionality.<sup>488</sup> The argument will be that a transfer-related dismissal is proportionate if it can be said that, in keeping with good industrial relations practice and the spirit of information and consultation rights, the employer considered the effect on employees at an appropriate stage in the decision-making process. An appropriate stage, in this context, would be at a stage when it is still possible for a consideration of employee interests to make a meaningful difference to the decision-making process.

As Craig suggests the proportionality inquiry focuses the attention of the decision maker or reviewer on the right type of questions, namely to justify why they ‘thought that the challenged action really was necessary and suitable to reach the desired end, and why it felt that the action did not impose an excessive burden on the applicant’.<sup>489</sup> This suggests that in thinking about the proportionality of transfer-related decisions, the analytical concern will be with the questions which the employer asked itself in looking at the potential effect on employees, and the need, if any, to dismiss them. The aim of this exercise is not to suggest that the courts should subject dismissals to such a proportionality analysis, but instead to offer a benchmark or standard by which we can assess the justifiability of the employer’s decision.

The remainder of the chapter proceeds as follows. The second section discusses the meaning of proportionality and the suitability and necessity stages of proportionality in the context of the ARD. The third section discusses the third stage of proportionality and its implications for the ARD. The fourth section refers to the advantages of

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<sup>488</sup> C. Barnard, ‘A proportionate response to proportionality in the field of collective action’ (2012) 37 (2) *European Law Review* 117, 131-132.

<sup>489</sup> P. Craig (n 479) 272-273.

procedural proportionality and the fifth section considers the implications of proportionality for dismissals taking place during serious economic crisis. Finally, the sixth section of this chapter refers to the important implications of proportionality for the safeguarding of a greater reflexive potential for the ARD.

## 2. The Meaning of Proportionality

The idea of proportionality goes back to ancient times: as Tridimas explains, ‘the spirit of the principle is encapsulated in the ancient Greek dictum ‘pan metron ariston’<sup>490</sup> meaning simply that moderation is best. Proportionality in this sense is elevated to a basic philosophical principle by Aristotle, referring to cases where ‘neither too much nor too little is a good choice’.<sup>491</sup>

Aristotle’s theory of moral values is based on the idea of intermediacy, as each of the virtues is a state of being that naturally seeks its mean [Greek [mesos]] relative to us. According to Aristotle, the virtuous habit of action is always an intermediate state between excess and deficiency as the opposing ends of the spectrum : too much and too little are always wrong; the right kind of action always lies in the mean.<sup>492</sup> He argues that:

Virtue is concerned with passions and actions, in which excess is a form of failure, and so is defect, while the intermediate is praised and is a form of success; and being praised and being successful are both characteristics of virtue. Therefore virtue is a kind of mean, since, as we have seen, it aims at what is intermediate.<sup>493</sup>

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<sup>490</sup> T. Tridimas (n 481) 136 (note 1).

<sup>491</sup> M.Z. Kopidakis, E. Patrikiou, D. Lypourlis, D. Moraitou 'Ancient Greek, Philosophical Reason' (OEDB, Athens 2007), 158 [in Greek].

<sup>492</sup> S. Magginas *Artistotle’s Nicomachean Ethics: Introduction, Translation, Interpretative Notes* (Greek Publishing Organisation, Greek Library 1972), Book 2, Chapter A [in Greek].

<sup>493</sup> M.Z. Kopidakis, E. Patrikiou, D. Lypourlis, D. Moraitou (n 491) 158 [in Greek].

To illustrate the value of the ‘mean’, Aristotle uses the following examples. As regards the enjoyment of pleasures, temperance is a mean between the excess of intemperance and the deficiency of insensibility; with respect to spending money, generosity is a mean between the excess of wastefulness and the deficiency of stinginess; with respect to relations with strangers, being friendly is a mean between the excess of being ingratiating and the deficiency of being surly; and with respect to self-esteem, magnanimity is a mean between the excess of vanity and the deficiency of pusillanimity. It is important that Aristotle recognizes the difficulties of keeping the intermediate state between two extremes: ‘it difficult to achieve according to our actions and in accordance with our emotions the intermediate’. This is the reason why he suggests that ‘if we fail, we should focus our efforts in those things that are less bad’.<sup>494</sup> Indeed, this argument has very important *practical* implications for the difficulties of our project.

It is also important to underline that Ethics is not merely a theoretical study for Aristotle. Unlike any intellectual capacity, virtues of character are dispositions to act in certain ways in response to similar situations, the habits of behaving in a certain way. Thus, good conduct arises from habits that in turn can only be acquired by repeated action and correction, making ethics an intensely practical discipline.<sup>495</sup> The practical implications of this approach are significant in relation to balancing employer and employee interests. As McMullen argues, ‘it must be commented that striking a fair balance between the competing interests of employers and employees during a great many business reorganizations will always be a major problem’.<sup>496</sup> Hence this field is not

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<sup>494</sup> Ibid.

<sup>495</sup> S. Magginas (n 492) Book 2, Chapter A [in Greek].

receptive to ultimate solutions, but rather to some proposals and suggestions for the improvement of the current reconciliation.

As a general principle of law in modern legal systems proportionality derives predominantly from German law, which has been particularly influential in the emergence of proportionality in EU law.<sup>497</sup> Tridimas describes proportionality as a general principle of EU law which ‘transcends specific areas of law and underlies the legal system as a whole’.<sup>498</sup> Indeed, the Treaties from Maastricht and onwards consistently refer to proportionality as the appropriate principle in implementing the provisions of the treaties: ‘any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty’ (article 5). The doctrine of proportionality therefore has constitutional significance even beyond contexts in which it is explicitly specified as the appropriate legal test.

According to Beatty, for the German Constitutional Court proportionality is a long standing principle ‘whose roots reach back to the rule of law’.<sup>499</sup> Schwarze argues that ‘two main schools of thought have shaped the historical development’ of proportionality ‘from its inception’.

On the one hand, there are the principles of retributive justice (*justitia vindicativa*) and of appropriate distributive justice (*justitia distributiva*); on the other hand, we find the notion of the liberal state, which has been making a steady advance since the end of the nineteenth century and which holds that the state should restrict itself to the achievement of objectives which are limited or capable of limitation. This source of the proportionality principle, which is no longer directly concerned with the notion of justice, is based on the premise that the law must serve a useful

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<sup>496</sup> J. McMullen, *Business Transfers and Employee Rights* (2<sup>nd</sup> ed Butterworths, London 1992) 208.

<sup>497</sup> T. Tridimas (n 481) 136.

<sup>498</sup> *Ibid.* 2

<sup>499</sup> D. Beatty, *The Ultimate Rule of Law* (Oxford, OUP 2004) 162 (footnotes omitted).

purpose, i.e. geared to the objective it seeks to achieve, and must consequently form part of a quantifiable casual relationship between means and ends aimed at achieving a desired result.<sup>500</sup>

Thus, as Tridimas argues ‘the principle of proportionality requires that action undertaken must be proportionate to its objectives’.<sup>501</sup> Craig argues that the evaluation as to whether a measure is proportionate to its objectives requires the examination of the following three factors by the courts. The courts will

consider whether the measure was suitable for the attainment of the desired objective. They will examine whether the disputed measure was necessary, in the sense that the agency had no other option at its disposal which was less restrictive of the individual’s freedom. The final stage of the inquiry is whether the measure was disproportionate to the restrictions thereby involved.<sup>502</sup>

These three requirements of proportionality are most commonly known, as Alexy observes as ‘suitability, necessity, and proportionality in the narrow sense’.<sup>503</sup> This terminology will be deployed in this chapter. We now move on to analyse the meaning of each requirement.

## ***2.1 Suitability***

The *suitability* requirement of proportionality requires the adopted measure to be suitable to achieve the desired objective. This does not set a difficult standard to be met, as the Court of Justice considers that the measure at issue is suitable when it ‘...does not appear

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<sup>500</sup> J. Schwarze, *European Administrative Law* (London, Sweet and Maxwell 2006) 678-679.

<sup>501</sup> T. Tridimas (n 481) 136.

<sup>502</sup> P. Craig, *EU Administrative Law* (OUP, Oxford 2006) 656 (footnotes omitted).

<sup>503</sup> R. Alexy, *Theory of Constitutional Rights* (trans. J. Rivers) (Oxford, OUP 2002), 66 (n 84).

on issue as obviously inappropriate for the realisation of the desired objective'.<sup>504</sup> This formula means that only a small number of measures will be struck down for being unsuitable in terms of the proportionality test.

The *suitability* inquiry in terms of the ARD will essentially be whether the employer's decision to restructuring that entails economic dismissals 'does not appear as obviously inappropriate for the realisation of the employer's desired objective', which inevitably will be related to the maximization of its profits and minimization of its cost including the labour cost.

Barnard refers particularly to contracting out (i.e. 'the process by which services previously provided in-house, and often ancillary to the main activity of the company (e.g. cleaning and catering), are offered out to be performed by contractors') as an important cost-saving strategy 'in part due to economies of scale and in part through paying the staff less'.<sup>505</sup> In this sense, the dismissals seem to be a suitable measure for the achievement of the employer's objective.<sup>506</sup>

In a similar vein, the case-law on proportionality shows that the Court of Justice applies the suitability requirement of proportionality loosely allowing for a broad discretion on behalf of the Community legislature when the adopted community measures entail complex assessments. This is recognized by Craig, who observes that in

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<sup>504</sup> J. Schwarze (n 500) 856 (footnotes omitted).

<sup>505</sup> C. Barnard, *EC Employment Law* (3<sup>rd</sup> edn OUP, Oxford 2006), 631.

<sup>506</sup> This is recognized by Njoya: 'Large firms regularly undertake organizational restructuring during which a single decision to lay off workers may result in hundreds or even thousands losing their jobs with significant social, economic and political implications. When firms 'downsize' and lay off their employees for economic reasons, often referred to as 'economic dismissals', there is an apparent legitimacy to the employer's action as it seems indisputable that the firm's economic success must take priority over job security': W. Njoya, *The Property in Work, The Employment Relationship in the Anglo-American Firm*, (Ashgate Publishing Limited, England 2007) 5.

political, social, and economic choice, involving complex assessments, the Community legislature must be allowed a broad discretion, the consequence being that the legality of the measure could only be affected if it was manifestly disproportionate with regard to the objective being pursued.<sup>507</sup>

The employer's decision to restructure its undertaking entailing economic dismissals is undoubtedly a controversial topic requiring complex economic evaluations and the employer enjoys a wide margin of discretion as to the choice of the appropriate measures so as to realize his financial objectives. Thus, the *suitability* requirement will be satisfied in each case of restructuring.

This may be an appropriate response to the criticism against the control of decision maker in the light of general principles, such as proportionality and legitimate expectations, because its discretion is unduly fettered. As Tridimas explains in the context of EU law courts apply a 'manifestly inappropriate' test in terms of the suitability, when measures entail complex assessments so as to safeguard that 'the Community institutions enjoy a wide margin of discretion'.<sup>508</sup> Similarly, as was suggested in this section, due to the fact that economic dismissals in the context of transfers entailing complex economic assessments the suitability requirement will be constrained to a 'manifestly inappropriate test' so that the required scope of managerial prerogative is safeguarded and the substitution of employers by the court is avoided.

It is clear, then, that the law is characterised by low intensity review in relation to the suitability requirement of dismissals. At the same time, it is important to underline the importance of the suitability stage of proportionality as a safeguard against non-genuine

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<sup>507</sup> P. Craig (n 502) 676 (footnotes omitted).

<sup>508</sup> T. Tridimas (n 481) 144.

ETOR justifications for dismissals in transfers.<sup>509</sup> This is captured really well by De Burca, who refers to cases, where member states claim derogations from fundamental freedoms guaranteed by the Treaties for various reasons, such as public policy, national health and the Court of Justice suspects that ‘that was not in fact the primary aim of the legislation at all’.<sup>510</sup> Hence when the real intention behind the derogations is for the state to ‘retain a marketing advantage which domestically produced goods have on domestic market’ or ‘some other partly protectionist motive’, the derogation will not satisfy the suitability requirement of proportionality, because ‘the State was not pursuing a legitimate aim, under the first part of the proportionality test’.<sup>511</sup>

## ***2.2 Necessity***

The *necessity* requirement in EU law essentially entails that there is no other less restrictive measure capable of attaining the same result. Thus, the formulation of the relevant question is whether restructuring entailing economic dismissals is necessary for the realisation of the employer’s financial objectives. The ARD allows, in principle, dismissals that ‘may take place for economic, technical or organisational reasons entailing changes in the workforce’ (article 4 par. 1) (ETOR). Hence as part of the necessity requirement of proportionality, the employer will need to show that there was

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<sup>509</sup> For further discussion see A. Davies ‘Judicial Self-Restraint in Labour Law’ (2009) ILJ 38, 278 et seq.

<sup>510</sup> G. D. Burca (n 477) 105, 131; German Beer case (Case 178/84 *Commission v Germany* [1987] ECR 1227, in which Germany claimed that the prohibition of marketing of particular beers that were lawfully manufactured and marketed in other member states was justified on both public policy reasons relating to the consumers’ protection and protection of public health, is, according to De Burca, a characteristic case, in which the Court of Justice was clearly not convinced ‘of the genuineness of the aim’, D. Burca (n 477) 105, 139.

<sup>511</sup> *Ibid.* 132 (footnotes omitted).

no less restrictive measure than the dismissal that would enable it to proceed with the restructuring.

### ***2.3 Proportionality in the narrow strict sense***

This section will examine the third limb of proportionality which is often referred to as the 'balancing' test. Two main questions arise. First, is a third limb of strict proportionality required in addition to the 'suitability' and 'necessity' stages? Second, is a balancing exercise integral in the context of the third element of proportionality? Commentators are divided on the value of balancing under proportionality. Those writing from a human rights perspective consider that 'the balancing approach, in the form of the principle of proportionality, appears to pervert rather than elucidate human rights adjudications',<sup>512</sup> but it is not clear whether there are any valuable alternatives.

#### *2.3.1 The third stage of proportionality in EU law*

The third limb of proportionality requires that a restriction should not constitute a 'disproportionate and intolerable interference, impairing the substance' of a right.<sup>513</sup> As Barnard points out

As the discussion of *Viking* shows, the Court of Justice generally applies a two, rather than three, limbed test to determine whether a measure is proportionate: (1) whether the measure was suitable or appropriate to achieve the desired objective and (2) whether it was necessary to achieve the desired end. Only occasionally does the Court (usually the Grand Chamber) add the third, strict proportionality,

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<sup>512</sup> S. Tsakyrakis, 'Proportionality: An Assault on Human Rights', Jean Monnet Working Papers 09/08, <<http://centers.law.nyu.edu/jeanmonnet/papers/08/080901.pdf>> accessed 02 July 2012.

<sup>513</sup> Wording actually taken by Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002], paras 122-123; P. Craig (n 479) 265, 270 (footnotes omitted).

limb--and this only in respect of challenges to the validity of EU legislation and only where one of the parties raises the issue.<sup>514</sup>

Barnard argues that the following reasons may permit the addition of the third limb to the proportionality inquiry under Community law. Firstly, it is required by the Charter of Fundamental Rights of the European Union, which provides in article 52 (1) that:

any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

This article provides that the limitation of rights and freedoms provided by the Charter must respect their essence. Barnard observes that ‘some commentators argue that respect for the essence of a right would “typically overlap with the third stage of the proportionality test”’.<sup>515</sup>

Secondly, Barnard finds some support for the addition of the third limb of proportionality in the Court of Justice’s case law under the Treaty of Lisbon. She specifically points to Article 3 (3) TEU establishing, as one of the objectives of the EU ‘the attainment of a social market economy’ where a proportionality review might allow more scope for the recognition of employees rights, such as the right to bargain collectively.<sup>516</sup>

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<sup>514</sup> C. Barnard (n 488) 117, 126 (footnotes omitted).

<sup>515</sup> Ibid. 134 (footnotes omitted).

<sup>516</sup> Ibid. 134 (footnotes omitted).

Thirdly, the three-limbed proportionality review is supported by the Draft Monti II Regulation, which clarifies that in case of conflict between an economic freedom and a social right, these are considered equal and should be reconciled by reference to the principle of proportionality.<sup>517</sup> Here, it is explicitly provided that the proportionality review entails three stages (i.e. appropriateness, necessity and reasonableness).<sup>518</sup> A direct quotation of the opinion of AG Trstenjak<sup>519</sup> in *Commission v Germany*<sup>520</sup> case exemplifies the exact elements of this approach:

A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.<sup>521</sup>

### 2.3.2 *Balancing*

The third requirement of proportionality entails an evaluation as to whether the restrictions imposed by a measure ‘constitute a disproportionate and intolerable interference, which impairs the very substance of the rights guaranteed’.<sup>522</sup> Although the issue whether a balancing exercise is required as part of the third limb of the

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<sup>517</sup> European Commission Proposal for a Council Regulation ‘on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services’ COM (2012) 130 final, para 3.4.2 < <http://ec.europa.eu/social/BlobServlet?docId=7480&langId=en> > accessed 07 July 2012

<sup>518</sup> Ibid. para 3.4.4.

<sup>519</sup> Opinion of AG Trstenjak in Case C-271/08 *European Commission v Federal Republic of Germany* (2008) OJ C 223.

<sup>520</sup> Case C-271/08 *European Commission v Federal Republic of Germany* [2008] OJ C 223.

<sup>521</sup> Opinion of AG Trstenjak in Case C-271/08 (n 519), para 19.

<sup>522</sup> P. Craig (n 502) 675 (footnotes omitted).

proportionality inquiry is controversial, this part takes the view expressed by Barnard, namely that ‘we may have to revert to balancing to help reconcile competing interests on a case-by-case basis’, because the alternative theory based on the premise that ‘one right automatically trumps another’ is ‘unsatisfactory in difficult cases’.<sup>523</sup> This part sheds some additional light on this argument by identifying some aspects of balancing that may secure a more satisfactory outcome. In this way, the concerns of some commentators that the very idea of balancing ‘reduces constitutional rights to the level of goals, policies and values’ and that this danger is accompanied by ‘irrational rulings’<sup>524</sup> will be addressed.

Following the interpretation of ‘proportionality’ in *Viking*<sup>525</sup> and *Laval*,<sup>526</sup> there is admittedly a fear that the Court of Justice will inevitably perform the proportionality balancing of employees’ protection against firms’ efficiency in such a way that it will accord an almost absolute priority to the employers’ economic freedom. The Court in these cases prioritised almost absolutely the freedom of establishment and the provision of services over the employees’ rights to collective action. The Court of Justice considered the freedom of establishment and provision of services to be the sole focus of its proportionality analysis, asking whether the employees’ rights to collective action restrict disproportionately the employers’ freedom of provision of services and establishment without investigating, accordingly, whether these two employers’ freedoms constitute, at the same time, a disproportionate restriction on employees’ rights to collective action.

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<sup>523</sup> C. Barnard (n 488) 117, 131.

<sup>524</sup> For a summary of these criticisms, see Barnard, *ibid.* 126 (footnotes omitted).

<sup>525</sup> Case C-438/05 *International Transport Workers’ Federation v Viking Line ABP* [2007] ECR I-10779.

<sup>526</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

However, the proportionality approach suggested in this thesis is fundamentally different. It avoids the danger of placing a monolithic emphasis on employers' economic freedom to transfer by ignoring the element of employees' protection. Instead, drawing on AG Trstenjak's idea in *Commission v Germany*<sup>527</sup> of a 'symmetrical approach',<sup>528</sup> it evaluates whether the employers' economic freedom to transfer restricts disproportionately the employees' interest in continuity of employment and, at the same time, whether employment protection restricts the employers' freedom to transfer. The analysis proceeds, therefore, in both directions.

By comparing the restrictions created on *both* employment protection as well as the employers' economic freedom to transfer it becomes possible to strike a fairer balance between these interests in the context of transfers or outsourcing. *Commission v Germany* illustrates the potential for such an approach to be adopted, as both the Court and AG Trstenjak recognise the need to strike a fair balance between economic freedoms and social rights.<sup>529</sup>

Building on this, Syrpis argues that such a symmetrical approach would better express the reconciliation of economic freedoms and social rights by assessing 'not only whether the social objective of the national scheme may be accommodated within the framework' of economic freedoms, but also whether the objective of economic freedoms

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<sup>527</sup> Case C-271/08 (n 520).

<sup>528</sup> The idea of symmetry is attributed to AG, because in the note 95 of her opinion she argues that 'this could be regarded as an asymmetrical development of Community law' so as to describe the effect of *Viking* and *Laval* (paras 183-184) and this the first reference to the idea of 'symmetry' in the broad sense in the context of fundamental rights-fundamental freedoms, Opinion of Advocate General Trstenjak (n 519) note 95.

<sup>529</sup> Case C-271/08 (n 520) para 52 ; Opinion of Advocate General Trstenjak, *ibid.* paras 188-193.

that are included in the context of some ‘EU Directives may be accommodated in a way which more fully respects fundamental rights’.<sup>530</sup>

The outcome of the balancing in *Commission v Germany* was in favour of the economic freedom. However, the execution of the ‘balancing’ exercise by the AG Trstenjak and the Court of was not satisfactory, because despite being ‘rich in promise’, ended up in an ‘asymmetrical approach’ that concluded that ‘there was a breach of the public procurement rules and so the economic freedom ultimately prevailed over the social right’.<sup>531</sup> This outcome prompts Syrpis to observe that

we already know only too well that it has proved difficult to justify restrictions on economic freedoms and to show that they are proportionate and that the result has been that a number of social schemes developed in the national context have had to be modified so as to comply with EU free movement law. This same familiar pattern is repeated in *Commission v Germany*.<sup>532</sup>

However, Barnard suggests that there are some signs that the Court and the AG Trstenjak were ‘also engaging in balancing through the proportionality principle’.<sup>533</sup>

This part builds on these genuine balancing signs by evaluating whether the employers’ economic freedom to transfer restricts disproportionately the employees’ interest in continuity of employment and, at the same time, whether employment protection restricts the employers’ freedom to transfer. The analysis proceeds, therefore, in both directions. In this analysis, Alexy’s theory of balancing is very helpful, as it

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<sup>530</sup> P. Syrpis ‘Reconciling Economic Freedoms and Social Rights-The Potential of *Commission v Germany* (Case C-271-08, Judgment of 15 July 2010) (2011) vol. 40 ILJ 222, 224.

<sup>531</sup> Barnard (n 488) 117, 127 (footnotes omitted).

<sup>532</sup> P. Syrpis (n 530) 22, 224.

<sup>533</sup> C. Barnard (n 488) 117, 127.

explains why the balancing exercise constitutes an internal part of the third limb of proportionality and what this balancing exercise entails.

The third limb of proportionality is seen by Alexy as synonymous to a balancing exercise observing that ‘in the third stage, it is established whether the importance of satisfying the latter principle justifies the detriment or non-satisfaction of the former’.<sup>534</sup> Similarly, Bobek calls the third stage of proportionality ‘proportionality in the narrow sense or value balancing and weighing’.<sup>535</sup> Additionally, de Burca recognizes the clear balancing procedure in terms of competing principles that it is internal to the application of the proportionality principle in Community law: ‘whatever way the proportionality principle may be described, (...) it seems apparent, from examining a selection of the case-law of the European Court of Justice, that it inevitably involves a balancing of interests of some sort’.<sup>536</sup>

Alexy uses the *Lebach* judgment, as a very illustrative example of German case-law so as to indicate that this stage of proportionality essentially entails balancing competing principles and deciding the extent to which each of these competing principles will be satisfied.<sup>537</sup> In *Lebach*, the competing principles were the freedom of press and the right to privacy. The requirement that neither of the competing interests should be

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<sup>534</sup> R. Alexy, ‘Balancing, constitutional review, and representation’ (2005) 3 *International Journal of Constitutional Law* 572, 574.

<sup>535</sup> M Bobek, ‘Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert, judgement of the Court of Justice (Grand Chamber) of 9 November 2010’ (2011) 48 *CML Rev* 2005, 2019 (footnotes omitted).

<sup>536</sup> G. de Burca (n 477), 113; even outside the context of European law, de Burca argues that ‘it can be seen from the structure of [the proportionality] inquiry that it involves an expression and weighing of different interests’, G. De Burca (n 477), 113.

<sup>537</sup> R. Alexy (n 503), 105.

restricted as to its very substance finds its legal corollary in the ‘Law of Balancing’ that is suggested by Alexy.

The ‘Law of Balancing’ has as its starting point the theory of principles as optimization requirements (i.e. norms requiring that something be realized to the greatest extent possible) given the legal and factual possibilities. Alexy argues that

According to the Law of Balancing, the permissible level of non-satisfaction of, or detriment to, one principle depends on the importance of satisfying the other. In defining principles, the clause ‘relative to the legally possible’ puts what the principle in question requires into relation with what competing principles require. The Law of Balancing states what this relation amounts to. It makes it clear that the weight of principles can never be determined independently or absolutely, but that one can only ever speak of relative weight.<sup>538</sup>

The formula of this ‘Law of Balancing’ is exemplified in *Lebach*, in which the central argument, according to Alexy, was that ‘the broadcast in question amounted to a very serious breach of privacy’, which was supported by references to

the extent of broadcasts, the impact of the documentary form, the high degree of plausibility that television broadcasts have in the eyes of the public, the threat to resocialization caused by this and other aspects of the broadcast, and the additional infringement involved in the broadcast of the matter some time after the immediate report.<sup>539</sup>

The Court did not omit to refer to various factors indicating the importance of satisfying media freedom, but, as Alexy observes, ‘the repeat report in question was qualified as

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<sup>538</sup> Ibid. 102 (footnotes omitted).

<sup>539</sup> R. Alexy (n 503) 105 (footnotes omitted).

insufficiently important to justify the intensity of the infringement<sup>540</sup> of the right to privacy.

In this sense, according to Alexy

the principle of proportionality in its narrow sense, that is, the requirement of balancing, derives from its relation to the legally possible. If a constitutional rights norm which is a principle competes with another principle, then the legal possibilities for realizing that norm depend on the competing principle. To reach a decision, one needs to engage in a balancing exercise as required by the Law of Competing Principles. Since the application of valid principles, if indeed they are applicable, is required, and since their application in a case of competing principles requires a balancing exercise, the character of constitutional rights norms as principles implies that when they compete with other principles, a balancing exercise becomes necessary. But this means that the principle of proportionality in its narrow sense can be deduced from the character of constitutional rights norms as principles.<sup>541</sup>

In other words, Alexy's theory of principles as 'norms which require that something be realized to the greatest extent possible given the legal and factual possibilities' (i.e. optimization requirements) makes him consider that 'proportionality in its narrow sense follows from the fact that principles are optimization requirements relative to what is legally possible'. Accordingly, the requirements of 'necessity and suitability' of proportionality 'follow from the nature of principles as optimization requirements of what is factually possible'.<sup>542</sup>

This justification of the principle of proportionality is called the 'justification from constitutional rights', because it is based 'on constitutional rights norms, to the extent that they are principles'.<sup>543</sup> This seems consistent with the case law of the German

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<sup>540</sup> Ibid. 106 (footnotes omitted).

<sup>541</sup> Ibid. 67 (footnotes omitted).

<sup>542</sup> Ibid. 47, 67 (footnotes omitted).

<sup>543</sup> Ibid. 69.

Federal Constitutional Court, which, according to Schwarze, discerned the proportionality principle in the ‘essence of fundamental rights themselves’.<sup>544</sup>

A similar view as regards the fact that a process of balancing is integral to the proportionality inquiry is taken by Kommers, who argues, as Barnard observes, that

The principle of the constitution's unity requires the optimisation of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values’.<sup>545</sup>

Kommers further considers that the ‘three pronged test of proportionality ... seems fully compatible with, if not required by, the principle of practical concordance’.<sup>546</sup> Hence these two theories based on the ideas of ‘principles as optimization requirements’ and the need for ‘practical concordance’ between competing values offer a normative justification for the argument that the third stage of proportionality inquiry requires a balancing of competing principles.

However, the issue of balancing is controversial and commentators, as Barnard explains, are divided into those hostile to balancing and those more ‘enthusiastic’ about it.<sup>547</sup> The hostile view against balancing, according to Barnard, is neatly summed up by Greer and suggests that balancing

should be regarded as an irrational and illegitimate renunciation of law in favour of a largely arbitrary judicial discretion, difficult to justify according to the ideals

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<sup>544</sup> J. Schwarze (n 500) 688 (footnotes omitted).

<sup>545</sup> C. Barnard (n 488) 117, 125 (footnotes omitted).

<sup>546</sup> *Ibid.* 125 (footnotes omitted).

<sup>547</sup> *Ibid.* 126-127 (footnotes omitted).

of democracy, respect of human rights, and the rule of law and, therefore ripe for elimination from the legal process.<sup>548</sup>

These criticisms may be accurate for an inappropriate balancing exercise, but they do not apply to a balancing exercise, such as the one suggested by Alexy, which ties the formal structure of balancing to ‘the general theory of rational legal argumentation’. In this context, balancing is not an ‘abstract or superficial procedure’, in which one interest ‘is ‘rashly’ realized at the cost of another’.

On the contrary, according to the theory of balancing suggested by Alexy, the outcome of the balancing exercise is based on ‘rational legal argumentation’ and ‘always forms the basis of a rule’.<sup>549</sup> The rational legal argumentation forming the basis of this balancing is verified by the outcome of the *Lebach* judgment, as is explained by Alexy. The outcome of the balancing of freedom of press and the right to privacy was determined by a variety of factors, such as ‘references to facts (extent of broadcasting) and empirical regularities (causation of a threat to resocialisation) as well as normative judgments (characterization of resocialization as urgently required by article 1(1) together with article 2 (1) Basic Law)’. This set of reasons ‘including evaluations is entirely typical of judicial reasoning’.<sup>550</sup>

Similarly, the outcome of such balancing under a proportionality analysis of the ARD does not depend on the individualistic perception of the value of competing interests adopted by each reviewer, but it should arise from objective argumentation. This

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<sup>548</sup> Ibid. 126 (footnotes omitted).

<sup>549</sup> R. Alexy (n 503), 106, 107 (footnotes omitted).

<sup>550</sup> Ibid. 106

point does not suggest that each outcome of a balancing exercise will be flawless, but it is argued here that a balancing based on appropriate rules, as the one suggested by Alexy, constitutes an appropriate legal tool for the striking of an impartial balance between competing principles. In an analogous vein, Beatty suggests that

because proportionality refuses to accord either rights or numbers any special status, it can claim an objectivity and integrity no other model of judicial review can match. It avoids the subjectivity and indeterminacy that plagues interpretation and cost/benefits calculations alike. Turning conflicts about people's most important interests and ideas into matters of fact, rather than matters of interpretation or matters of moral principles, allows the judiciary to supervise a discourse in which each person's perception of a state's course of action is valued equally and for which there is a correct resolution that can be verified empirically.<sup>551</sup>

As Barnard suggests, critics tend to 'reject balancing altogether as a means of resolving the issue of a conflict of rights and recognise that the rights at stake are not in fact of equal weight and that some values do take precedence over others'.<sup>552</sup>

The simple answer to this proposition is captured by Barnard, who argues that 'a simple reversal of priority would leave its proponents open to similar accusations made by trade unions against the current approach: it is asymmetrical and formalistic and embodies a one-dimensional view of the European Union'.<sup>553</sup> In other words, despite the fact that those arguing against balancing in the context of proportionality use some well-placed arguments, their recourse to an unequal weight being attached to competing

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<sup>551</sup> D. Beatty (n 499) 171 (footnotes omitted).

<sup>552</sup> C. Barnard (n 488) 129.

<sup>553</sup> *Ibid.* 129.

principles so as to solve conflicts of interests is difficult to be justified. This makes it inevitable to revert to some form of balancing in the event of competing interests.<sup>554</sup>

Hence there are good reasons permitting the addition of the third limb of proportionality inquiry to European law. Despite the controversy over the issue of balancing under proportionality, in some cases of conflicts between competing interests it is inevitable to resort to some notion of balancing, because the alternative theory of offering a priority to certain values over others is one-sided. However, the serious challenge that remains is to apply a balancing exercise that is able to safeguard an objective outcome. In this specific context, Alexy's theory of balancing may contribute to the achievement of this objective outcome. In the next section, the likely implications of the application of third stage of proportionality to the ARD will be identified.

### **3. The third stage of proportionality test under the ARD**

As was said above, under the ARD, the *suitability* stage of the test is easily satisfied with regard to the employer's decision to transfer the undertaking, because the financial decisions that the employer makes so as to maximize its profits remain within its discretion. The necessity requirement suggests that the employer should consider whether there is any alternative to dismissal of employees in the context of a transfer. This requires considering more carefully the interests of the employees and the likely effects of losing their jobs during the transfer. As was shown in the previous section, there are good reasons justifying the addition of the third limb of proportionality inquiry to this

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<sup>554</sup> Ibid. 131

analysis. The question that then arises concerns the likely implications of applying this third limb of proportionality, which will be considered in more detail below.

The third stage of the proportionality test, also known as proportionality in the narrow sense, evaluates whether the restriction at issue, even if it is suitable and necessary for attaining the desired objective, imposes an excessive burden on the individual and, in the case at issue, on the employees' legitimate expectation of protection. The Court of Justice considers that a burden is excessive when it constitutes a 'disproportionate and intolerable interference, impairing the substance' of a right.<sup>555</sup> Thus, it is necessary to evaluate the concrete effects arising from the employers' decision to effect economic dismissals as part of the restructuring process.

Economic restructuring puts jobs at risk, making it essential to consider the appropriate scope of legal protection for employees in this context. Such legal protection may be founded on the idea that employees have a legitimate interest in continuity of employment, especially when the employees in question have relied upon the expectation that they will keep their jobs, despite the transfer, in reliance upon an employer's promise or failure to inform them about the impending transfer. This argument will be developed in more detail in the next chapter.

The 'symmetrical approach' to balancing also requires evaluating the limitations imposed upon the employer's economic freedom by the employees' protection against dismissal. The employer's economic freedom is restricted by the application of the ARD, as this amounts to an additional financial cost. This additional financial cost is borne, in

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<sup>555</sup> Wording actually taken by Case C-491/01(n 513), paras 122-123; see also P. Craig (n 479), 265, 270 (footnotes omitted).

principle, by the transferee, who is obliged to employ the employees of the transferor with the same terms and conditions, according to article 3 par. 1 of the Directive.

However, the Directive in the majority of cases entails a financial cost for the transferor as well. Firstly, the ARD allows Member States to provide for the joint liability of the transferor and the transferee ‘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’ (article 3 par. 1).<sup>556</sup> Secondly, it is very possible that the transferee will adjust the price in order to cover, to a certain extent, the additional cost of the obligation to employ the transferor’s employees.

The sanctions arising from the violation of the Directive, as these are provided in *Juuri*<sup>557</sup>, are the following:

the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.<sup>558</sup>

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<sup>556</sup> Most Member States have indeed used this possibility, as indicated by the comparative study performed by the law firm CMS Employment Practice Area Group for the purposes of the study on cross-border transfers, CMS Employment Practice Area Group ‘Study on the application of the acquired rights directive (ARD) to cross-border transfers of undertakings’ (Study N<sup>o</sup> VT/2005/101, September 2006) <<http://ec.europa.eu/social/BlobServlet?docId=2445&langId=en>> accessed 07 July 2012; according to its website ‘CMS aims to be the best European provider of high-quality legal and tax advice’ and ‘has a common culture and a shared heritage that is distinctively European. With more than 5,000 people working in 54 offices, CMS has the most extensive footprint in Europe’. <<http://www.cmslegal.com/aboutcms/pages/default.aspx>> accessed 07 July 2012

<sup>557</sup> Case C-396/07 *Mirja Juuri v Fazer Amica Oy* [2008] ECR I-8883.

<sup>558</sup> *Ibid.* para 30

This means that the employer may proceed with its dismissal decision, as long as it ‘bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment’.

In other words, safeguarding the employees’ interests against dismissal ‘affects’ the employer’s decision to restructuring that entails economic dismissals, but it does not ‘prevent’ it from its operation. These two terms are particularly useful with regard to the question whether the limitations imposed upon the employers’ freedom to restructure for the safeguarding of the employees’ interests are disproportionate or not.

It could be argued that this difference in meaning between the terms ‘prevent’ and ‘affect’ has the potential to ameliorate the protective scope of legislation designed to protect employees’ acquired rights, where such rights come into conflict with the employer’s economic freedoms. The position would be that the effect on the employer’s freedom would only become unjustifiable, or disproportionate, if it went so far as to prevent the employer from achieving his or her goals. In the natural and ordinary meaning of these terms, the word ‘prevent’ entails stopping the employer from achieving the goals of the enterprise, whereas the term ‘affect’ is broader, referring to all circumstances that have an effect on the decision-making process.<sup>559</sup> Hence the word ‘affect’ catches a whole spectrum of activities not caught by ‘prevent’, and requires a far more intrusive action that impedes the employer from doing something.

The significance of the analytical distinction between these two terms in the context of European labour law is highlighted by Syrpis, who comments on the wide

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<sup>559</sup> These definitions are given by Oxford dictionaries, available at <<http://oxforddictionaries.com>> accessed 13 December 2012.

spectrum of cases captured under the word affect.<sup>560</sup> Syrpis observes that the main thrust of the Court's case law 'catches all measures which are liable to restrict trade, or, to put this in different ways, to render the exercise of free movement rights less attractive, or to affect market access'.<sup>561</sup> The challenge for labour law arising from this wide construction of the term 'affect' is that almost every rule of national labour law seems, at least prima facie, to be caught by the width of this approach.

Conversely, more scope for employment protection is offered by the use of the term 'prevent', in evaluating whether particular national labour laws or practices of the trade unions are compatible with the requirements of European law. For example, in the *Keck* case<sup>562</sup> in the specific context of national provisions restricting or prohibiting certain selling arrangements, the Court held that national rules fall outside the scope of the free movement provisions because their application to the sale of products from other Member States 'is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products'.<sup>563</sup> The evaluation of labour law rules or trade union action under the *Keck* test by reference to the idea of 'preventing', instead of 'affecting' allows a greater scope for national labour laws and practices, as the Court assesses the potential barriers created by labour law rules to free movement by determining whether these rules 'i) 'prevent' access to markets, or ii) impede the access of imported actors of production in a discriminatory way'.<sup>564</sup> Hence

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<sup>560</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>561</sup> P. Syrpis, 'Should the EU be Attempting to Harmonise National Systems of Labour Law?' (2010) 21 *European Business Law Review* 143, 156.

<sup>562</sup> Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

<sup>563</sup> *Ibid.* para 17

<sup>564</sup> P. Syrpis (n 561) 143, 156.

there mere fact that labour laws make the exercise of free movement rights less attractive does not render such laws incompatible with the fundamental freedoms of European law.

From this perspective it may be argued that employment protection under the ARD is not such as to 'prevent' the employer's recourse to restructuring, and, thus, it does not impair the substance of the employer's economic freedom. This means that by comparing the restrictions imposed upon the employees' interests and the restrictions imposed upon the employers' freedom to effect economic dismissals by these expectations, the former should acquire priority over the latter, in cases in which the employees have justifiably relied upon the expectation of continuing employment.

This perspective is very useful in considering the potential of the proportionality test, particularly in light of the goal of the proportionality test in this context, i.e. the desire to remain compatible with flexibility by ensuring that employment protection does not unduly restrict the employer's freedom to restructure the enterprise. The idea behind proportionality is that it would be possible to target only those limitations of managerial prerogative that are disproportionate having regard to the social goals of the ARD. The next issue that will be considered is procedural proportionality under the ARD.

#### **4. Procedural Proportionality and the ARD**

As Barnard observes, in the context of strike action the courts 'never applied a substantive proportionality review', but instead 'focus on ensuring compliance with the detailed technical requirements of the legislation'. According to Barnard this is

‘analogous to a procedural proportionality review’.<sup>565</sup> She specifically uses the term ‘externalization of the proportionality principle’ so as to describe the situation in which the proportionality review is understood as ‘a procedural check’ as to whether the question of proportionality has ‘been considered by the relevant parties’ and ‘how the proportionality principle has been satisfied’.<sup>566</sup>

In this way, courts will be constrained from engaging ‘in any way with the ultimate dilemma that strike action is by definition disproportionate in the substantive sense’.<sup>567</sup> In the context of the right to strike, procedural proportionality requires trade unions to show that ‘they had complied with the requirements of national legislation, that they had considered alternatives to strike action and that they had engaged effectively in negotiations before they went on strike’.<sup>568</sup>

This attempt to prevent the courts from intervening in the substance of the strike decision by means of substantive proportionality review is a rational consideration, because, as Barnard argues ‘industrial action and the proportionality principle are unhappy and probably incompatible bedfellows. The more successful a strike from a trade union's point of view (e.g. a complete closing down of the employer's business), the

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<sup>565</sup> C. Barnard (n 488), 117, 131; in the specific context of UK administrative law, the decision maker is not obliged to show that it took the requirements of proportionality into account before reaching a decision, according to English common law. In the Judgment *Belfast City Council (Appellants) v. Miss Behavin' Limited (Respondents) (Northern Ireland)*, Lord Hoffman states that ‘the question is still whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not’ [2007] UKHL 19 [2007] All ER (D) 219 [15].

<sup>566</sup> C. Barnard (n 488), 132.

<sup>567</sup> *Ibid.* 132

<sup>568</sup> *Ibid.* 131-132

less likely it is to be proportionate'.<sup>569</sup> Thus it is inherently problematic to allow a wide intervention of the courts in the substance of trade unions decisions, as this would constitute a serious infringement upon their autonomy.

The great significance of procedural proportionality in the specific context of restructuring that entails economic dismissals is that if employers took into account the requirements of proportionality while making their decisions, these decisions might be fairer and, therefore, costly judicial challenges by the employees on various grounds might be avoided. If the employer knew that it would be required to show that it considered the proportionality issue when deciding to restructure, it would possibly be more careful to reach a fair decision. Additionally, the prospect of arriving at a fair result without the need to resort to courts might be further promoted by the ARD's information and consultation procedure with employees.<sup>570</sup> Failure to give full information and to consult in good faith might be evidence that the dismissals were not necessary.

However, despite the important prospect of alternative dispute resolution, the proportionality analysis of the ARD should not be restricted only to this procedural aspect, but it should also embrace a substantial proportionality review undertaken by the courts. Otherwise, the employer very easily could always argue that its decision satisfies the requirements of proportionality and the absence of the courts intervention on the substance of the proportionality inquiry would not safeguard an objective decision on this issue.

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<sup>569</sup> Ibid. 123

<sup>570</sup> The information and consultation procedure covers 'at least the measures envisaged in relation to the employees' (article 7 par. 3).

Additionally, the employers would be encouraged to proceed with transfer dismissals based on non-genuine ETOR justifications safe in the knowledge that the courts will not intervene in the substance of these justifications. Evaluating the substance of an ETOR justifying a dismissal by the courts in the light of proportionality does not infringe upon the substance of the managerial prerogative, because, as Collins argues ‘managerial prerogative, in common with other examples of discretionary power, can only be legitimate if exercised for rational business purposes and without infringement of individual rights’.<sup>571</sup> In this sense, the ARD in itself constitutes a legislative restriction of the managerial prerogative to dismiss in order to make restructuring socially acceptable.

## **5. Scope of the Directive under Proportionality**

A proportionality analysis will by no means result in every dismissal arising from restructuring being prohibited as disproportionate.<sup>572</sup> For instance, it would not affect cases which entail significant financial losses that endanger the existence of the enterprise. Where the existence of the enterprise is at stake, the following comparison should be made. The effects of the limitations imposed upon employment protection will be compared with the effects of the restrictions upon the employer’s economic freedom to dismiss. The outcome of the comparison together with considerations to maintain the

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<sup>571</sup> H. Collins *Justice in Dismissal* (Oxford, Clarendon Press 1993), 273, as cited in S. Deakin and G. Morris, *Labour Law* (5<sup>th</sup> edn, Hart Publishing, Oxford 2009), 510.

<sup>572</sup> A similar view is taken by Njoya who argues that corporate restructuring is not always a ‘deliberate attempt to maximize profits by expropriating workers’ human capital investments. Not all reorganizations are a pretext for firing workers’. She also adds that ‘the law recognizes that in genuine situations of ‘economic dismissals’ it would not be appropriate to apply the same kind of employment protection measures that apply to other unfair or wrongful dismissal cases’, W. Njoya (n 506) 81-82.

viability of the working positions of the entire workforce, might well justify a number of required dismissals, according to the facts of each case.

This outcome is supported by the basic rule of balancing, according to Alexy, which provides that ‘the greater the degree of non satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other’.<sup>573</sup> In this sense, the great importance of maintaining the viability of the enterprise and the working positions of the majority of the workforce may justify the serious detriment caused to a minority of employees by the dismissal. Hence under these circumstances the imposed limitations upon the employment protection are proportionate in the light of the third limb of proportionality inquiry. A similar view is taken by Njoya, who in the context of employee participation in corporate decision-making, argues that ‘employee board representatives may readily support job cuts as a way of ensuring the survival of the firm during an economic downturn’ and she also adds that ‘here the challenge for employee representatives is to ascertain that economic dismissals are genuinely necessary, rather than merely expedient’.<sup>574</sup>

Finally, the extent of financial loss to the firm, which is relevant in accessing whether these losses are excessive, will differ depending on the size of each undertaking. Thus, the proportionality principle allows for differentiation between small-medium-sized businesses and businesses of large scale.<sup>575</sup> This adds an important dimension of

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<sup>573</sup> R. Alexy (n 503), 102 (footnotes omitted).

<sup>574</sup> W. Njoya ‘Job Security In a Flexible Labour Market: Challenges and Possibilities for Worker Voice’ (2012) *Comparative Labour Law and Policy Journal* 459, 472.

<sup>575</sup> On the differentiation between large and small firms on moral grounds see Selznick, who argues that: ‘The loss of a job ... may be far more hurtful than a term in jail. When these deprivations are inflicted arbitrarily, and there is no recourse, a gap in the legal order exists. We become more sensitive to that gap

reflexivity to the ARD. In this sense, particular financial losses may justify dismissals under the third stage of proportionality in the specific context of a small business, but not for a large enterprise.

This is important, because, as Collins observes, the ‘one size fits all’ type of regulation of employment relationship is inappropriate and he opts for a certain extent of reflexivity arising from the possibility of adjustment of the standard provided by the regulation.<sup>576</sup> A significant advantage of proportionality in this regard is that while it allows for this element of reflexivity, it has a clear structure that avoids the danger identified by Sengenberger of the abuse of the adjustment of the standards provided by the Directive to such an extent that they ‘cease to be standards’.<sup>577</sup>

Hence proportionality allows adjustment of the standard in terms of the size of the enterprise as regards the required extent of financial losses to consider the risk to the existence of the enterprise, but, at the same time, provide a safeguard against abuse. Thus, the third limb of proportionality enables the court to perform an objective evaluation of the proposed economic dismissals and reach an objective decision about the reconciliation of employers’ and employees’ interests. This is an important parameter of reflexivity in the implementation of the Directive, but the reflexive potential of the ARD under proportionality will be more fully explained in the following section.

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when the decisions are made by organizations that seem large, powerful and impersonal’, Philip Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage Foundation, 1969) 38, as cited in W. Njoya (n 506) 82.

<sup>576</sup> H. Collins, *Employment Law* (OUP, Oxford 2010), 44.

<sup>577</sup> W. Sengenberger, ‘Labour Standards: An Institutional Framework for Restructuring and Development’ in W. Sengenberger and D. Campbell (eds), *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring* (International Institute of Labour Studies, Geneva 1994), 37-38.

## 6. The reflexive potential of the ARD under Proportionality

As was shown in the first two chapters, the ARD after the 1998 amendment provides a clear example of reflexivity by allowing Member States to provide for collectively agreed derogations from its prescribed protection in cases of insolvency or serious economic crisis more generally.<sup>578</sup> However, as was also argued in the first two chapters, the existing implementation of the ARD results in a very restrictive framework as regards the involvement of social partners in restructuring outside the field of ‘insolvency’ and ‘serious economic crisis’.<sup>579</sup>

Additionally, it was argued that the current implementation results in an irrational outcome as it permits dismissal for an economic, technical or organizational reason (ETOR) entailing changes in the workforce (article 4 (2)), but prohibits a less intensive measure against employees falling short of a dismissal. In this sense, despite the fact that this judicial policy may be justified by employment protection considerations i.e. the abuse of ETOR justifications for collectively agreed derogations on behalf of employers, this approach could arguably result in the opposite outcome, as it forces the employers to dismiss employees when an ETOR justifies such dismissal even in cases where a less intensive measure against employees might be sufficient in the light of this ETOR.<sup>580</sup>

As also mentioned before, the Court of Justice may of course be concerned to prevent the abuse or exploitation of employees, an approach reflected in its interpretation

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<sup>578</sup> Article 5 par. 2; as Deakin and Morris referring to the ARD argue ‘the 1977 Directive was amended in 1998 in such a way as to encourage greater flexibility in its application to insolvency’, S. Deakin and G. Morris (n 571), 506.

<sup>579</sup> Case 362/89 *Giuseppe d'Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* [1994] ECR I-2435 and case 132/91 *Katsikas* [1992] ECR I-6577.

<sup>580</sup> For an acknowledgment of this danger, see TUPE Draft Revised Regulations Public Consultation Document (2005), paras 44-45, as cited in S. Deakin and G. Morris (n 571), 210.

of other directives such as the Working Time Directive.<sup>581</sup> The danger of abuse in relation to ETOR is that employers may use the threat of dismissal to achieve agreed derogations from existing employment terms and conditions. However, a proportionality analysis would help the court in such cases to arrive at an evaluation as to whether collectively agreed variations to the employees' terms and conditions should be permitted by allowing it to balance the risks against the benefits to be gained.

In this sense, the evaluation of these derogations, especially in the light of the *necessity* requirement of proportionality will enable the courts to scrutinize the facts of each case in such a way that they will shape an objective view as to the credibility of the alleged ETOR justification. This will enable the courts to evaluate objectively whether the collectively agreed variations to the employment terms and conditions were necessary (i.e. the least restrictive measure to the employees' protection) for the operation of restructuring and, if so, to permit these alterations.

Thus, the alternative options for the courts will either be to permit the operation of restructuring with the agreed alterations or to invalidate these alterations and provide that employment relationships are transferred unchanged to the transferee, according to the provisions of the ARD. The fact that the formulation of the proportionality enquiry permits the General Court and the Court of Justice to analyse the facts of each case with a certain degree of scrutiny that allows for a fair balance between conflicting interests is captured well by Craig, who observes that

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<sup>581</sup> Directive 2003/88/EC Working Time Directive (2003) OJ L299/9; *Pfeiffer v. Deutsches Rotes Kreuz* (Joined Cases C-397/01 to C-403/01) [2004] ECR I- 8835, para 82; See also C. Barnard, S. Deakin and R. Hobbs, 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time' in O. De Shutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?* (Bruylant, Brussels 2005) 243.

the structured form of the proportionality inquiry will normally lead the ECJ to examine the arguments of the parties in a degree of detail (...) The ECJ and CFI will check in detail within the proportionality inquiry to see whether the foundations for the challenged decision are sound. They will look hard at the facts and arguments adduced by the parties in order to determine whether the measure should be regarded as manifestly disproportionate.<sup>582</sup>

From the case law it is clear that the courts attach significance to information and consultation rights in the context of the ARD. They are particularly scathing about a strategic or 'calculated' failure to inform employees about the transfer. This is captured well by Lord Oliver of Aylmerton in *Litster*, observing that the fact the employer 'was asked specifically whether the business was being taken over by Forth Estuary' and 'said that he knew nothing about a company called Forth Estuary Engineering (...) indicates a calculated disregard for the obligations imposed by regulation 10 of the Regulations'<sup>583</sup> [the regulation requiring information and consultation with employees].

The significance of appropriate consultation before the transfer is also indicated by *Kerry Foods Ltd v Creber*<sup>584</sup>, where the Court observed that 'this was a bad case where consultation might, we think, have made a difference'. It is interesting that in this case, the Court explained in some detail the way in which the bargaining with employees over the applicable employment terms and conditions after the transfer might have led to

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<sup>582</sup> P. Craig (n 479) 265, 273 (footnotes omitted); A similar searching inquiry for the courts would arise from the application of proportionality test in the field of unfair dismissal, as is suggested by Collins: 'in the context of employment, the test of proportionality would assume that the employer needs to exercise a disciplinary power over the workforce for the legitimate aim of efficient production, but should subject dismissal decisions both to the question whether the employer was in fact pursuing such a goal of efficiency, and to the question whether dismissal was a necessary and proportionate means for achieving that goal in the circumstances', M. Freedland and H. Collins (n 477) 288, 296.

<sup>583</sup> *Litster and Others Appellants v Forth Dry Dock & Engineering Co Ltd* [1990] 1AC 546 (HL), para 564.

<sup>584</sup> *Kerry Foods Ltd v Creber* [2000] ICR 556 (EAT).

a more appropriate agreement with an alternative receiver, which might have safeguarded the employees' working positions and the viability of the enterprise:

Here, the receivers should have been anxious to find out what proposals the staff could make about the immediate and long-term future of Lukes. In the immediate short-term, the staff may have been prepared to forego their wages for a short period to keep the production running so as to keep the business intact. For the longer term, the staff should have been given the opportunity to make representations about the choice of purchaser. One of the front runners was prepared to carry on the business from Oreston and, no doubt, would have been prepared to keep on many of the existing work force. There was no good reason why that should not have been done.<sup>585</sup>

Additionally, Armour and Deakin refer to the illustrative Rover case in order to support a positive outcome of a similar bargaining procedure. In this particular case 'the employees and their representatives had found themselves in a position where their involvement in the rescue process had led to the success of the one bid which was consistent with maintaining Rover as a volume car producer'.<sup>586</sup> Hence the employees bargained over the serious liabilities arising from the application of the ARD so as to block a bid being unfavourable both for them and the future of Rover. Subsequently, they agreed upon waiving some of their rights so as to encourage another bid being favourable for the safeguarding of the viability of their enterprise.

In a wider context, Armour and Deakin strongly advocate the beneficial outcome of bargaining over the application of labour standards on the basis of employees' ability to waive some of their interests in return for some other advantages that may lead to the rescue of the enterprise in case of financial difficulties:

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<sup>585</sup> Ibid. para 18.

<sup>586</sup> J. Armour, S. Deakin, 'Insolvency and employment protection: the mixed effects of the Acquired Rights Directive' (2003) 22 *International Review of Law and Economics*, 443, 460.

Yet the case of Rover illustrates the role played by the law in tilting the bargaining process in favour of an outcome which both preserved employment and safeguarded the employees' interests in the maintenance of the enterprise over the long term. This example suggests that bargaining over the application of labour standards can be a means of achieving flexibility within the operation of the law, while still maintaining a role for employment rights in channelling the bargaining process in favour of an inclusive, stakeholder-orientated outcome.... The Rover case is therefore evidence that factoring employee interests into the restructuring process can result in outcomes which protect the human capital of the workforce without undermining the preservation of jobs.<sup>587</sup>

However, as was underlined above, the hostility of the Court of Justice towards the possibility of waiving of employees' rights under the ARD invalidates this reflexive potential of the Directive. It is true that some safeguards against abuse is essential, because free bargaining in itself is not the ultimate solution, as is indicated by Barnard, Deakin and Hobbs' case study on Working Time Directive (WTD)<sup>588</sup> and Corporate Social Responsibility (CSR):

the high hopes invested in reflexive law in general and the 'new CSR' in particular as a mode of regulation have not so far been borne out by the experience of the implementation of the WTD. Thanks to the wide derogations contained in the Directive and the parallel UK regulations, the new statutory limits on working time have been easily avoided in many workplaces.<sup>589</sup>

It is considered, though, that the solution may not be the refusal of any extent of reflexivity altogether, which was the choice adopted by the Court of Justice. The advantage of proportionality, in this regard, is that, while it allows for this reflexivity by permitting a certain extent of waiving of employees' rights, at the same time through its concrete structure, which was analysed in this chapter, it constitutes a safeguard against

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<sup>587</sup> Ibid. 461, 460

<sup>588</sup> Directive 2003/88/EC Working Time Directive (2003) OJ L299/9.

<sup>589</sup> C. Barnard, S. Deakin and R. Hobbs (n 581) 243.

disproportionate outcomes. This part indicated that the implementation of the ARD along the lines of proportionality safeguards an important reflexive potential of the Directive without undermining its role as a legislative instrument that sets an effective level of employees' protection in restructuring.

This chapter has indicated the potentially significant role of proportionality in the implementation of the ARD. However, the question still arises as to what weight to attach, or what value to assign, to the competing interests on both sides of the scale. Broad references to social considerations of employment protection would lack the precision required to adequately embark on a proportionality analysis. This is where the idea of legitimate expectations comes in.

## **Chapter 4: Legitimate Expectations**

### **1. Introduction**

The previous chapter suggested that the doctrine of proportionality offers a more fruitful approach in understanding and developing the jurisprudence under the ARD both legislatively and interpretatively. However, there is still no clarity or consensus as to how employees' expectation of continued employment under the ARD is best conceptualised. Therefore it is not sufficient to propose that proportionality should be the guiding principle in this area of law; it is necessary to offer a conceptual understanding of the precise legal nature of the interests safeguarded by the ARD.

This chapter suggests that the interest conferred upon employees by the ARD is best defined as a legitimate expectation. The idea that employees have legitimate expectations acknowledges the reality that employees typically invest their time, effort and skills at work in the expectation that they will continue in their employment unless there is good cause for the employment to be terminated. They then plan their lives in reliance on this expectation. It seems only fair that the law should recognize and protect this expectation and reliance.

The aim of this chapter is to concretize this general perspective, and offer an analytically coherent way of interpreting this idea in the context of the ARD. As Barak-Erez points out, the 'moral intuition' that legitimate expectations deserve protection is clear; less well-understood is the 'sound theoretical basis' of according such protection. She poses the following crucial question: 'Are legitimate expectations intrinsically protected due to respect for the individual concerned, or are they protected only to the

extent that they constitute a basis for reasonable reliance?’<sup>590</sup> This chapter will consider possible answers to this question in the context of the ARD.

The basic rationale of legitimate expectations is that in cases where individuals are led to expect that something will or will not happen and their belief is crystallised in an adequate concrete and sufficiently precise way, these expectations should be respected and any permitted alteration to their legal position should be subject to legal regulation.<sup>591</sup> One of the principal aims of the ARD, as described by Davies, is to ensure that the transferee takes on the employees of the company it acquires, thereby protecting the employees’ ‘social expectation of continued employment’.<sup>592</sup>

To an extent, this formulation of legitimate expectation is reflected in the developing implied term of mutual trust and confidence, in so far as this implied term protects the ‘employee’s reasonable expectations.’<sup>593</sup> Although the ARD clearly recognises this expectation of continued employment, the conceptual and doctrinal basis of this expectation has not received much attention. Njoya underlines the controversy characterizing the conceptualization of the precise legal nature of the interests safeguarded by the ARD in the specific context of the UK: ‘The precise nature of the rights conferred on employees by the TUPE Regulations has inspired much debate. They

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<sup>590</sup> D. Barak-Erez, ‘The Doctrine of Legitimate Expectations and the Distinction between the Reliance and the Expectation Interests’ (2005) vol. 11 *European Public Law* 583, 584.

<sup>591</sup> T. Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn OUP, Oxford 2006) 252 (footnotes omitted).

<sup>592</sup> P. Davies, ‘Recent Cases: Transfer Regulations’ (1988) 17 *Industrial Law Journal* 249, as cited W. Njoya, *The Property in Work, The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing Limited, England 2007) 181.

<sup>593</sup> A. Bogg ‘Good Faith in the Contract of Employment: A Case of the English Reserve?’ (2011) 32 *Comparative Labor Law and Policy Journal* 729.

could be described simply as statutory rights but this still leaves open the question of their underlying conceptual nature'.<sup>594</sup>

The principle of legitimate expectations offers a fruitful basis to explain the conceptual nature of ARD rights because it is a principle well established in European law, being one of Tridimas's general principles of law and having been 'expressly endorsed' by the Court of Justice as 'one of the fundamental principles of the Community' and 'one of the superior rules of the Community legal order for the protection of individuals'.<sup>595</sup>

As Barak-Erez argues there are compelling normative justifications for protecting legitimate expectations, particularly in situations where people have relied on those expectations to their detriment.<sup>596</sup> Case law under the ARD suggests that such an idea of reliance upon an expectation of continued employment has indeed played a role in judicial determinations that employees fall within the protective scope of the directive.<sup>597</sup>

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<sup>594</sup> W. Njoya, (n 592) 179; Njoya also comments that 'although TUPE now supplies the necessary clear terminology of transfer the concept of such automatic novation, creation of a new employment relationship out of the old which is not effected by agreement between the parties, appears at first sight to be conceptually problematic', W. Njoya (n 592) 180.

<sup>595</sup> J. Schwarze, *European Administrative Law* (London, Sweet and Maxwell 2006), 872 (footnotes omitted).

<sup>596</sup> D. Barak-Erez (n 590) 590.

<sup>597</sup> For an illustrative case, see *Litster and Others Appellants v Forth Dry Dock & Engineering Co Ltd (In Receivership) and Another Respondents* [1990] 1 AC 546 (HL). Two other cases indicating that the promise of the employer that the working positions would not be affected by the transfer were taken into account as part of the legal reasoning that the subsequent dismissals were unfair and the liabilities were passed on to the transferees are the *Carter v Qatar Airways Ltd, Air Cargo Partners Ltd* [2003] All ER (D) 515 (EAT) and the *Apex Leisure Hire v Barratt* [1984] ICR 452 (EAT). However, the existence of an explicit promise may not be required, but the concealment of the transfer on behalf of employer may be adequate to indicate the unfairness of the dismissal, especially in the light of the employers' information and consultation obligation (article 7). This is indicated by *Kerry Foods Ltd v Creber* [2000] ICR 556 (EAT), in which the Court observed that 'this was a bad case where consultation might, we think, have made a difference', para 19.

The chapter argues that the interest-protection which is conferred upon employees by the ARD may in and of itself be a basis for legitimate expectations. Initially, it is argued that this interest-protection is a concrete and specific one, and then the chapter goes on to argue that it may therefore be the foundation for a legitimate expectation protected by or under EU law.

It will also be suggested that a representation by the employer that the planned restructuring will not affect the employment positions of the workforce may constitute the legal basis of a legitimate expectation claim arising from or under the Directive. However, even in the absence of a promise or representation of that kind made by or on behalf of the employer, the obligation which is imposed by the Directive upon the employer to inform and consult employees about a transfer entailing economic dismissals may provide a substitute for such a promise or representation in founding the basis for a legitimate expectation.

In relation to the normative justifications for this approach, Barak-Erez identifies utilitarian and non-utilitarian reasons to protect the reliance interest which lies at the heart of legitimate expectations. Utilitarian arguments address the fact that employees invest time, skill and effort in their jobs in reliance on the expectation that their employment will continue: ‘disregard for other people’s reliance could lead them to lose their investments’.<sup>598</sup> Further, protecting that reliance is a pre-requisite to encourage employees to continue to make such investments of human capital: ‘people whose

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<sup>598</sup> D. Barak-Erez (n 590) 583, 587.

reliance has been ignored may prove unwilling to rely in the future, when such action might be vital for guaranteeing socially beneficial cooperation'.<sup>599</sup>

Barak-Erez's non-utilitarian arguments include 'the imperative to respect each person's humanity...taking into account the damages inflicted on relying parties shows consideration for their needs as creatures endowed with dignity'.<sup>600</sup> A further moral justification is 'the importance of social commitment': 'frustration of one's reasonable expectations causes anguish, destabilization, and demoralization'.<sup>601</sup> She also sees a strong correlation between protecting legitimate expectations, on the one hand, and considerations of equality of treatment on the other. This implies that people in the same circumstances will be treated in the same way: 'past experience is generally crucial in the formulation of expectations, and information about specific past behaviors is a basis for assuming that, should the same circumstances prevail, these behaviours will recur'.<sup>602</sup> This is particularly relevant in the context of dismissals related to economic crises, when different employers respond in different ways to the same downturn or fail to treat all their employees with equal consideration in making decisions about potential redundancies.

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<sup>599</sup> Ibid. 587-588

<sup>600</sup> Ibid. 588 (footnotes omitted).

<sup>601</sup> Ibid. 588

<sup>602</sup> Ibid. 589

## ***1.2 Legal analysis of legitimate expectations and the ARD***

Each claim to a legitimate expectation may be said to consist of two essential requirements: first, the identification of a legitimate interest being ‘specific’ and ‘well defined’,<sup>603</sup> and second, the treatment claimed for that interest. The treatment claimed for the legitimate interest refers to the consequences that each legal system attributes to it.<sup>604</sup> The legal treatment of all legitimate interests is not the same, but, depending on the facts of each case, this treatment may require the restoration of a previous situation, the award of compensation or a procedural remedy such as the right to be heard.<sup>605</sup>

The particular legal treatment of the legitimate interest depends, in turn, on the following requirements. First, the existence of a legal basis for the expectation, such as legislation, conduct or other representations or promises, as long as these are ‘the proximate cause of the legitimate expectation’.<sup>606</sup> Second, the criterion of foreseeability on behalf of the claimant is also central in the evaluation of frustration of an alleged legitimate expectation. As Tridimas observes, ‘in assessing whether a measure frustrates legitimate expectations, the Court places reliance on the criterion of foreseeability’.<sup>607</sup>

The criterion of foreseeability is indeed significant for the proof of the existence of reliance on behalf of the claimant. As Schwarze explains

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<sup>603</sup> T. Tridimas (n 591) 273.

<sup>604</sup> As Craig argues: ‘if a legitimate expectation has been found to exist then the Community courts will ensure that it is protected either through annulment of the offending provision or through the instrumentality of a damages actions (...)’, P. Craig, *EU Administrative Law* (OUP, Oxford 2006) 639.

<sup>605</sup> This is captured well by Schonberg, who observes that ‘an expectation is legitimate if the legal system acknowledges its reasonableness and attributes procedural, substantive, or compensatory legal consequences to it’, S. Schonberg, *Legitimate Expectations in Administrative Law* (Oxford, OUP 2003), 6.

<sup>606</sup> T. Tridimas (n 591) 252 (footnotes omitted).

<sup>607</sup> *Ibid.* 265

the affected party must not have acted in such a way as to preclude his reliance on the expectation. In addition, the subsequent frustration of the alleged legitimate expectation by the infringement of the acquired legal position or of the individual interest must not have been foreseeable by the person affected.<sup>608</sup>

Finally, the award of protection under a legitimate expectation claim in EU law requires the legitimate expectation claim to be balanced against the general interest running counter to it. Thus, even if an alleged legitimate expectation claim has a clear legal basis and satisfies the foreseeability requirement, it needs also to outweigh the general interest running counter to it.

It will be shown that the ARD safeguards employees' interests in transfers which are sufficiently precise, 'well defined' and individual so as to constitute the subject of the relevant legitimate expectation claims. Secondly, the ARD as a binding piece of secondary European legislation would constitute a sufficient legal basis for the relevant employees' legitimate expectation claim. An additional basis would be an employer's representation that it will keep its employees, despite the restructuring.<sup>609</sup> However, the existence of an explicit promise may not be required. Failure to inform and consult employees about the transfer may in itself be adequate to constitute the legal basis of the legitimate expectation claim, especially in the light of the employers' information and consultation obligation.<sup>610</sup>

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<sup>608</sup> J. Schwarze (n 595) 951 (footnotes omitted).

<sup>609</sup> The importance of this promise is underlined in *Litster* case. Lord Templeman states, amongst the other reasons that made him reject the argument that 'the Directive and the Regulations did not apply because the whole of the business of Forth Dry Dock had not been transferred (...) that 'the workers of Forth Dry Dock were given the impression that their employment would be continued by a new owner', *Litster and Others Appellants v Forth Dry Dock & Engineering Co. Ltd. (In Receivership) and Another Respondents* (n 597), para 556.

As far as the foreseeability requirement is concerned, the well established history of the ARD as a Directive adopted in 1977 means that employees should be secure in the idea that they will keep their working position after the transfer. Further, an employer's promise that a transfer will not affect the working positions of the workforce or the failure to inform about this transfer altogether renders transfer-related dismissals a potentially unforeseeable change in the employees' legal position. Finally, as regards the balancing requirement, the employees' legitimate expectation of protection against dismissal under the ARD runs counter to the general interest of firms' competitiveness, as it reduces employers' freedom to effect economic dismissals in each case of transfer. Thus, the employee's legitimate expectation needs to be balanced against the employers' freedom to restructure.

In the specific context of this balancing, emphasis is placed in most cases on the requirement of reliance, which, as Barak-Erez aptly depicts, may in principle tilt the balance either in favour of the individual's protection or in favour of the unfettered discretion of the decision-maker. The outcome of the balancing exercise depends on whether it is a 'pure' expectation case or whether there is an additional element of reliance by the claimant.

Where expectation is coupled with detrimental reliance, the balance will usually tilt in favour of the individual, whereas in pure expectation cases in the absence of reliance the discretion of the decision-maker would weigh more heavily in the balance.<sup>611</sup> Similarly, where employees have relied upon an employer's promise that they will keep

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<sup>610</sup> Article 7 of the ARD.

<sup>611</sup> D. Barak-Erez (n 590) 583, 595.

their working position, despite the transfer, the balance more easily tilts in favour of their protection and against the managerial prerogative to effect economic dismissals.

In this sense, the proportionality balancing will tilt in favour of the employee whose reliance would be defeated by a transfer-related dismissal. However, it is significant, as Barak-Erez observes, that ‘expectations often prompt reliance’.<sup>612</sup> The centrality of one's job for everyone's life ensures that people in employment invariably place reliance on the expectation that they will not lose their jobs for arbitrary or capricious, or otherwise unfair, reasons.<sup>613</sup> Therefore, in most cases the reliance element is satisfied; only in rare cases would this detrimental reliance be lacking on the facts.

The rest of this chapter proceeds as follows. Section 2 analyses the historical development of legitimate expectations as a general principle of Community law. Section 3 refers to some compelling normative justifications for protecting legitimate expectations. Section 4 refers to the essential characteristics of the legitimate interests. Section 5 analyses the elements of the treatment claimed to protect the interest, namely the legal basis and the foreseeability requirement, as well as the balancing requirement. Finally, section 6 applies this discussion to the ARD followed by a brief concluding section (section 7).

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<sup>612</sup> Ibid. 585

<sup>613</sup> H. Collins, *Employment Law* (OUP, Oxford 2010) Part 1.

## 2. Historical Origins

The aim of this part is to understand how legitimate expectations became part of EU law. From looking at this historical development, it emerges that the Court of Justice played the leading role in the conceptualization of this principle.<sup>614</sup> There are two different ways in which the principle of legitimate expectations is recognised in the case-law of the Court of Justice.

Firstly, legitimate expectations are considered as a corollary to the principle of legal certainty. This was verified in *Duff*,<sup>615</sup> in which it was stated that:

That principle (*i.e. protection of legitimate expectations*), which is part of the Community legal order (...), is the corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable...<sup>616</sup>

On the other hand, in other cases, the Court recognised the concept of legitimate expectations explicitly as an independent principle of Community Law and it described it as ‘one of the fundamental principles of the Community’, a ‘constituent part of the legal order of the Community’, a ‘superior rule of law’ or ‘one of the superior rules of the Community legal order for the protection of individuals’.<sup>617</sup>

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<sup>614</sup> Alexy makes the following very important linguistic observation as regards principles. He observes that the fact that principles ‘are often characterized ‘evolved’ rather than ‘created’ lies in the fact that they need not be expressly enacted, but can be derived from a tradition of detailed norm-creation and judicial decision-taking which are often the expressions of a widespread understanding of what law ought to be’, R. Alexy, *Theory of Constitutional Rights* (trans. by J. Rivers) (Oxford, OUP 2002) 61.

<sup>615</sup> Case C-63/93 *Fintan Duff, Liam Finlay, Thomas Julian, James Lyons, Catherine Moloney, Michael McCarthy, Patrick McCarthy, James O'Regan, Patrick O'Donovan v Minister for Agriculture and Food and Attorney General* [1996] ECR I-569.

<sup>616</sup> See para 20 of Case C-63/93, *ibid.*

The exact legal nature of legitimate expectations is theoretically controversial. Some legal theorists insist that legitimate expectations are simply an expression of the principle of legal certainty. Charlesworth and Cullen characterize legitimate expectations as a ‘sub-principle’ of legal certainty<sup>618</sup> and Hartley considers legitimate expectations as a ‘sub-concept’ of legal certainty.<sup>619</sup> However, other commentators, such as Tridimas and Barrett, consider legitimate expectation as an independent principle of Community Law.<sup>620</sup>

Additionally, there is dispute over the legal nature of legitimate expectations in national laws. For example, in French administrative law there is no recognition of an independent legal principle of legitimate expectations and this gap is filled by the application of legal certainty and the three sub-principles arising from it, namely the non-retroactivity of administrative acts, the recognition of vested rights and the inviolability of individual administrative acts.<sup>621</sup>

On the contrary, in Germany and the Netherlands, the protection of legitimate expectations is an independent legal principle equal in rank in the hierarchy of norms

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<sup>617</sup> For the expression ‘one of the fundamental principles of the Community’, see Case 112/80 *Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095 at 1120 et seq.; for the ‘constituent part of the legal order of the Community’, see Case 112/77 *August Töpfer & Co. GmbH v Commission of the European Communities* [1978] ECR 1019 at 1033; for the ‘superior rule of law’, see joined Cases 42 and 49/59 *Snupat v. High Authority* [1961] ECR 53 p. 549; for ‘one of the superior rules of the Community legal order for the protection of individuals’, see Opinion of Trabucchi AG in Case 5/75 *Deuka Deutsche Kraftfutter GmbH B. J. Stolp v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 759 at 777, as cited in J. Schwarze (n 620), 872.

<sup>618</sup> A. Charlesworth and H. Cullen, *European Community law* (Pitman, London 1994) 126.

<sup>619</sup> T. Hartley, *The Foundations of European Community Law: An Introduction To The Constitutional And Administrative Law Of The European Community* (OUP, Oxford 2007) 146.

<sup>620</sup> T. Tridimas (n 591) 251; G. Barrett, ‘Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law (2001) 20 YEL 191, 203.

<sup>621</sup> J-Y Vincent, ‘Le retrait des actes administratifs unilatéraux’ (1974) *Revue Trimestrielle De Droit Europeen* 31-32.

with legal certainty. However, the German courts have not provided an explicit answer to the question whether the principle of legitimate expectations arises from legal certainty, despite the fact that in certain cases it is clearly assumed that there is a close correlation between the two.<sup>622</sup>

In the context of Community law, despite the theoretical correlation between legitimate expectations and legal certainty, the principle of legitimate expectations is an independent legal principle that may stand on its own as the legal basis of the relevant claim. A similar approach is taken by Reynolds, who considers, at least in principle, that:

It is natural that there should be a clear distinction between the principles of legal certainty and legitimate expectations in European law. Both concepts originate from German Law and within German law they are perfectly separate. Legal certainty is based on *Rechtssicherheit*: a principle which demands certainty of the content of law and is primarily employed in cases concerning retroactive law. The protection of legitimate expectations is derived from the principle of *Vertrauensschutz*, which seeks to ensure that “everyone who trusts the legality of a public administrative decision should be protected”. The principle of *Vertrauensschutz* seeks quite distinct objectives to legal certainty. It is concerned to promote confidence in the public administration and trust in its decisions: this is seen from the fact that the principle can apply even against legislation, the surest challenge to legal certainty that there can be.<sup>623</sup>

In this sense, in a number of cases of the Court of Justice<sup>624</sup> the principle of legitimate expectations was invoked without reference to legal certainty. In practice this means that the doctrine of legitimate expectations in European law plays an important role, even when legal certainty is not a relevant consideration in the light of the facts of the cases.

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<sup>622</sup> J. Schwarze (n 595) 946-947.

<sup>623</sup> P. Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ (2011) *Public Law* 330, 340-341.

<sup>624</sup> See note 639, above

### 3. Normative Justifications

Leaving aside for now the issue whether reliance is an essential condition for the protection of legitimate expectations, which will be analysed below, it is important to make the following two significant observations here.

Firstly, the normative foundation for the protection of reliance is arguably significant for the creation of high trust employment relationships.<sup>625</sup> Indeed, we may draw an analogy here with Craig's '*good administration and trust in government*' rationale for the protection of legitimate expectations identified, which emphasizes that 'administrative power is more likely to be perceived as legitimate authority if exercised in a way which respects legitimate expectations'.<sup>626</sup> Applying this to the context of economic dismissals, employers who respect the reasonable expectations of their employees are more likely to be perceived as fair by the employees in such a way that the creation of high trust employment relationships may be promoted.

Secondly, the existence of detrimental reliance safeguards a greater probability for the protection of legitimate expectations. Barak-Erez aptly depicts the balance 'tilting' in favour of the individual's protection or the unfettered administrative discretion depending on whether it is a 'pure' expectation interest or whether there is reliance:

The reasons for supporting the protection of the reliance interest are far weightier than those supporting the protection of expectations that did not serve a basis for reliance. (...) If the protected interest is primarily reliance rather than expectation

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<sup>625</sup> S. Deakin and F. Wilkinson, 'Labour Law and economic theory: A reappraisal', in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 59.

<sup>626</sup> P. Craig (n 604) 613 (footnotes omitted).

in the strict sense, awarding remedy to the individual is more easily balanced against the prohibition on the restriction of administrative discretion.<sup>627</sup>

Arguably, an analogy could be drawn here with the issue of proportionality balancing of competing employers and employees interests in the field of the ETOR justification for dismissals. In cases where the employees have relied upon an employers' promise that they will keep their working position, despite the transfer, the balance more easily tilts in favour of their protection and against the managerial prerogative to effect economic dismissals than in cases when such a reliance is absent.

We now move on to examine the constituent elements of the principle of legitimate expectations arising from legislation.

#### **4. Nature of the Interest**

This section identifies the types of interests that may give rise to legitimate expectation claims, examining the judicial meaning given to the term 'interest' capable of qualifying as the subject of a relevant legitimate expectation claim. Identifying this interest constitutes the first required element of a successful claim to legitimate expectation.

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<sup>627</sup> D. Barak-Erez (n 590) 595.

#### 4.1 'Specific' and 'Well defined' Interests

The first requirement is that the subject of the legitimate expectation claim must be 'specific' and 'well defined'.<sup>628</sup> This means that no legitimate interest may arise from legislation that does not give rise to specific individual interests.<sup>629</sup> Second, only individual interests may constitute the subject of a legitimate expectation claim. The question then arises: must the interest amount to a 'right'?

There was, at first, a presumption that a 'right' is required. In *Algera*<sup>630</sup> the Court restricted the application of this principle to rights, as opposed to mere interests:

An administrative measure *conferring individual rights on the person concerned cannot in principle be withdrawn*, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails over the interests of an administration desirous of reserving its decision. This is true in particular of the appointment of an official.<sup>631</sup> (emphasis added)

This presumption that only rights may constitute the subject of a legitimate expectation claim later evolved towards a much broader conceptualization of the triggering criterion of the legitimate expectations protection. The Court developed the idea that 'similar benefit' would serve the same function as a 'right': *Verli-Wallace*<sup>632</sup> characterized 'the

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<sup>628</sup> T. Tridimas (n 591) 273.

<sup>629</sup> Case T-472/93 *Campo Ebro and Others v Council* [1995] ECR II-421, para 82: 'It follows from the case-law of the Court of Justice that there is a breach of the principle of the protection of legitimate expectations if, in the absence of an overriding matter of public interest, a Community institution abolishes with immediate effect and without warning *a specific advantage*, worthy of protection, for the undertakings concerned without adopting appropriate transitional measures' (emphasis added).

<sup>630</sup> Joined Cases 7/56 & 3-7/57 *Algera v. Common Assembly* [1957-58] ECR 39.

<sup>631</sup> *Ibid.* p. 54

<sup>632</sup> Case 159/82 *Verli-Wallace v Commission* [1983] ECR 2711.

retroactive withdrawal of a legal measure which *has conferred individual rights or similar benefits*’ as being ‘contrary to the general principles of law’<sup>633</sup> (emphasis added). This broadened the subject of legitimate expectations from the concept of individual rights towards the notion of interests.

The Court later developed this further to extend to a simple ‘interest’ that needs not be similar to a ‘right’. In *SNUPAT*<sup>634</sup> it held that the claimants’ legitimate expectation was founded on ‘*the interest of the beneficiaries*’ and especially the fact that they might assume in good faith that they did not have to pay contributions on the ferrous scrap in question, and might arrange their affairs in reliance on the continuance of this position’ (emphasis added). Here, the Court explicitly held that it is sufficient for a legitimate expectation claim to be based on the interest, together with reliance of the beneficiary. No reference is made to the existence of a right, which signals the unequivocal detachment of the protection offered by legitimate expectations from the existence of a right.

Thus, the Court of Justice adopts a very broad view of the spectrum of interests that may constitute the basis for the protection of legitimate expectation. In other words, the triggering criterion for the award of legal protection in terms of legitimate expectations includes a wide range of interests and ‘other similar benefits’ and not only rights. Hence Craig’s observation that the community courts ‘are not intending to limit the applicability of the legal protection to rights *stricto sensu*’.<sup>635</sup>

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<sup>633</sup> Ibid. para 8

<sup>634</sup> Joined Cases 42 and 49/59 *Snupat v. High Authority* [1961] ECR 53.

<sup>635</sup> P. Craig (n 604) 616.

The next question to ask is where this interest emanates from. The interest may arise from legislation, as long as the legislation gives rise to specific individual interests. This is explicitly expressed in *Sofrimport*,<sup>636</sup> in which the Court of Justice ruled that ‘since Article 3 of Regulation No 2707/72 gives specific protection to those importers, they must therefore be able to enforce observance of that protection and bring legal proceedings for that purpose’.<sup>637</sup> The Court continued by holding that the protection awarded by this provision enables ‘an importer...to rely on a legitimate expectation that in the absence of an overriding public interest no suspensory measures will be applied against him’.<sup>638</sup> Here the Court of Justice expressly determines that a legislative measure must confer ‘specific protection’ upon individual so that it may give rise to a legitimate expectation claim.

#### ***4.2 Is ‘detrimental reliance’ an essential element of the legitimate interest?***

The next question is whether it is necessary to show ‘detrimental reliance’ in order to acquire a sufficient interest to found the legitimate expectation. Schonberg seems to suggest that detriment or harm resulting from reliance is required. In identifying reliance theory as a potential justification for the protection of legitimate expectations he argues that there is a general obligation not to cause preventable harm to others, so the harm caused to particular individuals constitutes the upper limit to the authorities’ discretion. In other words, if an authority acts in such a way that it made a person rely upon its

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<sup>636</sup> Case C-152/88 *Sofrimport Sarl v Commission* [1990] ECR I-2477.

<sup>637</sup> *Ibid.* para 12.

<sup>638</sup> *Ibid.* para 16.

representation or conduct to his or her detriment, it is in principle under an obligation not to disappoint the individual's reliance.<sup>639</sup>

Craig recognizes that reliance may be a reason for the protection of legitimate expectations, but not the only one. He refers to four categories of cases, in which he considers that legal protection should be awarded irrespective of the absence of reliance: (i) revocation of decisions (ii) departure from representations (iii) changes in general policy affecting a group of individuals (iv) change of policy with regard to a particular individual. These categories are so broad that they cover almost the full spectrum of legitimate expectations claims.<sup>640</sup>

The Court of Justice seems to agree. In *Alpha Steel*<sup>641</sup>, the Court may have accepted that the applicant has not relied upon the lawfulness of the decision, since it lodged an application for its annulment (i.e. the initial decision), but it did not require any kind of substantial reliance, such as the individual to have placed financial reliance upon the decision. On the contrary, the Court of Justice only referred to the existence of an application for the annulment of the decision at issue, which indicates the applicant's doubts as to its validity. In other words, it was the doubts of the claimant as to the validity of the decision indicated by the lack of reliance that made the Court reject the protection of legitimate expectation in this case and not the absence of reliance in itself.

This interpretation suggests that the reliance is not an essential precondition for the protection of the legitimate expectation in EU law. In other words, reliance may justify the protection of legitimate expectations in some cases, but it is not an essential

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<sup>639</sup> S. Schonberg (n 605) 9-11.

<sup>640</sup> P. Craig (n 604) 611- 612.

<sup>641</sup> Case 14/81 *Alpha Steel v Commission* [1982] ECR 749.

condition for their protection. Hence, Craig argues that reliance is a limited principled foundation for the protection of legitimate expectation, but the existence of loss caused by detrimental reliance is still a good reason why the law ‘should afford protection in cases where such justified reliance exists’.<sup>642</sup> In Craig’s view, every claim of legitimate expectation may be justified, even in the absence of reliance, by reference to the fairness of public administration, the principle of equality and rule of law considerations.

In a similar vein Schonberg considers that the protection of legitimate expectations increases the level of trustworthiness of authorities, as they do not use their discretion arbitrarily. The anxiety of administrative authorities not to breach the legally protected legitimate expectations of individuals makes them more prudent to the provision of information, which in turn leads to the amelioration of the quality of administration in general.<sup>643</sup> However, the possibility of protection of ‘pure’ expectations without an element of reliance does not reduce the great practical significance of the existence of detrimental reliance on behalf of the claimant.

This is captured well by Barak-Erez:

I do not argue that expectations *per se* do not warrant protection. Justifications for the protection of expectations exist independently, even barring detrimental changes. If no reliance is involved, however, the consideration of the authorities’ freedom to alter their policy in relation to the future assumes further significance in the balance to be weighed by the court. This is especially important with regard to the substantive protection of legitimate expectations (...).<sup>644</sup>

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<sup>642</sup> P. Craig (n 604) 612- 613.

<sup>643</sup> S. Schonberg (n 605) 24-26.

<sup>644</sup> D. Barak-Erez (n 590) 583, 595-596.

In this sense, Barak-Erez on the basis of an evaluation of the case-law explains that, despite the scope for protecting ‘pure expectations’, when it comes to the balancing exercise or deciding which way to ‘tilt’ the balance then ‘in the absence of reliance, legitimate expectations will usually not be enforced, subject to rare exceptions’.<sup>645</sup> The implications of this significant parameter of reliance for the protection of employees’ legitimate expectations under the ARD and the balance between these expectations and the managerial prerogative to effect economic dismissals will be analysed below in section 6.

#### ***4.3 Interests of Private Law as ‘legitimate’ interests***

Most commentators discuss the issue of legitimate expectations in the context of administrative law and therefore they do not address the potential extension of this idea to the field of the private employment relationship. If the doctrine of legitimate expectations does not extend to private employees, the recognition of these expectations would be valuable solely for state employees. Thus, the application of legitimate expectations to private employment law increases the interpretative value of this principle. It has already been explained on the basis of Tridimas’ theory of general principles of law that legitimate expectations, as a general principle of EU law, ‘transcend specific areas of law and underlie the legal system as a whole’.<sup>646</sup>

However, it is also argued here that there are more specific reasons supporting the application of the principle of legitimate expectations to private employment

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<sup>645</sup> Ibid. 599

<sup>646</sup> T. Tridimas (n 591) 2.

relationships. The reasons relate to the rationales and the operation of the protection of legitimate expectations in public and private law, the strong similarities of this principle with some basic notions of private employment law and some specific characteristics of European law.

#### *4.3.1 The meaning of 'public body' in EU law*

Due to the fact that the principle of legitimate expectations in European law originates from public law, it may be thought to apply primarily to employees of a public undertaking. Hence, we will start our discussion from there. The relevant question is what types of undertakings are considered public authorities under Community law?

The term 'public body' is very broadly interpreted. The Court of Justice uses the terms 'state', 'organ of the state' and 'public authority' interchangeably.<sup>647</sup> Identifying the criteria determining whether a particular body falls within the ambit of 'public undertaking' was referred to the Court of Justice in *Foster*.<sup>648</sup> The Court in this case established that the provision of public services by the bodies is essential.<sup>649</sup> The bodies providing public services must either be 'subject to the authority or control of the State' or have 'special powers beyond those which result from the normal rules applicable to relations between individuals'.<sup>650</sup>

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<sup>647</sup> S. Prechal, *Directives in EC Law* (Oxford, OUP 2006) 58.

<sup>648</sup> Case C-188/89 A. *Foster and others v British Gas plc* [1990] ECR I-3313.

<sup>649</sup> *Ibid.* para 20

<sup>650</sup> *Ibid.* para 18

Later, in *Kampelmann*,<sup>651</sup> the Court of Justice seems to adopt an even broader view regarding the determination of public bodies being directly obliged by the provisions of a directive, as the alternative criteria applied in this regard were either for the body to be ‘subject to the authority or control of the State’ or to have ‘special powers beyond those which result from the normal rules applicable to relations between individuals’. Thus, no reference was made to the necessity of provision of public services by these bodies. However, in *Rieser*<sup>652</sup>, the Court of Justice seemed to refer again to the judicial test applied in *Foster*.

In any event, as Prechal points out

the Court is willing to apply a broadbrush approach which covers the whole panoply of bodies which exercise public authority in one way or another, through which the State pursues its policies, whether in its regulatory capacity or in its interventionist capacity or where the State operates as a market participant.<sup>653</sup>

#### 4.3.2 *Private Law Interests*

The second question is whether an interest arising from private law may give rise to a legitimate expectations claim. Starting from the underlying reasons for the protection of legitimate expectations in administrative law, Barak-Erez suggests that they are similar to those justifying the protection of expectation interests in private law.<sup>654</sup>

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<sup>651</sup> Joined cases C-253/96, C-254/96, C-255/96, C-256/96, C-257/96 and C-258/96 *Helmut Kampelmann and Others v Landschaftsverband Westfalen-Lippe (C-253/96 to C-256/96), Stadtwerke Witten GmbH v Andreas Schade (C-257/96) and Klaus Haseley v Stadtwerke Altena GmbH (C-258/96)* [1997] ECR I-6907

<sup>652</sup> Case C-157/02 *Rieser Internationale Transporte GmbH and Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2004] ECR I-1477.

<sup>653</sup> S. Prechal (n 647) 60.

<sup>654</sup> D. Barak-Erez (n 590) 590.

Firstly, the reliance element exists in both private and public law as a rationale for the protection of expectations. The protection of reliance in private law safeguards the continuous flow of commercial life,<sup>655</sup> while, the protection of reliance in administrative law guarantees the attainment of governmental goals. Secondly, the basic premise of the reliance theory that public authorities have a general obligation not to cause preventable harm to others was initially formulated in the context of tort law by reference to the idea of ‘avoiding actions actually involving more harm than benefit’ and that ‘the efficient allocation of social recourses requires each action to bear its costs’.<sup>656</sup>

Apart from these similarities in terms of the rationales for the protection of expectations in public and private law, there are also analogies regarding the substantive protection of expectations in these two fields of law. Cartwright draws attention to several fields of English private law in which the courts have given some legal effect to the expectations of the parties. He argues that the objective approach as to the contract formation ‘has even been identified as based on the desire to protect the reasonable expectations of the party whose interpretation and understanding is held to have been correct’.<sup>657</sup>

He also observes that the protection of legitimate expectations exists in some rules regarding offer and acceptance, such as the rule that the ‘offer is withdrawn only if the withdrawal is actually communicated to the offeree’, which purports to protect the expectations of the offeree ‘who reasonably believes himself to be still entitled to accept

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<sup>655</sup> L. Fuller & E. Perdue, ‘The Reliance Interest in Contract Damages’ (1937) 46 Yale Law Journal 373.

<sup>656</sup> D. Barak-Erez (n 590) 591.

<sup>657</sup> John Cartwright, ‘Protecting Legitimate Expectations and Estoppel in English Law’, (December 2006) vol 10.3 Electronic Journal of Comparative Law <<http://www.ejcl.org/103/art103-6.pdf>> (footnotes omitted) accessed 07 July 2012.

the offer by post...'.<sup>658</sup> Additionally, Cartwright identifies the protection of legitimate expectations concerning the arguments of invalidation of the contract. He also observes that the party who created the belief that the contract was valid cannot take advantage of the statutory deficiencies or the defects of consent, as this would infringe upon the expectations of the other party.<sup>659</sup>

As for the legitimate character of the expectation, this is not difficult to prove, as in the context of executory contracts each party's promise is 'the consideration for the other's'.<sup>660</sup> In this sense, Cartwright observes that the remedies for breach of contract are formulated to protect the expectations, in principle, in terms of monetary compensation.<sup>661</sup> Thus, private law explicitly protects the expectations of the contracting parties and the doctrine of consideration determines the legitimate character of these expectations. Morris and Fredman use the example of privatised prisons in order to highlight that it is not reasonable for the notion of a prisoner's contract to give rise to 'legitimate expectations which could be relied upon in judicial review proceedings by those held in public but not in private prisons'.<sup>662</sup>

Especially with regard to private employment law, the idea of legitimate expectations is not unfamiliar. Collins observes that 'an analogy can be drawn between the dangers presented by the discretionary power of the state and the discretionary power of employers. Employees need certain guarantees that managerial powers can never be

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<sup>658</sup> Ibid. 11

<sup>659</sup> Ibid. 15-16

<sup>660</sup> Ibid.

<sup>661</sup> Ibid. 19-22

<sup>662</sup> S. Fredman and G. Morris, 'The costs of exclusivity: public and private re-examined' (1994) Public Law 69, 85.

used to override basic liberties and rights'.<sup>663</sup> Additionally, Deakin and Morris argue that implied terms at common law 'protect certain of the employee's expectations of continuing work and employment'.<sup>664</sup>

The implied term of mutual trust and confidence is strongly connected with the protection of employees' expectations. This is captured well by Bogg, who argues that

Trust and confidence makes its specific contribution by preventing the disappointment of the employee's reasonable expectations. It does this in four main ways: the requirement of notice in respect of certain discretionary decisions, the requirement of consistency of treatment between employees, the protection of legitimate expectations; and the employer's positive obligation to provide information to employees in particular contexts.<sup>665</sup>

This is also clearly illustrated by the case-law which suggests that an employer commits a breach of the duty of mutual trust and confidence,<sup>666</sup> inter alia, when it permits an employee to be victim of persistent verbal abuse or sexual harassment, fails to investigate a legitimate complaint about health and safety, unjustifiably insists that the employee should undergo psychiatric examination, provides misleading and potentially destructive

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<sup>663</sup> However, Collins also notes that 'these arguments have certainly influenced the evolution of employment law, but it has never accepted the view that employment relationships should be governed by legal requirements that precisely imitate the democratic institutions and the protection of civil liberties that public law applies to relations between citizen and the state. Instead, employment law has developed a distinctive interpretation of the application of these liberal values to the workplace', H. Collins (n 613)11.

<sup>664</sup> S. Deakin and G. Morris *Labour Law* (5<sup>th</sup> edn, Hart Publishing, Oxford 2009) 219

<sup>665</sup> A Bogg 'Good Faith in the Contract of Employment: A Case of the English Reserve?' (2011) 32 *Comparative Labor Law and Policy Journal* 729, 759-760.

<sup>666</sup> For the limits of the implied term of mutual trust and confidence that applies 'only to the performance phase of the contractual relationship, but not to its negotiation or termination', see A. Bogg, *ibid.* 773; However, Bogg also adds 'that good faith is fully applicable to the performance of contractual obligations and the exercise of contractual powers in the English contract of employment. In respect of contractual powers particularly, the implied term of trust and confidence has been deployed extensively' and its application is so broad that 'the range of behaviours caught by trust and confidence displays a breathtaking variety', see *ibid.* 738, 754.

reference to a prospective employer and carries out a restructuring which had the effect of depriving the employee of a chance to earn a contracted-for bonus.<sup>667</sup>

It seems that in all these cases the breach of the implied term of mutual trust and confidence arises from the infringement of the employees' expectation that their employers shall not 'without reasonable and proper cause, conduct [itself] in a manner calculated to or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.<sup>668</sup>

It is important to note here that Bogg identifies a particular set of criteria for the protection of employees' legitimate expectations in the context of the English contract of employment under the implied term of mutual trust and confidence, on the basis of the *French v Barclays Bank*<sup>669</sup> case:

The facts in *French* disclosed an especially strong argument for protecting the employee's legitimate expectation. His reliance on published criteria in the staff handbook was reasonable, he had suffered extreme detriment and hardship as a result of that reliance, and there were no weighty identifiable countervailing reasons justifying the (retrospective) change of policy in his case.<sup>670</sup>

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<sup>667</sup> For the verbal abuse or sexual harassment, see *Horkulak v Cantor Fitzgerald International* [2003] IRLR 455; for the failure to investigate a legitimate complaint about health and safety, see *British Aircraft Corp v Austin* [1978] IRLR 332 (EAT); for the unjustifiably insistence that the employee should undergo psychiatric examination, see *Bliss v South-East Thames Regional Health Authority* [1985] IRLR 308 (CA); for the provision of misleading and potentially destructive reference to a prospective employer, see *TSB Bank v Harris* [2000] IRLR 157 (EAT); for the carrying out a restructuring which had the effect of depriving the employee of a change to earn a contracted-for bonus, see *Takacs V Barclays Services Jersey Ltd* [2006] IRLR 877 (HC, QBD), as cited in S. Deakin and G. Morris (n 664), 306-307.

<sup>668</sup> *Woods v WM Car Services (Peterborough) Ltd* [1982] ICR 693 (CA), para 695 that affirmed the position taken by the EAT on this issue.

<sup>669</sup> *French v. Barclay's Bank* concerned an employee's relocation following the employer's requirement. As part of this relocation arrangement the employer offered an interest free bridging loan to the employee that was set out in the relevant staff handbook. Subsequently, the employer sought to readjust the interest free loan arrangement due to a collapse in the housing market and this would amount to a significant financial loss for the concerned employee. The Court of Appeal held that this readjustment constitutes a breach of trust and confidence because it defeats the legitimate expectations of the employee that had been induced by his reasonable reliance on the loan rules set out in the relevant staff handbook, *French v. Barclay's Bank* [1998] IRLR 646 (CA), para 18, as cited in A. Bogg (n 665) 729, 761.

The constitutive elements of the employee's legitimate expectation claim in *French v Barclays Bank* case satisfy the requirements for a successful legitimate expectation claim under the EU law, in the sense that the employee had a 'specific' and 'precise' legitimate interest in being treated according to the staff handbook, which constituted the legal basis of the relevant legitimate expectation claim. Accordingly, the publicity of the handbook rendered the subsequent treatment by the employer, i.e. the contravention of its published criteria, unforeseeable. The absence of 'weighty identifiable countervailing reasons justifying the (retrospective) change of policy' meant that the alleged legitimate expectation claim satisfied the balancing requirement.

In a more general context, the idea of applying some of the protective principles of public law to the employment relationship, regardless of whether the employer is public or private, is further reinforced by the characteristic imbalance of power in the employment relationship, which resembles the power imbalance in the relationship between individuals and public authorities. In other words, as in administrative law the authorities' freedom to disregard individual reliance increases 'the risk of misuse of power to the point of infringing individual civil rights'<sup>671</sup>, the employer's freedom to disregard employees' expectations and reliance increases the risk of arbitrary decisions constituting abuse of the managerial prerogative.

This line of analysis received further support from the observations of Deakin and Morris regarding the public elements of private employment relationship in UK law: 'despite the procedural divide, the influence of public law concepts, in particular procedural fairness, has spread in some contexts to proceedings brought in private

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<sup>670</sup> Ibid. 762

<sup>671</sup> D. Barak-Erez (n 590) 591.

law...'.<sup>672</sup> The courts have recognized that, even if the employment contract contains an express mobility clause without any reference to a notice period, the employer must give the employee reasonable notice of the move to a new place of work on the basis of the implied term that the employer must act reasonably in exercising the option to invoke the powers that express terms confer.<sup>673</sup>

Another clear indication of the public law dimensions of UK private employment law is the fact that despite the contractual nature of the relationship between the trade unions and their members, the courts recognize that it has also a public-law character enabling them to scrutinize both procedures and the substance of the rules.<sup>674</sup> Morris and Fredman also highlight the co-existing public elements of the employment relationship and they point out that the equation of contract with private law 'obscures the existence of public-law elements which co-exist with the contractual'. Especially in public employment cases this is obvious, as a 'decision to terminate employees' contracts with notice may be entirely lawful so far as contract is concerned', but 'the same decision may be unlawful in public law if it is taken pursuant to an unlawful exercise of public power'.<sup>675</sup>

As far as the European law is concerned, the following two reasons support the application of the principle of legitimate expectations to interests being generated from private law. Firstly, in European Law there is no clear divide between private and public

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<sup>672</sup> S. Deakin and G. Morris (n 664) 57.

<sup>673</sup> *Express Lift Co Ltd v Bowles* [1977] ICR 474 (EAT); *United Bank Ltd v Akhtar* [1989] IRLR 507 (EAT).

<sup>674</sup> *McInnes v Onslow Fane* [1978] 3 All ER 211; *Breen v AEU* [1971] 2 QB 175, as cited in S. Fredman and G. Morris (n 662) 69, 75.

<sup>675</sup> S. Fredman and G. Morris, *ibid.* 80.

law. Even in the context of UK law, Morris and Fredman criticize the doctrine of procedural exclusivity based on a strict division between issues characterized as exclusively private or public, as they observe that the applied tests (i.e. the nature of the body, the source of its powers, and the nature of its functions) have proven unsatisfactory and they suggest that the divide should be abandoned and be replaced by a unified procedure.<sup>676</sup> Acknowledging the overlap between public and private in this context facilitates, in principle, the application of the general principles of Community Law such as legal certainty and legitimate expectations to both private and public law.

Secondly, the majority of directives referring to employment law are directly applicable to public and private undertakings. This indicates the intention of the community legislator to put employees in the private and public sector on an equal basis regarding the particular interests safeguarded by these Directives and not to discriminate between them as to their legal treatment. In sum, the nature of the interest protected by legitimate expectations must be ‘concrete’, ‘individual’ and it may be generated from both public and private law. Finally, there is no need for an element of detrimental reliance as part of the ‘legitimate’ interest.

### **5. The treatment claimed to protect the interest**

The treatment claimed for the legitimate interest refers to the consequences that the legal system attributes to it. The legal treatment of all legitimate interests is not the same, but, depending on the facts of each case, the treatment may consist in the restoration of a previous situation or the award of compensation. The treatment claimed in respect of a

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<sup>676</sup> Ibid. 81

legitimate interest depends on the following three criteria: 1. The legal basis of the legitimate claim 2. The foreseeability condition that requires the expectation to be worthy of protection in terms of the claimant's conduct in the sense that the frustration of the expectation could not have been foreseen by the individual.<sup>677</sup> 3. The final requirement for a successful legitimate expectation claim consists in the judicial balancing of the individual interest against the public interest.

### ***5.1 The legal basis of the legitimate expectation claim***

A legitimate expectation may be based on an administrative act,<sup>678</sup> consistent administrative practice,<sup>679</sup> representations made by decision maker<sup>680</sup> or a legislative measure.<sup>681</sup> Legitimate expectations claims based on each of these categories pose particular issues and may have specific requirements or characteristics.

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<sup>677</sup> J. Schwarze (n 595) 950-951.

<sup>678</sup> Joined Cases 7/56 & 3-7/57 *Algera v. Common Assembly* (n 655); Case 159/82 *Verli-Wallace v Commission* (n 630); Joined Cases 42 and 49/59 *Snupat v. High Authority* (n 617).

<sup>679</sup> Case C- 402/98 *Agricola Tabacchi Bonavicina Snc di Mercati Federica (ATB) and Others v Ministero per le Politiche Agricole, Azienda di Stato per gli interventi nel mercato agricolo (AIMA) and Mario Pittaro* [2000] ECR I-5501.

<sup>680</sup> Case T-203/96 *Embassy Limousines & Services v European Parliament* [1998] ECR II-4239; Case 188/82 *Thyssen AG v Commission of the European Communities* [1983] ECR 3721.

<sup>681</sup> Case 81/72 *Commission v Council* [1973] ECR 575.

## 5.2 *The foreseeability requirement*

The importance of foreseeability is exemplified by Advocate General Mayras in *Union Malt*,<sup>682</sup> who explicitly recognized that a condition for the protection of legitimate expectations is that the change in the legal position adversely affecting the legal interest of the concerned individual must have been unforeseeable. He further qualified the requirement of ‘unforeseeability’ with the conditions that the change in an individual’s legal situation must have taken place without warning, with immediate effect and without transitional measures.

It seems that this requirement has acquired a prominent role in the Community court’s jurisprudence in the field of legitimate expectations. This is clearly illustrated in *Peugeot*<sup>683</sup>, where the General Court held that an applicant’s letter revealing his knowledge about the Commission’s officials’ views on his matter means that the change was not unforeseeable and thus it excluded the existence of a relevant legitimate expectation.

Additionally, in *Hewlett Packard*<sup>684</sup> the Court of Justice held that the change to the situation formulated by an administrative representation has to be unforeseeable by the individual in order to give rise to legitimate expectation. The Court exemplified this requirement by explaining that in order to assess whether an error could not reasonably have been detected by the person liable, it required a global assessment ‘...of the nature

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<sup>682</sup> Opinion of Mayras AG in Joined cases 44 to 51/77 *Groupement d’intérêt économique ‘Union Malt’ and others v Commission* [1978] ECR 57, para 90.

<sup>683</sup> Case T-23/90 *Peugeot v Commission* [1991] ECR II-653 at para 48.

<sup>684</sup> Case C-250/91 *Hewlett Packard France v Directeur Général des Douanes* [1993] ECR I-1819.

of the error, of the professional experience of the trader and of the diligence shown by him'.<sup>685</sup>

### ***5.3 Balancing the individual against the general interest***

In this section, we will indicate the extent to which the treatment claimed to protect a legitimate expectation requires, in the final analysis, balancing the individual against the general interest. The meaning given to general interests depends on the facts of each case. In some cases, the general interest refers to everybody or very large groups of persons and, in others, to a particular group of undertakings.

In *Dieckmann*<sup>686</sup> and *Affish*<sup>687</sup> the Court weighed the affected traders' legitimate expectations against the public interest, which in this case was the protection of consumers' health. This outweighed the traders' legitimate expectations. In other words, despite the fact that the claimants had a prima facie legitimate expectation, the protection was not finally awarded, because their expectations did not pass the final test of balancing the individual against the general interest. In these cases, the general interest acquired the meaning of the interest of every consumer, as it expressed the value of public health.

However, in other cases the general interest acquired the meaning of the interest of a particular group of undertakings or even undertaking. In *SNUPAT*,<sup>688</sup> the Court dealt with a levy on metal scrap providing for the payment of a levy, unless the scrap resulted

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<sup>685</sup> Ibid. para 28.

<sup>686</sup> Case T-155/99 *Dieckmann & Hansen GmbH v Commission* [2001] ECR II-3143.

<sup>687</sup> Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I-4315.

<sup>688</sup> Joined Cases 42 and 49/59 *Snupat v. High Authority* (n 617).

from a company's own production. Hoogovens received scrap from a company within its corporate group and the Commission considered it as falling within the ambit of 'own' production. On the other hand, SNUPAT failed to obtain an exception on the same basis and brought an action against the decision granting the exception to Hoogovens.

The Court revoked retroactively the favourable decision in relation to Hoogovens on the basis of balancing the individual against the general interest. On the basis of the facts of this case, the general interest was found to mean the 'interest of the community in ensuring the proper working of the equalization scheme' that 'makes it necessary to ensure that other contributors do not permanently suffer the financial consequences of an exemption illegally granted to their competitors'.<sup>689</sup> It was clear that on the facts of this case the alleged general community interest was expressed in terms of the interest of a particular company that was not granted the levy and, thus, faced an unfair competitive disadvantage.

In this sense, the conflicting interests that were balanced were the interests of two individual companies. Thus, the concept of general interest does not have a predetermined meaning in the field of legitimate expectations, but it is a flexible notion acquiring different meanings on the basis of the facts of each case. The general impression given by the Court of Justice's case-law is that the alleged legitimate expectation claims are balanced against interests running counter to their protection.

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<sup>689</sup> Ibid.

## 6. Application to the ARD

In this section, the foregoing analysis of the legitimate expectation claims will be applied to the ARD and in this way it will be evaluated whether legitimate expectation claims may be identified under the Directive.

### 6.1 *The nature of the interests under the ARD*

As was indicated previously a ‘concrete’ interest conferred upon an ‘individual’ is adequate so as to be considered ‘legitimate’. This part will examine whether the protection accorded by the ARD confers the requisite individual interests. This examination is based on two characteristics, namely whether the definition of interests in the directive is sufficiently precise and whether the directive safeguards individual interests.

It is argued that the ARD satisfies all the relevant criteria and, thus, it gives rise to precise individual interests that may be considered legitimate in the context of legitimate expectation claims for the following reasons. Firstly, the aim of the Directive has been approached by the Court as intending ‘...to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership’.<sup>690</sup> The

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<sup>690</sup> Wording actually taken by para 19 of Case C-172/99 *Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen* [2001] ECR I-7; however, this expression has been repeated almost to every case concerning the application of the ARD and we could refer, inter alia, to the Joined Cases C-171 and C-172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* [1996] ECR I-1253, Case C-13/95 *Ayşe Sützen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259, *Joined Cases C-127/96, C-229/96 and C-74/97 Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96), Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97)* [1998] ECR I-8179, C-51/00 *Temco Services Industries SA v Imzilyen* [2002] ECR I- 969, *Joined Cases C-232/04 and C-233/04 Güney-Görres, Gul Demir v Securicor Aviation (Germany) Ltd, Kötter Aviation Security GmbH & Co* [2005] ECR I-11237.

reference to the concept of continuous employment does not mean that in every case of prohibited transfer related dismissals, the employees will be actually employed by the transferee, but the consequences provided by each national law for these dismissals will apply.

This is in conformity with the partial harmonization aim of the Directive, which according to Garde ‘is a mechanism that enables Community law to coexist with the laws of the Member States’, as ‘the Community may legislate on particular points of a given problem, leaving the Member States to fill in the gaps in areas that have not been directly dealt with at Community level, or have been expressly left to national law’.<sup>691</sup> In this sense, the ARD does not provide for specific sanctions for prohibited transfer related dismissals, but allows each Member State to determine them.

Barnard takes a similar view, when she refers to the implications of *Dethier* case, in which the Court of Justice said that ‘the contract of employment of a person unlawfully dismissed shortly before the transfer had to be regarded as still extant as against the transferee even if the dismissed employee was not taken on by him after the undertaking was transferred’.<sup>692</sup> This suggests that the concerned employee can claim that the dismissal was ‘unlawful against the transferee’ and therefore ‘the transferee is liable for all secondary contractual obligations, such as the right to claim unfair dismissal, but not the primary obligation to continued employment’.<sup>693</sup>

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<sup>691</sup> A. Garde, ‘Partial harmonisation and European social policy: a case study on the Acquired Rights Directive’ (2002-2003) 5 Cambridge Yearbook of European Legal Studies 173.

<sup>692</sup> Case C-319/94 [1998] *Dethier* ECR I-1061, para 41.

<sup>693</sup> C. Barnard, *EC Employment Law* (3<sup>rd</sup> edn OUP, Oxford 2006) 664 (footnotes omitted).

This approach is also verified by the Court of Justice in the more recent *Juuri* case, in which it was ruled that ‘the transferee employer (...) bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship...’.<sup>694</sup> In other words, the ARD secures that employees may not, in principle, be dismissed for a transfer related reason without some form of protection, which according to the Court’s rulings in *Juuri* must be such that render the Directive ‘fully effective in accordance with the objective which it pursues’.<sup>695</sup> This was interpreted in the *Commission v UK* as meaning that the adopted penalties for the infringement of community measures *must be* ‘effective, proportionate and dissuasive’.<sup>696</sup> This wide meaning, given to the interest of protection against dismissal following a restructuring ranging from an order for *reinstatement to compensatory damages*, which may vary considerably as to their amount, is adopted in this thesis.

However, the discretion left to Member States as to the adoption of the appropriate sanctions enforcing the prohibition of dismissals under the ARD does not mean that the interests safeguarded by the Directive regarding the prohibition of dismissals are not sufficiently precise with clear dimensions. As Barnard explains regarding the rights relating to dismissal under the ARD

The first sentence of Article 4(1) provides that the transfer of the undertaking shall not *in itself* constitute grounds for dismissal by the transferor or the transferee. Article 4(2) concerns constructive dismissal. It provides that if the contract of employment is terminated because the transfer involves a substantial

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<sup>694</sup> Case C-396/07 *Mirja Juuri v Fazer Amica Oy* [2008] ECR I-8883, para 30.

<sup>695</sup> *Ibid.* para 26.

<sup>696</sup> Case C-382/92 *Commission v UK* [1994] ECR I-2435, para 55.

change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract.<sup>697</sup>

These provisions are arguably sufficiently precise so as to give rise to concrete employees' interests and this should not be confused with the discretion allowed to Member States for the provision of penalties enforcing the requirements of the ARD.

This is captured well by Prechal, who argues that

Even when Member States are left with quite some discretion as to the exact scope and modalities of the content of the measures to be enacted at national level in pursuance of the directive, this may not lead to the conclusion that a directive is *not intended* to create rights in favour of individuals, with all the consequences for the requirements posed with respect to its implementation.<sup>698</sup>

She also adds that 'it may be clear that the element of "judicial protection" (which is necessarily protection through national courts) as an indication for the existence of a right does not work'.<sup>699</sup>

Secondly, as far as the individual character of these interests is concerned, this means that the beneficiaries of a measure conferring individual rights should be an identifiable group of persons. Conversely, in cases of protection of the public or general interest, everybody or very large and general groups of persons are the addressees of the corresponding community measures.<sup>700</sup> Judge Schockweiler refers to directives in

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<sup>697</sup> C. Barnard (n 693) 663 (footnotes omitted).

<sup>698</sup> S. Prechal (n 647) 128 (footnotes omitted).

<sup>699</sup> Ibid. 130

<sup>700</sup> Ibid. 118-119

environmental law as a clear instance of directives aiming at safeguarding the general or public interest without granting individual rights.<sup>701</sup>

Conversely, a characteristic example of a directive conferring individual rights is presented by *Dillenkofer*,<sup>702</sup> which concerned the interpretation the Council directive 90/314/EEC on package travel, package holidays and package tours.<sup>703</sup> The Court of Justice considered the repeated references to the purpose of protecting consumers in the directive's preamble, as well as the aim and the wording of the particular provisions adequate in order to conclude that the aim of the directive is to protect consumers, even if it 'intended to ensure other objectives'<sup>704</sup> as well (i.e. freedom to provide services and fair competition).

Similarly the ARD, according its preamble and the articulation of its provisions, aims at safeguarding the interests of particular employees' involved in a transfer procedure. In this sense, the beneficiaries of the Directive are easily identified on the basis of articles 3 and 4, as a group of particular employees forming the workforce of a transferred undertaking or part of it, and they do not constitute an unidentifiably large group of persons, as is the case with the directives in environmental law.<sup>705</sup> The individual character of these interests is not affected by the fact that the Directive may

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<sup>701</sup> F. Schockweiler, 'La responsabilite de l'autorite nationale en cas de violation du droit communautaire' (1992) *Revue Trimestrielle de Droit Europeen* 44.

<sup>702</sup> Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* [1996] ECR I-4845.

<sup>703</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (1990) OJ 1990 L 158, p. 59.

<sup>704</sup> *Ibid.* para 39

<sup>705</sup> Prechal seems to share a similar view, as she considers a characteristic example of directives safeguarding the public interest those of environmental law, contrasted with the ARD, which safeguards individuals' (i.e. employees') interests, S. Prechal (n 647) 119-120.

intend ‘to ensure other objectives’, such as to provide a common floor of protection in transfers among the member states, as will be analysed in the following chapter.

As was said above, detrimental reliance is not a necessary characteristic of legitimate interests, but the justification of the protection for these interests may arise from the rule of law. According to Craig ‘a basic tenet of the rule of law is that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions’.<sup>706</sup> Thus, the protection of legal certainty and legitimate expectations promote the individuals’ autonomy, as they are able to plan ahead by foreseeing with some degree of certainty and predictability the consequences of their actions.<sup>707</sup>

In a similar vein, Raz indicates a direct link between human dignity, autonomy and protection of legal certainty in the sense that respecting human dignity entails treating humans as persons capable of planning and plotting their future, and respecting their autonomy and right to control their lives.<sup>708</sup> However, it was also underlined that, as Barak-Erez observes, the absence of reliance renders the prospect of protection under the doctrine of legitimate expectations highly dubious.<sup>709</sup>

It is considered that an explicit employer’s promise that employees will keep their jobs after the transfer or the concealment of the transfer in itself will in most cases justify the employees’ reliance on this expectation,<sup>710</sup> because of the utmost significance and

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<sup>706</sup> P. Craig (n 604) 607-608.

<sup>707</sup> S. Schonberg (n 630) 12

<sup>708</sup> J. Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 1979) 220-221; J. Finnis, *Natural Law and Natural Rights* (OUP, Oxford 1992) 272.

<sup>709</sup> D. Barak-Erez (n 590) 599.

value of work in everyone's life.<sup>711</sup> Indeed, work stability is a key factor for long term planning for the majority of employees. Hence only in rare cases, there might be found that no reliance resulted from the employers' representation that transfer will not affect employment positions. Finally, for the reasons explained above the protection of the legitimate expectation claims under the ARD should not be restricted to employees of public undertakings, but it should be extended to employees of private undertakings, as well.

Having indicated that the ARD safeguards specific individual employees' interests that may give rise to relevant legitimate expectation claims, we now move on to examine the additional conditions for the protection of these expectations referring to the treatment claimed for these interests.

## ***6.2 The ARD as the legal basis of the employees' legitimate expectation claims***

The point in the argument of this chapter has been reached at which one of the central claims of the chapter can be firmly advanced, namely that the interest-protection which is conferred upon employees by the ARD may in and of itself be a basis for legitimate expectations. The previous subsection argued that this interest-protection is a concrete and specific one, and this subsection goes on to argue that it may therefore be the foundation for a legitimate expectation such as is protected by or under EU law.

It has earlier been argued that a representation by the employer that the planned restructuring will not affect the employment positions of the workforce may constitute

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<sup>710</sup> For a generally broad duty of disclosure on behalf of the employer that covers 'any employer decision likely to have a significant effect on employment practices or contractual relations', see A. Bogg (n 665) 729, 762.

<sup>711</sup> H. Collins (n 613) Part 1.

the legal basis of a legitimate expectation claim arising from or under the Directive and this argument will now be sustained by reference to the case-law. It is also now argued that even in the absence of a promise or representation of that kind made by or on behalf of the employer, the obligation which is imposed by the Directive upon the employer to inform and consult employees about a transfer entailing economic dismissals may provide a substitute for such a promise or representation in founding the basis for a legitimate expectation.<sup>712</sup>

The fact that the ARD, as a binding piece of European secondary legislation, may qualify as the legal basis of a legitimate expectation claim arises from the following reasons. Firstly, directives and regulations are publicised in the Official Journal of the European Union<sup>713</sup> which renders the individuals' belief that their situation will not receive a treatment contravening the provision of these legislative measures justifiable. The importance of the publication of legislative measures in the Official Journal of the European Union<sup>714</sup> is verified by the Court of Justice in *Behn* case, in which it was ruled that 'the applicable Community tariff provisions constituted the sole relevant positive law as from the date of their publication in the Official Journal of the European Communities, and everyone was deemed to know that law'.<sup>715</sup>

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<sup>712</sup> Article 7 of the ARD.

<sup>713</sup> Article 254 of TEU provided that: 'Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 shall be signed by the President of the European Parliament and by the President of the Council and published in the Official Journal of the European Union...'

<sup>714</sup> Article 297 TFEU provides that: 'Legislative acts shall be published in the Official Journal of the European Union...'

<sup>715</sup> Case C-80/89 *Erwin Behn Verpackungsbedarf GmbH v Hauptzollamt Itzehoe* [1990] ECR I-2659.

Secondly, the directives and regulations are higher in rank in the hierarchy of norms compared to the administrative acts. Thus, it would be irrational that an administrative act conferring a precise individual interest would qualify as the legal basis of a legitimate expectation claim whereas a legislative measure of the Community being a higher legal norm would not. As Schwarze points out, ‘the impact of the protection of legitimate expectations is not simply restricted to the narrow domain of administrative law, but is also applicable to the legislative and judicial functions of the Community’s bodies’.<sup>716</sup>

Thirdly, in a number of cases the Court of Justice’s jurisprudence indicates that legitimate expectations claims may be founded on legislation. As was shown above, in *Sofrimport*<sup>717</sup> the Court ruled that the specific protection awarded by a provision of a regulation to an individual enables him ‘...to rely on a legitimate expectation that in the absence of an overriding public interest no suspensory measures will be applied against him’.<sup>718</sup> Apart from the significance of this case as regards the necessary characteristics of the legitimate interest that was underlined above, this ruling signifies the Court’s recognition that the protection awarded by a regulation being a piece of secondary European legislation may give rise to a relevant legitimate expectation claim. Additionally, in a number of cases that concerned legitimate expectation claims raised by staff of the Community, the community courts accepted that a legitimate expectation

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<sup>716</sup> J. Schwarze (n 595) cxliii; Barak-Erez seems to accept a similar view towards the direction that law can generate legitimate expectations claims, when she argues that: ‘...laws forbidding discrimination protect expectations of equal treatment. The protection of expectations to equal treatment is thus a significant dimension of the right to equality’, D. Barak-Erez (n 590) 589 (footnotes omitted).

<sup>717</sup> Case C-152/88 *Sofrimport Sarl v Commission* (n 636).

<sup>718</sup> *Ibid.* para 16

claim may be, at least in principle, founded on a community regulation providing rules for staff remuneration.<sup>719</sup>

The significant role of a particular act or representation by the employer (eg a transferee's promise that the employees will maintain their working positions after the transfer) for the legal evaluation of dismissals under the ARD is indicated by *Litster*. Lord Templeman states, amongst other reasons that made him rule in favour of the employees, that 'the workers of Forth Dry Dock were given the impression that their employment would be continued by a new owner'.<sup>720</sup> Even in the absence of a promise or representation of that kind made by or on behalf of the employer, the obligation which is imposed by the Directive upon the employer to inform and consult employees about a transfer entailing economic dismissals may provide a substitute for such a promise or representation in founding the basis for a legitimate expectation (article 7). In *Apex Leisure Hire v Barratt*<sup>721</sup> the receiver appointed by the lender reassured the workforce that although he was no longer able to pay them, his negotiations with the employers were so advanced that their managing director was prepared to guarantee wages and salaries and he also expressed the belief that the employers would employ all the existing staff. This played a role in the identification of the unfairness of subsequent dismissals.

Additionally, in *Carter v Qatar Airways Ltd*<sup>722</sup> during a meeting just before the transfer, the transferor informed the two concerned employees as to the identity of the transferee and 'indicated to both men that they could expect alternative employment with

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<sup>719</sup> Case 81/72 *Commission v Council* (n 681); Case 3/83 *Abrias v Commission* [1985] ECR 1995.

<sup>720</sup> *Litster and Others Appellants v Forth Dry Dock & Engineering Co Ltd* (n 597), para 556.

<sup>721</sup> *Apex Leisure Hire v Barratt* [1984] ICR 452 (EAT).

<sup>722</sup> *Carter v Qatar Airways Ltd Air Cargo Partners Ltd* [2003] All ER (D) 515 (EAT).

the transferee'. At that time, 'none of the parties, the Appellant, Transferor or Transferee, were aware of TUPE or its effect' and owing to the parties' 'collective ignorance of TUPE' an attempt was made to vary the terms and conditions of employment to the detriment of the claimant. The claimant's decision not to accept this variation led to his dismissal, which was held to be related to the transfer and therefore automatically unfair. Had there been doubts as to whether there was a relevant transfer the employer's representation is likely to have played a significant role.

The UK Supreme Court (UKSC) has more recently endorsed the significance of the reliance placed by the employee on representations made by the employer. In *Ravat v Halliburton Manufacturing and Services Ltd*<sup>723</sup> the employer had assured the employee that the employment relationship would be governed by UK employment law, even if the work was performed exclusively in Libya and the employee, who lived in Great Britain, had to travel there to provide his services. The employer thereafter, in defending an unfair dismissal claim, attempted to rely on the defence that UK law did not apply to the contract of employment, i.e. to argue that the representation made to the employee was not relevant to deciding whether the UK law applies.

The Employment Appeal Tribunal thought that the representations made by the employer to the employee about the applicable law were indeed irrelevant in deciding which law applied. Significantly, the UKSC disagreed, taking that view that while such representations could not be 'determinative', they were nevertheless relevant: 'factors such as any assurance that the employer may have given to the employee and the way the

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<sup>723</sup> *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1 [2012] ICR 389.

employment relationship is then handled in practice must play a part in the assessment'.<sup>724</sup>

Hence the Court in *Halliburton* approved of the approach taken by Lady Hale in *Duncombe v Secretary of State for Children, Schools and Families*,<sup>725</sup> where she attached particular importance to 'the expectation of each party as to the protection which the employees would enjoy',<sup>726</sup> in ruling in favour of the claimant. Smith observes that Lady Hale's reliance upon the parties' expectations as a relevant factor in determining whether UK courts have jurisdiction in relation to employees working overseas is a novelty.<sup>727</sup> This clearly has wider implications for the role played by employees' expectations in interpreting employment protection legislation.

In this part, it was shown that the ARD, as a binding legislative measure of the Community or an employer's representation that the transfer will not affect employees' position or a failure to inform employees about the transfer may constitute the legal basis of a relevant legitimate expectation claim. The next part refers to the foreseeability requirement of the legitimate expectation claim. In the final part of this section, it will be explained that reliance in such cases may have a determinate impact upon the proportionality balancing of employees' legitimate expectation against the employers' freedom to effect economic dismissals.

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<sup>724</sup> Ibid. para 32.

<sup>725</sup> *Duncombe and others v Secretary of State for Children* [2011] UKSC 36 [2011] ICR 1312.

<sup>726</sup> Ibid. para 16.

<sup>727</sup> 'ground (ii) above is novel (and Lady Hale states that it does not appear in Lawson); previously the tendency has been to keep statutory and contractual matters apart, so that the proper law of the employment contract has not figured much in determining the reach of the statutory action for unfair dismissal. However, her ladyship states that this factor "must be relevant to the expectation of each party as to the protection which the employees would enjoy"' I. Smith 'Employment: Does it work?' (2011) 161 *New Law Journal* 1165, 1166.

### ***6.3 The ARD and the foreseeability requirement of the legitimate expectation claim***

The ARD justifies employees feeling reasonably secure in the idea that they will keep their working position after the transfer. Consequently, an employer's promise that a transfer will not affect the working positions of the workforce or the failure to inform about this transfer altogether renders potential dismissals an unforeseeable change to the employees' legal position. Indeed, employees who know that restructuring will lead to their dismissals can plan their response accordingly so as to alleviate the adverse effects of their dismissals.<sup>728</sup> Conversely, employees are not prepared to face a transfer related dismissal if the employer promises that the transfer will not affect their jobs or conceals this situation altogether. This arguably constitutes an unforeseeable change to the employees' working position satisfying the relevant requirement of a legitimate expectation claim.

The fact that a change in employees' legal position contrary to the provisions of community legislation may satisfy the 'unforeseeability' requirement of the legitimate expectation claim is verified by the Court of Justice's case-law. *Staff Salaries*<sup>729</sup> concerned the claim of some employees that the fact that the Council did not follow the Staff Regulations procedure for the adjustment of their salaries constituted a breach of their legitimate expectations arising from the existence of that procedure. It was especially the employer-staff relationship in itself that made the departure from these procedures unforeseeable and satisfied the relevant requirement of the legitimate expectation claim:

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<sup>728</sup> Tridimas makes a similar observation regarding the priority that the principle of legal certainty might in some particular cases acquire over the principle of equality, T. Tridimas (n 591) 242.

<sup>729</sup> Case 81/72 *Commission v Council* (n 681).

Taking account of the particular employer-staff relationship which forms the background to the implementation of Article 65 of the Staff Regulations, and the aspects of consultation which its application involved, the rule of protection of the confidence that the staff could have that the authorities would respect undertakings of this nature...binds the Council in its future action.<sup>730</sup>

Secondly, *Abrias v Commission*<sup>731</sup> refers to an amendment of the Staff Regulation by the Council that brought a change in the remuneration of officials and other servants of the Communities. Some of the employees affected by the new regulations claimed that 'even though the status of the Staff Regulations as secondary legislation enables the Council to amend them, that possibility is not open where the proposed amendment goes to the root of the employment relationship between officials and institutions'.<sup>732</sup> This argument was based on the fact that the previous form of the regulation was in force for five years, before it was amended in 1981.

The Court of Justice dismissed the argument, but not for considering it irrelevant. On the contrary, the Court felt obliged to justify the reasons why it rejected this submission. Firstly, the Court stated that 'the Council's intention to amend the method of adjusting remuneration which had been in force since 1976 was expressed as early as 1980'.<sup>733</sup> Secondly, it stated that 'the staff trade-union organizations were closely involved in the discussions which culminated in the implementation of both the new method of adjustment and the exceptional levy',<sup>734</sup> and finally it observed that there was

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<sup>730</sup> Ibid. para 10.

<sup>731</sup> Case 3/83 *Abrias v Commission* (n 719).

<sup>732</sup> Ibid. para 24.

<sup>733</sup> Ibid. para 25.

<sup>734</sup> Ibid. para 26.

a clause whereby the Council reserved the right to determine 'possible improvements and rectify any distortions'<sup>735</sup> of the regulation.

These factors are indeed crucial as to the evaluation that the amendment of the regulation was foreseeable on behalf of employees and the Court's decision on the rejection of the employees' legitimate expectation claim in the context of the case at issue was based on them. However, an evaluation of the change in the employees' legal position created by a transfer related dismissal on the basis of the same factors (ie the period of time during which the ARD is in force is thirty five years) could arguably lead to the opposite outcome. In other words, the same factors constitute strong indicators that the change in employees' legal position by dismissals following a transfer is unforeseeable.

This part showed that the change in the employees' legal position caused by transfer related dismissals contrary to a previous employer's promise or following a concealment of the transfer by the employer leads, in principle, to an unforeseeable change and, thus, the relevant requirement of the legitimate expectation claim is also satisfied. The next issue that will be examined is the balancing requirement within the ARD.

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<sup>735</sup> Ibid. para 27.

#### ***6.4 The ARD and the Balancing***

As was shown above, even if an alleged legitimate expectation claim has a clear legal basis and satisfies the unforeseeability requirement, it needs also to outweigh the general interest running counter to it so as to enjoy protection in European law. The previous chapters indicated that there are clearly conflicting interests that must be reconciled in the field of transfer related dismissals and proportionality was chosen as a useful conceptual framework for this balancing.

On the basis of the conceptualisation of employees' protection around the principle of legitimate expectations, it is these expectations that must be balanced against the need for firms' efficiency arising from the managerial prerogative to effect economic dismissals. Lord Hoffman recognises the need to balance individual employee protection against the general economic interest in *Johnson v Unisys*: 'Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest'.<sup>736</sup>

In this sense, the employees' legitimate expectations under the ARD run counter to the general interest of firms' competitiveness. Thus, the interests needing to be balanced so as to decide whether employees' legitimate expectations under the ARD should be protected are these expectations against the employers' freedom to effect economic dismissals. The exact parameters of this balancing under proportionality were analysed in the previous chapter. However, it is important to highlight the significant role

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<sup>736</sup> In *Johnson v Unisys* [2001] UKHL 13 [2003] 1 AC 518 [37]; Bogg reads in the following important for the purposes of this thesis element in Lord Hoffman's 'philosophy' in *Johnson v Unisys*: 'emphasizes the multiplicity of an employee's legitimate interests in the employment relationship', A. Bogg (n 665) 750.

of employees' reliance upon an employers' representation that the transfer will not affect the working position in the process of this balancing.

As was said above, Barak-Erez aptly depicts the balance 'tilting' in favour of the individual's protection or the unfettered administrative discretion depending on whether it is a 'pure' expectation interest or whether there is reliance. In the latter case, the balance will usually tilt in favour of the individual, whereas in the former case in the majority of cases, the administrative discretion will be favoured against the protection of the expectation.<sup>737</sup> Similarly, if the employees have relied upon an employers' promise that the employees will retain their working position, despite the transfer, the balance more easily tilts in favour of their protection and against the managerial prerogative to effect economic dismissals than in cases where such reliance is absent.

In this sense, the proportionality balancing will tilt in favour of the employee whose reliance would be defeated by a transfer-related dismissal. However, the centrality of one's job for one's life renders the reliance upon the expectation that the working relation will continue unfettered on the basis of a relevant employers' promise justifiable. Hence this does not set a high standard to be met for finding that an element of reliance indeed exists on behalf of the employees, and only in rare cases should such detrimental reliance be rejected on the basis of the facts.

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<sup>737</sup> D. Barak-Erez (n 590) 595.

## 7. Conclusion

This chapter suggested that the interest conferred upon employees by the ARD is best defined as a legitimate expectation. It was indicated that the principle of legitimate expectations offers a fruitful basis for the evaluation of proportionality in this context, as it clarifies the content of the competing interests and the value that should be ascribed to each one of those. In this sense, the principle of legitimate expectations constitutes a valuable contribution to the proportionality balancing suggested in the previous chapter by clarifying the circumstances that should be taken into account as part of this balancing, such as the existence of an employers' promise that the transfer will not cause dismissals and the relevant employees' reliance on that promise.

The following part will link the discussion undertaken so far to recent regulatory developments in EU social policy, focusing on the Open Method of Coordination, currently implemented within a theoretical framework of reflexive law, and the 'Europe 2020' Communication.<sup>738</sup>

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<sup>738</sup> European Commission 'Communication From the Commission Europe 2020: A Strategy For Smart, Sustainable and Inclusive Growth' COM (2010) 2020 (Brussels, 3.3.2010), 19.

## **Part Three: Conclusions**

Part three of this thesis identifies the insights which might be gained by linking the foregoing discussion to recent regulatory developments in EU social policy, concluding that within the framework of reflexive regulation the ARD is able to continue to play an effective role in safeguarding employees' interests in the context of transfers of undertakings.

## **Chapter 5: Soft Law and Reflexive Regulation: the ARD in the new Regulatory Landscape**

### **1. Introduction**

This thesis, after having highlighted the tension between the economic and social dimensions of the EU and indicated how the conceptualization of the social considerations around the principle of legitimate expectations and proportionality might constitute a framework for balancing these tensions, concludes by reflecting on the implications for these proposals for recent developments in European social policy and evolving ideas about employment protection.

The growing significance of soft-law regulation under the Open Method of Coordination (OMC), currently implemented within a theoretical framework of reflexive law, has taken European labour law far beyond the traditional method of command and control regulation which was largely in vogue at the time when the ARD was first conceptualised. This trend remains highly controversial, because, as Countouris observes

‘there seems to be a recognized and unresolved tension between the OMC on the one hand, and “hard” EC labour law on the other’.<sup>739</sup>

This chapter understands the role of OMC and traditional labour rights as complementary rather than mutually exclusive. As Barnard argues ‘there is greater and more deliberate synergy between the classic Community method and new governance tools, notably OMC’.<sup>740</sup> The diversity of legal tools and mechanisms deployed by the European labour law therefore does not question its autonomy. Instead, it seeks to ensure its effectiveness by adopting a variety of regulatory approaches.<sup>741</sup> Deakin and Rogowski express this relationship by reference to the idea of reflexive theory.<sup>742</sup>

From the perspective of reflexive law, one of the major advantages of the proportionality analysis analysed in this thesis is that it might enable the Directive to develop its reflexive potential by encouraging a greater extent of self-regulation. As was argued above, the ARD currently operates under a very restrictive framework in terms of collective self-regulation. Outside the context of insolvency and related financial situations, the Court of Justice is reluctant to allow employees to waive the rights conferred by the Directive, even with their consent and even if the disadvantages resulting from such waiver are offset by benefits to the employees.<sup>743</sup>

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<sup>739</sup> N. Countouris, 'European Social Law as an Autonomous Legal Discipline' (2009) 28 (1) YEL, 95, 113.

<sup>740</sup> C. Barnard, *EC Employment Law* (3<sup>rd</sup> edn OUP, Oxford 2006) 61.

<sup>741</sup> N. Countouris (n 739) 114-115.

<sup>742</sup> S. Deakin and R. Rogowski, 'Reflexive Labour Law, Capabilities and the Future of Labour Law' (2011) Warwick School of Law Research Paper No. 2011/04, 1-34.  
< [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1780922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780922)> accessed 07 July 2012

<sup>743</sup> Case 362/89 *Giuseppe d'Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* [1994] ECR I-2435 and case 132/91 *Katsikas* [1992] ECR I-6577.

It was noted earlier that the aim of protecting employees should not override the role of social partners in negotiation and self-regulation.<sup>744</sup> As was indicated in the third chapter, a proportionality analysis would help the court in such cases to arrive at an evaluation as to whether collectively agreed variations to the employees' terms and conditions should be permitted by allowing it to balance the risks against the benefits to be gained. In this way the ARD could develop further its reflexive potential through self-regulation. The main argument of this chapter is that the current emphasis on reflexive law does not undermine the significant role of directives such as the ARD, but, on the contrary, hard law regulation and collective self-regulation in the field of labour relations supplement each other quite effectively. This argument can be supported in the following ways.

Firstly, it is possible for these directives to accommodate a wide scope for collectively agreed derogations and, in this way, to develop an important reflexive potential in the form of self-regulation. This will offer the advantage to these directives of being adaptable to a variety of standards depending on the needs of different enterprises and sectors of activities while, at the same time, they constitute a minimum level of protection. Secondly, reflexive law theory with its emphasis on consensus and wide dialogue between various actors may indeed contribute to the setting of standards being characterised by a great degree of consensus and, thus, to a better democratic foundation

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<sup>744</sup> Directive 2003/88/EC Working Time Directive (2003) OJ L299/9; see also C. Barnard, S. Deakin and R. Hobbs, 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time' in O. De Shutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?* (Bruylant, Brussels 2005) 243.

for them, as indicated by Commission's recent Communication on 'A renewed EU strategy 2011-14 for Corporate Social Responsibility'.<sup>745</sup>

## 2. The OMC

Traces of the OMC may be found 'in the Treaty of Maastricht for the coordination of economic policies of Member States (Art. 98 and 99 EC) and applied to employment policy in the Treaty of Amsterdam (Art. 125 to 130 EC)'.<sup>746</sup> According to Lenoble, 'the OMC was confirmed and used in a generic way at the Lisbon summit in several areas of industrial and social policy'.<sup>747</sup> The OMC is defined by the European Council as follows: 'a new open method of coordination as the means of spreading best practice and achieving greater convergence towards the main EU goals'.<sup>748</sup> Eberlein and Kerwer argue that

OMC seeks to initiate an iterative process of mutual learning on the basis of diverse national experiences with reform experiments. While there are fixed guidelines and timetables for achieving goals at the EU level policies and specific targets are spelled out on the national level. National performance is constantly monitored and evaluated through peer review and benchmarking – mechanisms which act as "soft law" catalysts for greater convergence towards European "best practice".<sup>749</sup>

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<sup>745</sup> European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM(2011) 681 final (Brussels, 25.10.2011).

<sup>746</sup> J. Lenoble, 'Open Method of Coordination and Theory of Reflexive Governance' in O. De Shutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?* (Bruylant, Brussels 2005) 20.

<sup>747</sup> Ibid.

<sup>748</sup> Lisbon European Council 23 and 24 March 2000 'Presidency Conclusions'.  
<[http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)> accessed 07 July 2012, point 37

<sup>749</sup> E. Eberlein and D. Kerwer, 'Theorizing the New Modes of European Union Governance' (2002) vol. 6, 2 European Integration online Papers (EioP) <<http://eiop.or.at/eiop/pdf/2002-005.pdf>> accessed 07 July 2012 (footnotes omitted).

The OMC has both a procedural and substantive dimension. From a procedural perspective, the OMC may be seen as a participatory structure ‘for shaping the instruments so that all those affected by’<sup>750</sup> regulation have a voice in shaping it. There is a clear element of additional legitimacy to the law-making process underpinning this procedural account. The substantive interpretation of the OMC offered by De Shutter and Deakin sees the OMC ‘as a means to channel certain substantive values, and [the OMC] is therefore a mechanism by which objectives set out for employment and social policy can be more effectively achieved’.<sup>751</sup>

Deakin and Rogowski argue that the OMC addresses ‘problems of effectiveness, legitimacy and visibility by calling for a broader set of actors to be involved at member state level’ and ‘concerns over the operation of the EES’. The OMC addresses these issues by supporting ‘mutual learning’ and additional ‘democratic participation’ in the process of decision making.<sup>752</sup> The crucial question that the emergence of the OMC poses is the following: what is the position of hard law measures, such as standard-setting directives, in the aftermath of the introduction of the OMC?

This part agrees with Deakin’s and Rogowski’s argument, namely that ‘the OMC should not be seen as marking a fundamental departure from earlier approaches to EU-level governance and regulation’<sup>753</sup> for the following reasons. Firstly, from a relatively

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<sup>750</sup> J. Lenoble (n 746) 24.

<sup>751</sup> O. De Shutter and S. Deakin, ‘Introduction’ in O. De Shutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?* (Bruylant, Brussels 2005) 7.

<sup>752</sup> S. Deakin and R. Rogowski (n 742) 11.

<sup>753</sup> S. Deakin and R. Rogowski, *ibid.* 11 (footnotes omitted); a similar view is taken by Sciarra, who considers that ‘even in the classical Community method of ‘command and control’, elements of

early stage EU labour laws were reflexive ‘in their formation (direct input from self-regulatory bodies), in their structure (the use of defaults and derogations), and in their implementation (stimulation to self-regulation at national, industry and firm level)’.<sup>754</sup>

Characteristic examples of this reflexivity of EU labour law, even before the OMC was adopted are the following:

*Social progress clauses* envisaged the standards set out in directives as minima, below which member state could not go, but which they could improve on. *Non-regression clauses* stipulated that the implementation of directives at member state level should not be the occasion for a weakening of worker protection, even if the minimum set by the relevant EU measure was below the level already guaranteed by the domestic laws of the state in question. (...) The *controlled derogations* of the working time directive allowed for the variation of statutory standards through collective and, more controversially, individual agreement. The *fall-back provisions* of the European Works Councils directive introduced the logic of default rules, imposing a standard form of information and consultation only if the parties could not make their own agreement within more loosely defined parameters. *Negotiated laws* were recognized in the expanded role given to the transnational social partners in drafting framework collective agreements which formed the basis for the directives on part-time work and temporary employment.<sup>755</sup>

Thus, the reflexive legal mechanisms are an established feature of European labour law even preceding the OMC, and have always been seen as entirely compatible with traditional legislative measures such as the standard-setting directives.

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coordination of national policies have never been absent (...)', S. Sciarra, 'La constitutionnalisation de l'Europe sociale, entre droit sociaux fondamentaux et soft law' in O. De Shutter and P. Nihoul (eds), *Une Constitution pour l'Europe Reflexions sur les transformations du droit de l'Union europeene* (Louvain – La – Neuve, Larcier 2004), as cited in A. Andronico and A. Lo Faro 'Defining Problems: The Open Method of Coordination, Fundamental Rights and the Theory of Governance' in O. De Shutter and S. Deakin (eds) *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?* (Bruylant, Brussels 2005) 46.

<sup>754</sup> S. Deakin and R. Rogowski (n 742) 10.

<sup>755</sup> Ibid. 9-10.

Secondly, there are concrete points in the history of the introduction of the OMC indicating that the Community legislator does not envisage this notion as a departure from the traditional community method in the form of hard law instruments. For example, the White Paper of the Commission on European Governance, which recognizes that the OMC ‘adds value at a European level where there is little scope for legislative solutions’,<sup>756</sup> also explicitly provides that ‘the open method of co-ordination should be a complement, rather than a replacement, for Community action’.<sup>757</sup> Even more characteristic of the supplementary role of the OMC to traditional hard law regulation is the following extract from the White Paper:

Whichever form of legislative instrument is chosen, **more use should be made of “primary” legislation** limited to essential elements (basic rights and obligations, conditions to implement them), leaving the executive to fill in the technical detail via implementing “secondary” rules.<sup>758</sup>

Additionally, as Deakin and Rogowski argue ‘the reliance on OMC as a key instrument for future EU policy-making seems now in doubt’ in the light of the Commission’s evaluation of the Lisbon Strategy that ‘led to critical insights on its effectiveness’.<sup>759</sup> Indeed, the Commission’s evaluation of the Lisbon Strategy concludes with the following very critical remarks as regards the contribution of the OMC: ‘While the OMC can be used as a source of peer pressure and a forum for sharing good practice, evidence suggests that in fact most Member States have used OMCs as a reporting device rather

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<sup>756</sup> Commission of the European Communities ‘European Governance: A White Paper’ COM (2001) 428, 22.

<sup>757</sup> Ibid.22

<sup>758</sup> Ibid. 20

<sup>759</sup> S. Deakin and R. Rogowski (n 742) 13.

than one of policy development’ and ‘a 2008 evaluation concluded that the research policy OMC had proven to be a useful tool to support policy learning, but that it had only given rise to a limited amount of policy coordination(...)’.<sup>760</sup> Thus, the doubts characterizing the implementation of the OMC indicate that it may not be wise to suggest that traditional law making has been substituted by this method of regulation.

Finally, there is a considerable amount of community acquis incorporated in the form of standard-setting directives. In this sense, even if at some point the decisive step is taken and the OMC completely substitutes hard law measures, this will only refer to future social regulation. Hence the implementation of the existing standard-setting directives remains unresolved. The following section refers to reasons indicating that the regulation through labour standards by standard-setting directives plays and should continue to play a significant role in EU law.

### **3. The Role of Standard-Setting Directives**

This section will examine the role of standard-setting directives in the regulation of social Europe throughout the history of European integration, and how this role has played out under the influence of the OMC. Finally, it will be argued that hard law regulation and reflexive law in the field of labour relations supplement each other quite effectively.

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<sup>760</sup> European Commission ‘Commission Staff Working Document: Lisbon Strategy evaluation document’ SEC (2010) 114, 22.

### ***3.1 Standard-Setting Directives in EU law***

Standard-setting directives in the field of social policy have continued to play a role after the Maastricht Treaty and onwards. This role is provided for explicitly in the main provisions of social policy (article 153 TFEU par. 2 (b)- ex Article 137 EC) stipulating that ‘the European Parliament and the Council...may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States’.

This provision arguably covers a wide variety of employment issues, if not the full spectrum of issues regarding employment relation (i.e. such as improvement of the working environment to protect workers’ health and safety; working conditions; social security and social protection of workers; protection of workers where their employment contract is terminated; the information and consultation of workers). However, the unanimity required for the adoption of the directives in a number of issues (e.g. social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers; conditions of employment for third-country nationals legally residing in Union territory) may limit the number of directives adopted under this provision.

Minimum standards directives continue to play a role in regulating social Europe, even under the Treaty of Lisbon. As Falkner et al. observe, the existence of non-binding provisions and exemption possibilities in some social directives does not mean that non-

binding measures have substituted the binding ones, but it is ‘more appropriate to speak of a diversification of different elements contained in these Directives’.<sup>761</sup>

One reason why directives still occupy a position in social policy matters is indicated by the fact that, while article 151 TFEU authorises the Union to implement measures having as their objectives the promotion of employment, the improvement of living and working conditions, the development of human resources with a view to lasting high employment and the combating of exclusion; the next articles (152-153 TFEU) provide explicitly only for the enactment of directives for the fulfilment of these aims, and not for regulations or decisions.

There are underlying political and practical reasons justifying this choice. As Daubler explains, the directives are obligatory as to the result to be achieved, but leave the choice of the means to this end to Member States.<sup>762</sup> This is essential in the social field, which traditionally remains within the core of national autonomy, and makes it easier for directives to be adopted politically, as the use of Regulations might be seen by at least some of the Member States as an inappropriate restriction on their national discretion with regard to social policy.

However, in practice directives referring to the social field have been applied in such a way that they resemble regulations. In this sense, labour law directives impose relatively specific obligations to Member States and leave narrow scope for national decision-making. This was accepted by the Court of Justice, which also offered vertical

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<sup>761</sup> G. Falkner, O. Treib, M. Hartlapp and S. Leiber, *Complying with Europe: EU Harmonisation and Soft law in the Member States* (CUP, Cambridge 2005) 55.

<sup>762</sup> W. Daubler, ‘Instruments of EC Labour Law’ in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Clarendon Press, Oxford 1996), 160-162.

direct effect to the directives when Member States failed to implement them timely in their national laws. They may also have indirect horizontal effect in some cases, as there is a general obligation for national courts to interpret their national laws in conformity with Community and Union law.

Therefore it could be said that even under the new trends of the social policy agenda encapsulated in the EES and the OMC, the Directives remain the main legal mechanism for setting particular labour standards. This is because the EES and OMC are not implemented only by non-binding legal acts, but also by binding legal instruments taking the form of directives. This is illustrated by the empirical evidence of the research work conducted by the research group ‘New Governance and Social Europe: Minimum Harmonisation and Soft Law in the European Multi-level System’ of the Max Planck Society.<sup>763</sup> One of the main outcomes of this research was that binding and non-binding measures in EU social policy developed in parallel and there has been no indication that ‘soft’ law instruments have replaced binding ones.

More precisely, it is indicative that according to this empirical study, by the end of the year 2003 seventy-two Directives (new ones or amended) had been adopted falling within the ambit of labour law. Furthermore, the comparison between the number of legally binding and non-binding legal measures until 2002 in three key fields of European labour law, namely non-discrimination policy, working conditions and health and safety of workers showed that directives clearly outnumbered non-binding acts in two of the three fields. Only in non-discrimination policy were non-binding measures more common (twenty) than Directives (ten); whereas, in the field of working conditions the number of

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<sup>763</sup> G. Falkner, O. Treib, M. Hartlapp and S. Leiber (n 761) 41-55.

Directives was twenty-six and of non-binding acts only seven, and in the field of health and safety, thirty-six Directives (including amendments) were adopted that clearly outweigh the only four non-binding acts.

Finally, the EMU has restricted considerably the national autonomy of adopting social measures, a basic precondition for the absence of a strong European social agenda under the Treaty of Rome, according to the Ohlin report, as was analysed in the first chapter. This is verified even more emphatically now by the reforms carried out in Greece, because, as Deakin and Rogowski observe ‘the extension of financial support from the EU and IMF have included restrictions on the right to strike and on the application of collective agreements’.<sup>764</sup>

These reforms reflect an emerging view to the effect that the stabilisation of the single currency requires ‘the imposition of stricter control over national and social policy’ which seems likely to result in further marginalisation of social policy at European level and additional deregulation. Deakin and Rogowski suggest that a ‘reassertion of the binding force of the floor of rights set by directive’ and ‘a clarification of the autonomy of member states to develop their own approaches to labour law and social policy above the floor’ constitute the only potential way so as the EU social policy to ‘move forward’.<sup>765</sup>

This part indicated why the emergence of the OMC at Union level does not and should not undermine the role of standard-setting instruments. It is interesting to note that even some of the commentators who support the reflexive regulation of employment

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<sup>764</sup> S. Deakin and R. Rogowski (n 742) 27.

<sup>765</sup> *Ibid.* 27-29

relationships do not argue in favour of a total abandonment of hard law measures. Simitis starts from a reflexive perspective of labour law, opting for a flexible form of intervention in the labour market so as to achieve effectiveness. However, he emphasises that in the context of flexible intervention traditional ‘protective’ laws as well as other binding provisions should not be deemed ‘a closed chapter in the history of labour law’, because the ‘resurrection’ of labour law requires both ‘a consistent development and equally determined defence of collective activity’, ‘numerous legislative interferences’ and ‘the rediscovery of the employees’ subjectivity’.<sup>766</sup> Similarly, Schmid’s approach to reflexive labour law is based on a concept of ‘coordinated flexibility’ being founded on the principles of equity and efficiency that may be attained through the mechanism of preventive state labour law.<sup>767</sup>

De Shutter can be read in the same way, explaining how ‘the systematic collection of information about best practices and their analysis at EU level’ could contribute to the ‘identification of innovative solutions and of swift responses to new problems’. He is not, in general, hostile to regulation at European level. On the contrary, de Shutter supports an innovative process of learning through the participation of Member States, actors and institutions, such as the Fundamental Rights Agency, which can lead then to identify ‘where collective action is required at EU level’. In this sense, he does not preclude that this action may take the form of regulation on the pre-condition that the aims of this regulation will be determined and re-determined by Member States and national actors,

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<sup>766</sup> S. Simitis, ‘The Rediscovery of the Individual in Labour Law’ in R. Rogowski and T. Wilthagen (eds), *Reflexive Labour Law* (Deventer, Kluwere Law and Taxations Publishers 1994) 192, 193, 205.

<sup>767</sup> G. Schmid, ‘Flexibilization of the Labour Market Through Law? On Equity and Efficiency in the Regulation of Working Time’ in R. Rogowski and T. Wilthagen (eds), *Reflexive Labour Law* (Deventer, Kluwere Law and Taxations Publishers 1994) 317-343.

which through appropriate learning mechanisms will be sufficiently equipped for such a determination.<sup>768</sup> Dickens also criticizes the decrease of statutory protection and she supports an increase of positive rights operating as ‘real’ rights in Britain in the field of labour law.<sup>769</sup>

### ***3.2 Arguments against regulation through labour standards***

This part addresses some of the concerns that have been expressed against the regulation of the employment relationship through labour standards.

It is often argued that hard law measures setting particular labour standards are considered to be a source of rigidity in labour markets.<sup>770</sup> This results, according to the same critiques, in an increase in the production cost without a simultaneous positive contribution to the economy, as the overall costs outweigh the potential benefits of labour legislation, which is both ineffective and inefficient.<sup>771</sup> An answer to these critics is offered by Sengenberger, who argues that these criticisms ‘derive from deductive

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<sup>768</sup> O. De Schutter, ‘Democratic Experimentalism and Social Rights’ in O. De Schutter and J. Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford, Hart Publishing 2010) 140, 143.

<sup>769</sup> From a reflexive labour law perspective, her intervention concentrates on the proposal for the setting up of an arbitration regime as alternative to British industrial tribunals, L. Dickens, ‘Deregulation and Employment Rights in Great Britain’ in R. Rogowski and T. Wilthagen (eds), *Reflexive Labour Law* (Deventer, Kluwer Law and Taxation Publishers 1994) 243-247.

<sup>770</sup> For a good summary of the criticisms, see R. Freeman, ‘Labor Market Institutions and Policies: Help or Hindrance to Economic Development’ in *Proceedings of the World Bank Annual Conference on Development Economics 1992* (Washington, DC: World Bank, 1993) 117-44; see also F. Wilkinson, ‘Equality, efficiency and economic progress: The case for universally applied equitable standards for wages and conditions of work’ in W. Sengenberger and D. Campbell (eds), *Creating Economic Opportunities : The Role of Labour Standards in Industrial Restructuring* (International Institute of Labour Studies, Geneva 1994) 62-67.

<sup>771</sup> H. Collins, *Employment Law* (OUP, Oxford 2010) 27-50.

economic theory built on a few abstract axioms, with poor empirical content and not proven in reality’; whereas labour standards

are founded on vast practical experience and the common perceptions of workers, employers and governments in many countries who, after thorough and prolonged investigation and discussions, have agreed that certain outcomes of labour and capital market processes are undesirable and call for corrective action. Obviously, labour standards are directed at redressing such market failures, the costs of which are deemed unacceptably high. There is substantial, consensus-based economic wisdom inherent in standards which could never be matched by the empirical content of any theory.<sup>772</sup>

In a similar vein, Deakin suggests that no reliable proof exists to support the position that deregulation of labour market leads the price mechanism to allocate resources to their most efficient use.<sup>773</sup> He points out that even in unregulated labour markets market imperfections ‘in the form of uncertainty, limited information and sunk costs’ may result in employers having the labour of comparable skills available at different wage rates.<sup>774</sup>

Additionally, according to Deakin, ‘the availability of undervalued labour is a cause of productive inefficiency’ per se, as it compensates less efficient firms for their inadequacies by allowing them to invest in obsolete equipment, and encouraging low wage competition among employers.<sup>775</sup> In this sense, Deakin sees labour standards not only as a response to these inefficiencies, but as offering a way forward to a balanced and

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<sup>772</sup> W. Sengenberger, ‘Labour Standards: An Institutional Framework for Restructuring and Development’ in W. Sengenberger and D. Campbell (eds), *Creating Economic Opportunities : The Role of Labour Standards in Industrial Restructuring* (International Institute of Labour Studies, Geneva 1994) 5.

<sup>773</sup> S. Deakin, ‘Labour Law as Market Regulation: The Economic Foundations of European Social Policy’ in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives, Liber Amicorum Lord Wedderburn* (Clarendon Press, Oxford 1996) 85.

<sup>774</sup> Ibid. 85

<sup>775</sup> Ibid. 85

sustained economic development, as they permit firms to operate on a high-wage high-productivity basis.<sup>776</sup>

Thus, labour market regulation through the mechanism of labour standards may contribute to balanced economic development. This is the principal objective of the European Union, as according to article 3 TEU (ex Article 2 TEU) the Union ‘shall work for the sustainable development of Europe based on balanced economic growth’ and it seems that the setting of transnational labour standards contributes to this objective.

This observation is verified by empirical studies conducted in the US indicating that labour standards have performed equally well in their restructuring efforts in the 1980’s, as states with high protection scored among the top performers.

Thus, it may be argued that innovation and dynamisms do not derive from making labour cheaper, but more productive.<sup>777</sup> The outcome of these empirical studies seems to support Deakin’s and Wilkinson’s theory that labour standards might promote employers’ and employees’ co-operation based on high trust, which might in turn lead to higher productivity on the basis of a high-protection, high-productivity strategy.

Deakin and Wilkinson explain the positive contribution of labour standards to competitiveness in the following way: ‘Basic levels of protection in such areas, as wages, working time and conditions of employment’ may forestall destructive competition ‘by setting a floor below which terms and conditions may not fall’. Hence, according to them, labour standards ‘essentially constitute a form of discipline for firms’,<sup>778</sup> requiring them

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<sup>776</sup> Ibid. 85-88

<sup>777</sup> M. Dertouzos et al, *Made in America. Regaining the Productive edge* (MIT Press, Cambridge 1987).

<sup>778</sup> S. Deakin and F. Wilkinson, ‘Labour Law and economic theory: A reappraisal’, in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 60.

to engage in an upward competition in terms of products and techniques so as to remain competitive.

This role of labour standards is of utmost significance for the European Union, because the avoidance of social dumping is one of its main objectives, as is indicated by the White Paper on Social Policy ‘European Social Policy - A Way Forward for the Union’, in which it is stated that

The establishment of a framework of basic minimum standards which the Commission started some years ago provides a bulwark against using low social standards as an instrument of unfair economic competition and protection against reducing social standards to gain competitiveness, and is also an expression of the political will to maintain the momentum of social progress. The continuing aim should be to develop and improve standards for all the Members of the Union.<sup>779</sup>

Deakin also argues that transnational labour standards, such as those set at European level, perform an important role because, despite the comparative advantages that systems operating on the basis of high protection-high productivity might enjoy, these systems cannot close the door to opportunistic behaviour.

The aim of minimum standards, according to Deakin, is not mainly to prevent undertakings from adopting such kinds of opportunistic behaviour, but to discourage states from adopting a mutually destructive policy of cutting labour protection in order to attract capital investments.<sup>780</sup> This is the reason why we need transnational labour standards, because if the standards remain confined to the context of national states they will be vulnerable to destructive competition at transnational level. These kinds of labour

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<sup>779</sup> European Commission ‘White Paper on Social Policy ‘European Social Policy - A Way Forward for the Union’ COM (94) 33, 27 July 1994.

<sup>780</sup> S. Deakin (n 773) 87.

standards are not hostile to economic development, as they only discourage destructive strategies of states and undertakings and promote development based on the combination of economic competitiveness with social protection.

Finally, regarding the criticism of labour standards arising from the assumption that they generate high levels of unemployment, Deakin and Wilkinson consider that the problem of unemployment is not of labour law alone but is also closely related to macro-economic policy. Hence Deakin and Wilkinson suggest that protection of the unemployed may take various forms which may not involve the removal of current employees' protection, because 'it is one thing to strengthen the hand of outsiders relative to insiders and quite another to strengthen the hand of employers towards insiders'.<sup>781</sup> They use the term 'insiders' to refer to currently employed persons and outsiders to refer to unemployed.

They also suggest that a potential solution of strengthening the power of the unemployed without diminishing employees' protection might arise from the extension of collective representation so as to ensure 'the representation for groups in the "secondary" market, as well as the unemployed'.<sup>782</sup> These points provide an answer to the criticisms of regulation through labour standards. However, a point that remains controversial is the determination of the optimum level of labour standards. It is often argued that these standards are set by the legislator arbitrarily without responding to the actual dynamics of the market forces. The next part presents the way in which the reflexive theory of labour law responds to this problem by presenting an alternative form of regulation.

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<sup>781</sup> S. Deakin and F. Wilkinson (n 778) 54 (footnotes omitted).

<sup>782</sup> Ibid. (footnotes omitted).

### ***3.3 The response of reflexive regulation to the level of labour standards***

The basic premise of reflexive regulatory frameworks for labour law may be summarised in Rogowski's and Wilthagen's words as offering the necessary reflexivity so as, on the one hand, to avoid 'inefficiency and ineffectiveness' and, on the other, to allow legal regulation of employment relations to respond and be sensitive to the variety of contexts to which it applies.<sup>783</sup>

Collins explains how reflexive forms of labour regulation may respond to the common problems of hard law labour legislation arising from the lack of both efficiency and compliance. Collins suggests that a better level of compliance and effectiveness may be attained by procedural regulation that 'requires or induces self-regulation by employers and workers through negotiation'.<sup>784</sup> The main advantage of this reflexive technique arises from the fact that 'collective self regulation permits the parties to agree standards that are practicable and efficient for each workplace, and which can be modified easily in the light of experience'.<sup>785</sup>

In other words, the negotiation and agreement of standards constituting a form of self-regulation and characterizing a particular sector of industry or specific business makes them responsive to the need of this sector or business and, thus, it enhances their overall effectiveness and the level of compliance that they achieve. This form of self

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<sup>783</sup> R. Rogowski and T. Wilthagen, 'Reflexive Labour Law: An Introduction' in R. Rogowski and T. Wilthagen (eds), *Reflexive Labour Law* (Deventer, Kluwer Law and Taxations Publishers 1994) 1-19.

<sup>784</sup> H. Collins (n 771) 30.

<sup>785</sup> *Ibid.* 30

regulation might take the form of voluntary<sup>786</sup> code of practices which offer, according to the Commission's Communication 'Better Regulation for Growth and Jobs in the European Union', the possibility for economic operators, the social partners, NGOs or associations 'to adopt amongst themselves and for themselves common guidelines at European level'.<sup>787</sup> However, it is also important to refer to the following shortcomings of the self-regulation of employment relations that are recognized even from those recognizing their overall positive contribution.<sup>788</sup>

Its overall effectiveness depends heavily on the strength of trade unions and other employee representatives. This could possibly lead to intensive diversities and inequalities regarding the working conditions of various sectors depending on the strength of collective action. Thus, it could possibly create a two-tier workforce in terms of working conditions not on the basis of skills, but with reference to the position of the various trade unions in each sector.

Sengenberger uses the illustrative historical example of Germany being one of the leading countries in European integration to explain how the existence of an extreme contradicting dualism in its labour market led to a social disaster.<sup>789</sup> Germany before 1950 was characterized by the co-existence of a two-tier workforce, namely the 'modern

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<sup>786</sup> The voluntary character of the codes of practice is questioned on various respects by Arthurs, H. Arthurs, 'Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law' in B. Bercusson and C. Estlund (eds), *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Hart Publishing, Oxford 2008) 20-24.

<sup>787</sup> Commission Communication 'Better Regulation for Growth and Jobs in the European Union' COM(2005) 97, note 30.

<sup>788</sup> H. Collins (n 771) 31-32; Deakin recognizes that self-regulation may not always have the optimum results due to legal constraints and diversities existing in European countries, J. Lenoble and M. Maesschalk, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-Based Approach to Governance' in O. De Schutter and J. Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford, Hart Publishing 2010) 13.

<sup>789</sup> W. Sengenberger (n 772) 35- 36.

industrialized sector' and the 'traditional subsistence sector' that was comprised mainly by agriculture, crafts and other small businesses being characterized by low wages and 'inferior terms of employment'. This situation led to the 'iron law of wages', according to which 'inadequate labour income and inadequate social security lead to unlimited increase in labour supply, discouraging "upward" - directed pressures of competition...'<sup>790</sup>

The dualism described by Sengenberger arises from the selective application of legislative standards. However, a similar problem of market segmentation or dualism may arise from the selective application of collectively agreed labour standards, as the two situations are strongly analogous. This challenge becomes real due to the fact that the trade unions, as they operate within a democratic framework, function in such a way that they express the wishes of the majority of its members and might disregard the interest of the minorities.<sup>791</sup>

Another alternative to standard-setting directives, which operate within the traditional framework of command-and-control regulation and rely on sanctions in the event of the non-compliance, is the replacement of 'coercion by a system which harnesses regulatory goals to market incentives'.<sup>792</sup> The proposed instruments of incentives consist of fiscal impositions, subsidies, tax breaks<sup>793</sup> aiming at achieving

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<sup>790</sup> Ibid. 35

<sup>791</sup> H. Collins (n 771) 31.

<sup>792</sup> A. Ogus, 'New techniques for social regulation: Decentralisation and diversity' in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 95 (footnotes omitted).

<sup>793</sup> H. Collins, 'Justifications and techniques of legal regulation of the employment relation' in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 24.

employers' co-operation to labour standards without the threatening of sanctions. The advantages of these techniques are that 'they reduce information and administrative costs', 'their imposition is more certain' and 'they are more adept at inducing marginal adjustments to behaviour and they create incentives for technological development'.<sup>794</sup>

Finally, De Shutter refers to collective action at transnational level as a potential 'counterweight to the exercise by companies of their freedom of establishment' that may cover 'the limited competences of the EU in the area of social rights'. However, as the same author recognizes, the dynamic of collective action may be practically limited, in the aftermath of the Court of Justice's ruling in *Viking*,<sup>795</sup> which allowed 'for transnational collective action to constitute a "counter-weight" to the free movement of companies only insofar as it preserves the freedom of each national union to choose whether or not to join the action' that seems to 'negate the idea of collective action altogether, the very purpose of which is to strengthen the bargaining position of all workers by imposing a collective discipline across the workforce'.<sup>796</sup>

The two major drawbacks of all these techniques are the following. Firstly, as Collins observes, 'the danger exists, of course, that the collectively agreed standards will be pitched very low, so that they do not accord with the aspirations of the legislator'.<sup>797</sup> Secondly, it is difficult to compel employers 'to comply with procedural regulation such as that requiring recognition of trade unions for the purposes of collective bargaining'.<sup>798</sup>

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<sup>794</sup> A. Ogus (n 792) 95 (footnotes omitted).

<sup>795</sup> Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779.

<sup>796</sup> O. De Shutter (n 768) 135-136.

<sup>797</sup> H. Collins (n 771) 31.

<sup>798</sup> *Ibid.* 32

The second danger is particularly acute in the context of the European Union, because the Union has no competence on the right to association (article 153 par. 5 TFEU) and, thus, it might have a limited indirect impact on national laws referring to the conditions for the recognition of trade unions. Additionally, as Fredman observes, a problem of social dialogue in Europe is that it lacks ‘sufficient accountability, representativity, or transparency to carry the responsibility for legislation’.<sup>799</sup>

In this part, it was indicated how the reflexive techniques of labour regulation address the issue of setting the optimum level of labour standards in terms of effectiveness and compliance by emphasizing on the role of collective self-regulation. Additionally, the major drawbacks of these techniques were highlighted. The next part will indicate how these reflexive strategies may be combined effectively with standard-setting directives so as to create an overall effective regulatory regime of employment relations in EU law.

#### ***3.4 The potential harmony between reflexive labour law and standard-setting directives***

The previous parts presented the significant role of labour standard directives in European social regulation and the response of reflexive regulatory techniques to the issue of determining the optimum level of standards. This part will illustrate that these two strategies are not mutually exclusive, but may be combined for the effective regulation of social Europe. In Rogowski’s and Wilthagen’s words, this potential co-existence of hard regulation and self-regulation is expressed as follows:

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<sup>799</sup> S. Fredman, ‘Discrimination law in the EU’ in H. Collins, P. Davies, R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London 2000) 189.

whereas the establishment of standards of protection is left to mechanisms of interest co-ordination, such as collective bargaining, co-determination at company level, and corporatist producer coalitions, labour law provides the procedural framework in which co-ordination can take place.<sup>800</sup>

This argument will be supported by reference to the ARD and the recent Commission Communication ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’.<sup>801</sup>

The main weak point of the labour standards imposed through regulation, as was illustrated above, consist in the usual absence of consensus of market forces with regard to their level that renders them ineffective, rigid and discouraging in terms of compliance. Reflexive law attempts to solve this problem through self-regulation of the employment relationship mainly through collectively agreed standards; however, there is a significant price to be paid for this self-regulation.

On the one hand, there is a danger that the level of these collectively agreed standards will be far too low and, on the other, much might depend on the strength of each trade union, and thus, the danger of selective application of standards with the simultaneous market segmentation ‘to union versus non-union employment sectors’ comes into play.<sup>802</sup> In the context of the European Union this danger is intensified when national laws do not adequately support freedom of association.

However, there are some concrete suggestions that may enable standard-setting directives to co-exist with reflexive regulatory strategy in a mutually beneficial way.

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<sup>800</sup> R. Rogowski and T. Wilthagen (n 783), 16 (footnotes omitted).

<sup>801</sup> European Commission Communication ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (n 745).

<sup>802</sup> For the very destructive social effects of market segmentation in terms of the application of labour standards, see W. Sengenberger (n 772) 34.

Brousseau and Glachant seem to take a similar view, as their approach to reflexivity does not seem hostile to regulation, at least in the form of soft and evolving regulation. In particular, they consider that a potentially successful reflexive framework could be based on the constant evolution and renegotiation of regulatory principles that would adjust them ‘in a permanently evolving environment’. Thus they do not seem to exclude, at least, in principle, regulation, but they prefer a more ‘flexible’ form of regulation adjustable to changing circumstance through negotiations and re-negotiations.<sup>803</sup>

Starting from the issue of the optimum level of standards provided by standard-setting directives, reflexive strategies may create an appropriate tool for determining the particular level of standards supported by wide consensus. Thus, the potential of reflexive theories will be fully developed if the particular agreed standards are based on social dialogue and exchange of knowledge and information to reflect the dynamics of the labour market. At this particular level the European legislator may intervene so as to incorporate these standards in standard-setting legal instruments, such as directives.

This will offer to these standards the significant characteristic of universality referring ‘to the extension of labour standards both within, and between, national economies’.<sup>804</sup> This will obviously restrict the danger of segmentation and market dualism based on the dynamism of particular trades unions. Collins seems to take a similar view about the potential beneficial intervention of the legislator, although solely at an absolute minimum level, so as, on the one hand, to ‘guard against’ the potential

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<sup>803</sup> E. Brousseau and J.-M. Glachant, “Reflexive” Market Regulation: Cognitive Cooperation in Competitive Information For a’ in O. De Schutter and J. Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford, Hart Publishing 2010) 40-41.

<sup>804</sup> W. Sengenberger (n 772) 34.

worst outcomes of reflexive self-regulation at a very low level, and on the other, not to distort the functioning of self-regulation by providing something more than minimum standards.<sup>805</sup>

It may be argued that this procedure of consensus building as regards the level of standards before the adoption of the directive may be difficult, because as Deakin observes, even ‘within a trading bloc as comparatively homogenous as the EC’, there are ‘extensive differences of form and substance between the laws of different Member States’.<sup>806</sup> However, the recent Commission Communication ‘a renewed EU strategy 2011-14 for Corporate Social Responsibility’<sup>807</sup> (CSR) offers some leeway to the prospect of combining traditional regulation with reflexive strategies of regulation.

The direct link between the CSR and labour law is indicated by the reference to the need for mitigation ‘of the social effects of the current economic crisis, including job losses’, which is considered by the Communication to be ‘part of the social responsibility of enterprises’.<sup>808</sup> Furthermore, it provides that CSR covers, at least, among other things, ‘labour and employment practices (such as training, diversity, gender equality and employee health and well-being)’.<sup>809</sup> The Commission aims through the promotion of CSR to ‘create conditions favourable to sustainable growth, responsible business behaviour and durable employment generation in the medium and long term’. This

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<sup>805</sup> H. Collins (n 771) 31.

<sup>806</sup> S. Deakin (n 773) 91.

<sup>807</sup> European Commission Communication ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (n 745).

<sup>808</sup> *Ibid.* para 1.2.

<sup>809</sup> *Ibid.* para 3.3.

constitutes a further indication of the significant role that CSR may perform as regards the employment rate in the EU, which is one of the major concerns of the Union.

The reflexive strategy for CSR suggested by the Commission in this Communication has the following important dimensions. Firstly, it provides that ‘the development of CSR should be led by enterprises themselves’ with the public authorities being constrained to ‘a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability’.<sup>810</sup>

It insists that ‘enterprises must be given the flexibility to innovate and to develop an approach to CSR that is appropriate to their circumstances; however, it also acknowledges that ‘principles and guidelines that are supported by public authorities, to benchmark’ the policies and performance of the enterprises may have a significant role to play in the shaping of the CSR.’<sup>811</sup> This emphasis on self-regulation is further highlighted by the explicit reference to this form of regulation as part of the EU ‘better regulation agenda’ and by the recognition that a properly structured self-regulation strategy ‘can earn stakeholder support and be an effective means of ensuring responsible business conduct’.<sup>812</sup>

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<sup>810</sup> Ibid. para 3.4.

<sup>811</sup> Ibid. para 3.4; it is noted that the so-called experimentalism approach to reflexive governance being supported by Dorf and Sabel consider benchmarking and monitoring as ideal bases for collective learning, M. Dorf and C. Sabel, ‘A Constitution of Democratic Experimentalism’ 1998 Columbia Law Review 267-473.

<sup>812</sup> European Commission Communication ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (n 745), para 4.3.

The role of public authorities such as the European Commission is considered crucial, according to the Communication, for the effective operation of this self-regulatory framework. In this regard, the ‘initial open analysis of the issues with all concerned stakeholders, in the presence of and if necessary convened by public authorities...’ results in ‘a subsequent phase, in clear commitments from all concerned stakeholders, with performance indicators’.<sup>813</sup>

In a similar vein, the role of public authorities is crucial for the provision of ‘objective monitoring mechanisms, performance review and the possibility of improving commitments as needed’, as well as effective accountability mechanisms ‘for dealing with complaints regarding non-compliance’.<sup>814</sup> Especially, with regard to the monitoring process the Commission intends to ‘monitor the commitments made by European enterprises with more than 1000 employees to take account of internationally recognised CSR principles and guidelines’.<sup>815</sup>

Secondly, the role of social dialogue is important in the formulation of the suggested strategy for SCR and thus the Commission will ‘promote dialogue with enterprises and other stakeholders on issues such as employability, demographic change and active ageing, and workplace challenges...’<sup>816</sup> In this vein, the Commission intends to initiate an open debate with ‘citizens, enterprises and other stakeholders on the role and potential of business in the 21st century, with the aim of encouraging common

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<sup>813</sup> Ibid.

<sup>814</sup> Ibid.

<sup>815</sup> Ibid. para 4.8.1.

<sup>816</sup> Ibid. para 4.1 (footnotes omitted).

understanding and expectations, and carry out periodic surveys of citizen trust in business and attitudes towards CSR'.<sup>817</sup>

Thirdly, the role of Member States is significant in the process of formulating the reflexive framework for CSR and this is the reason why the Commission invites

Member States to develop or update by mid 2012 their own plans or national lists of priority actions to promote CSR in support of the Europe 2020 strategy, with reference to internationally recognised CSR principles and guidelines and in cooperation with enterprises and other stakeholders, taking account of the issues raised in this communication.<sup>818</sup>

The reflexive strategy suggested by the Communication for CSR is based on a combination of various aspects, such as enterprises' self-regulation, social dialogue, the Commission's co-ordination and monitoring of this procedure, as well as Member States' national plans. This does not undermine the role of traditional regulation. Conversely, a number of references in the Communication indicate that the effectiveness of the suggested reflexive regulatory framework depends on its successful combination with traditional regulation.

This is clear even in the first paragraph of the Communication providing that 'corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment. Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility'.<sup>819</sup> In this paragraph, the role of traditional regulation is highlighted by the

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<sup>817</sup> Ibid. para 4.2.

<sup>818</sup> Ibid. para 4.7.

<sup>819</sup> Ibid. para 1.

expression ‘over and above their legal obligations’. This reference clearly underlines the significant role of traditional regulation, even under the self-regulatory framework set by this Communication, which explicitly supplements traditional regulation (over and above), but it does not substitute for it.

Additionally, the Communication in the definition given to the term CSR as ‘the responsibility of enterprises for their impacts on society’ clarifies that ‘respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility’.<sup>820</sup> This reference constitutes an unambiguous statement of the Commission that the reflexive framework of CSR does not undermine traditional legislation, but on the contrary, the effectiveness of this reflexive framework pre-requires the respect for traditional legislation and collective agreements on behalf of the companies.

A second reflexive potential of standards-setting directives is the possibility of these directives accommodating a wide scope for collectively agreed derogations and, in this way, developing an important reflexive potential in the form of self-regulation. This will offer the advantage to these directives of being adaptable to a variety of standards depending on the needs of different enterprises and sector of activities while, at the same time, they constitute a minimum level of protection.

We have analysed the prospect of offering an important reflexive potential to the ARD by means of proportionality and so that we avoid repetition here, we will only briefly summarise the crucial points of that discussion. Initially, it was argued that the

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<sup>820</sup> Ibid. para 3.1.

ARD operates under a restrictive framework outside the area of insolvency and serious economic crisis, because the Court of Justice does not allow scope for collectively agreed derogations from the provided protection, even in return for other advantages.<sup>821</sup>

This tendency was criticized, because there are examples, where the bargaining over the applicable labour standards of protection in cases of ailing enterprises resulted in successful agreements that safeguarded the viability of these enterprises.<sup>822</sup> It was recognized that there must be some safeguards against abuse of these derogations on behalf of employers that will channel ‘the bargaining process in favour of an inclusive, stakeholder-orientated outcome’,<sup>823</sup> which may not be guaranteed by free bargaining.

However, these safeguards should not be sought by the imposition of a total ban on the prospect of employees’ waiving part of their rights, which invalidate the reflexive potential of the Directive. In this sense, the structured form of proportionality, as this was analysed above, constitutes an appropriate framework for bargaining over the labour standards of protection that guarantees an essential amount of reflexivity in the implementation of the ARD, while, at the same time, it constitutes a safeguard against ‘disproportionate’ outcomes.

The next section analyses the relationship between standard-setting directives, such as the ARD, which were adopted under the harmonization articles providing for the approximation of such laws, regulations or administrative provisions of the Member

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<sup>821</sup> Case 362/89 *Giuseppe d’Urso, Adriana Ventadori and others v Ercole Marelli Elettromeccanica Generale SpA and others* (n 743) and case 132/91 *Katsikas* (n 743) ECR I-6577.

<sup>822</sup> For the illustrative example of the Rover case, see J. Armour, S. Deakin, ‘Insolvency and employment protection: the mixed effects of the Acquired Rights Directive’ (2003) 22 *International Review of Law and Economics*, 443, 458-461.

<sup>823</sup> *Ibid.* 461.

States as directly affecting the establishment or functioning of the internal market and the OMC. The legal basis of these legislative measures is the traditional harmonisation provision found in the Treaties from Rome and onwards, while the OMC marks a shift from harmonisation towards co-ordination. The question then arises: are the legislative measures adopted pursuant to the harmonisation legal basis compatible with the OMC?

#### **4. The harmonization aim of standard-setting directives and the OMC**

As was seen above, the main objective of the OMC is to shift the emphasis away from harmonisation towards co-ordination. This is clear in the definition of the OMC given in the Commission's evaluation of the Lisbon Strategy: 'The Open Method of Coordination: an intergovernmental method of "soft coordination" by which Member States are evaluated by one another, with the Commission's role being one of surveillance'.<sup>824</sup>

Thus, the OMC emphasises the potentially beneficial role of existing diversities between Member States that may lead to the exchange of best practice among them,<sup>825</sup> rather than the harmonisation of national legal systems, and it provides for a more active role for the social partners in this process.<sup>826</sup> This section evaluates whether the logic and the articulation of the ARD and other standard-setting directives based on the general harmonisation clauses of the Treaties are consistent with the OMC. The argument is that despite the *prima facie* incompatibility between these directives and the OMC arising

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<sup>824</sup> European Commission 'Commission Staff Working Document: Lisbon Strategy evaluation document' SEC (2010) 114, page 18.

<sup>825</sup> According to paragraph 31 of the Lisbon Presidency Conclusions (n 748), the Council should aim at strengthening 'the cooperation between Member States by exchanging experiences and best practice on the basis of improved information networks which are the basic tools in this field'.

<sup>826</sup> Paragraph 28, *ibid.* Lisbon Presidency Conclusions (n 748).

from their legal basis, it may be implemented in a way as to be compatible with some of the basic premises of the OMC.

The legal basis of the Directive is ex article 94 EC (now article 115 TFEU) providing for the approximation of such laws, regulations or administrative provisions of the Member States as directly affecting the establishment or functioning of the internal market. Hence it seems that ARD aims at harmonising labour costs during transfers, which might in principle be incompatible with the OMC.<sup>827</sup> The significance of this aim is also verified by its reference to the Commission's report on the ARD.<sup>828</sup> However, the assimilation of the ARD and standard-setting directives more generally with instruments aimed at creating 'parity of costs' constitutes a misunderstanding of their function.

As Deakin explains, the aim of social directives providing for minimum standards of protection is not to create uniformity either of costs, or of regulation, but to constitute a floor of rights, from which 'there may be no downwards derogation but on which it is normally possible to improve'. This reading of minimum standards allows for differences in the levels of costs which are inevitable, according to Deakin, 'as long as Member States, through their own laws, and the "social partners", through collective bargaining,

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<sup>827</sup> For a view that even harmonization should be approached in such a way so as not to be incompatible with the national diversities, because its goal 'should be actively to preserve diversity at Member State level, by ruling out the kind of destructive inter-jurisdictional competition', see S. Deakin and H. Reed, 'The Contested Meaning of Labour Market Flexibility' in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 83.

<sup>828</sup> Commission Report 'on 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' COM (2007) 334, para 1.

retain the right to set standards above the basic floor set by any transnational regulations'.<sup>829</sup>

This approach is also supported by the view expressed by the Commission in its Communication of 'International Labour Standards', in which it recognised that 'each state has the sovereign right to choose what labour laws it will enact and the choice made will reflect both the country's level of economic development and its political and social priorities'.<sup>830</sup> Thus, this approach is clearly consistent with the OMC, as it does not interpret standard-setting directives as excluding national diversities, but it gives to social directives their true meaning, which is to provide for a minimum floor of rights.

Syrpis also combines the operation of minimum standards with the notion of distortion of competition in the following way. He observes that 'where social standards are unacceptably low, the necessary element of wrongfulness is introduced and, with it, the distortion of competition'.<sup>831</sup> Then, he recognises that on the basis of this conception of distortion, minimum standards and not harmonisation will be the appropriate policy response. Syrpis considers that while minimum labour standards 'may succeed in ruling out certain destructive options for low standard Member States', they 'may even

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<sup>829</sup> Deakin also considers that differences in level of costs among Member States may be desirable, and 'form part of the process of leveling up, envisaged by Spaak report as flowing from liberalization of trade', S. Deakin (n 773) 78-79 (footnotes omitted); a similar view is taken by Syrpis, who observes that 'as long as free movement between Member States is guaranteed, competition between legal regimes is not incompatible with the creation of the common or internal market', P. Syrpis, 'The Integrationist Rationale for European Social Policy' in J. Shaw (ed.), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 26.

<sup>830</sup> European Commission Communication, The Trading System and Internationally Recognised Labour Standards COM (96) 402 at 6, as this is cited in P. Syrpis, *ibid.* 24-25.

<sup>831</sup> P. Syrpis (n 829) 27; while, Barnard considers the existence of social dumping as a version of market failure, C. Barnard, 'Competitive Federalism in the EU' in J. Shaw (ed), *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000) 60.

encourage higher standard States to lower their standards towards the Community minimum'.<sup>832</sup>

Although this is a realistic challenge, the Community seems to be aware of this and it has addressed this issue by adding non-regression clauses to a number of employment law legislative measures.<sup>833</sup> It is also true, however, that the effectiveness of these clauses is highly questionable, especially in the light of the way that these clauses are applied by the Court of Justice.<sup>834</sup> The important point here is that, even if Syrpis seems sceptical about the practical consequences of minimum standards, he undoubtedly distinguishes between the concept of harmonisation and minimum standards legislation.

Therefore, the next question arises: is this approach of social directives as minimum standard-setting directives applicable to the ARD or does its legal basis show that this directive aims solely at bringing a parity of labour costs among Member States in transfers? The following points could be made with regard to this question. Firstly, the ARD undoubtedly constitutes a minimum standard-directive, as it arises from article 8 providing for the right of Member States 'to introduce laws, regulations, administrative

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<sup>832</sup> P. Syrpis, *ibid.* 29 (footnotes omitted).

<sup>833</sup> Clause 8(3) of the fixed-term workers' Directive (Directive 1999/70 [1999] OJ L 175/43) constitutes a characteristic example of non-regression clause by providing that the 'implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'.

<sup>834</sup> On this issue see Peers, who argues that 'non-regression clauses in EU employment legislation is not an effective way of maintaining existing employment standards, at least from a judicial point of view'; as far as the competence of the Community in setting 'non-regression clauses' is concerned, he considers that it enjoys this competence on the basis of Article 151 TFEU, referring to 'improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained'(emphasis added), S. Peers, 'Non-regression Clauses: The Fig Leaf Has Fallen' (2010) 39 *Industrial Law Journal*, 436, 443; the content of Article 151 TFEU is included in the text of the Treaties consistently from the Treaty of Amsterdam and onwards.

provisions being more favourable to employees or of the social partners to conclude collective agreements to the same effect’.

This is also verified by the Commission’s Memorandum of 1997, which unequivocally states that the ARD essentially sets ‘minimum standards for promoting fair competition in the context of such changes’.<sup>835</sup> Secondly, the ARD does not aim at creating a total harmonisation of national laws in transfers, but, on the contrary, it constitutes a typical partial harmonization measure in the sense that it legislates on some aspects of transfers and leaves other aspects to be determined by national laws.<sup>836</sup>

Thirdly, when interpreting the ARD, we should always keep in mind that the choice of the particular legal basis of article 100 EEC (now article 115 TFEU) referring to the harmonisation of national laws for the initial 1977 Directive covered, to a certain extent, the practical need of the absence of an alternative legal basis<sup>837</sup> on which to found this directive. This was indicated in the first chapter that analysed the process of the adoption of SAP 1974 that was implemented by a number of directives including the ARD. Thus, in light of these observations, it seems that the ARD and similar standard-setting directives aim indeed at establishing a minimum transnational floor of employees’ rights and they are not incompatible with the OMC, even if their legal basis points towards harmonisation.

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<sup>835</sup> Commission of the European Communities ‘Memorandum on acquired rights of workers in cases of transfers of undertakings’ COM (97) 85 final, 04/03/1997, page 2.

<sup>836</sup> A. Garde, ‘Partial harmonisation and European social policy: a case study on the Acquired Rights Directive’ (2002-2003) 5 Cambridge Yearbook of European Legal Studies 173-193.

<sup>837</sup> It was already mentioned that the non substitution of this legal basis with the article 117 EEC that was then into force and constituted a more specialized legal basis for social policy measures was not a successful choice. However, this choice does not alter the substance and the validity of our point, namely that the choice of article 94 EC as the legal basis covered a practical necessity at the time of the initial adoption of the Directive.

## 5. The ‘Europe 2020’ and the ARD

This section refers to the prospects of the ARD in the light of the Commission Communication ‘Europe 2020’<sup>838</sup> that places an emphasis on the mobility and flexibility.<sup>839</sup> It will be argued that the ARD may facilitate this mobility for the following reason. The total absence of employee protection in cross-border transfers would very possibly lead to employees’ protestations constituting a practical obstacle to this process, as was found by the 1998 Commission’s study on cross-border transfers.<sup>840</sup>

It is highly unlikely that the recent economic crisis calling for urgent measures on behalf of the undertakings, which often constitute their last resort for avoiding bankruptcy, enables the undertakings to be involved in such serious delays. A similar view is shared by Laulom, who highlights the significance of the aim of avoiding ‘violent conflicts’ in the field of restructuring by means of ‘full and active representation’ of social partners at European and national level.<sup>841</sup>

Hence the safeguarding of employees’ consent may be the only possible way of avoiding conflicts in the field of cross-border transfers. This argument should not be overstated, because it is inevitable that the encouragement of mobility and its smooth functioning require the adoption of various and complex policy measures that are not

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<sup>838</sup> European Commission ‘Communication From the Commission Europe 2020: A Strategy For Smart, Sustainable and Inclusive Growth’ COM (2010) 2020 (Brussels, 3.3.2010).

<sup>839</sup> European Council ‘Conclusions’ EUCO 13/10 (Brussels, 17 June 2010) page 1.  
< [http://ec.europa.eu/eu2020/pdf/council\\_conclusion\\_17\\_june\\_en.pdf](http://ec.europa.eu/eu2020/pdf/council_conclusion_17_june_en.pdf)> accessed 07 July 2012

<sup>840</sup> B. Hepple, ‘A Report for the European Commission DG-V: The legal consequences of cross-border transfers of undertakings within the European Union’ (Cambridge 1998).  
< <http://ec.europa.eu/social/BlobServlet?docId=2446&langId=en>> accessed 07 July 2012

<sup>841</sup> S. Laulom, ‘The Flawed Revision of the European Works Council Directive’ (2010) 39 (Translated by C. Kilpatrick) 202, 208.

restricted in the context of a Directive. However, the ARD may contribute significantly to the facilitation of mobility in the field of restructuring.

### ***5.1 The Europe 2020 Communication***

The main points of the Commission's Communication 'Europe 2020', whose findings were adopted by the European Council of 17 June 2010 as the 'new strategy for jobs and smart, sustainable and inclusive growth' could be summarised as follows. Firstly, the Commission sets the following three priorities under this communication: a) smart growth: developing an economy based on knowledge and innovation; b) sustainable growth: promoting a more resource efficient, greener and more competitive economy; c) inclusive growth: fostering a high-employment economy delivering social and territorial cohesion.<sup>842</sup>

As for employment the measurable target set with regard to this priority is 'the employment rate of the population aged 20-64' to 'increase from the current 69% to at least 75%, including through the greater involvement of women, older workers and the better integration of migrants in the work force'.<sup>843</sup> Secondly, it emphasises the need to modernise labour markets with a view to raising employment levels and ensuring the sustainability of our social models, the improvement of education and the increasing competitiveness of Europe by the adoption of environmentally friendly policies.

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<sup>842</sup> European Commission 'Communication From the Commission Europe 2020: A Strategy For Smart, Sustainable and Inclusive Growth' (n 838) page 5.

<sup>843</sup> Ibid. page 10.

From an employment perspective, the more interesting objective is the modernisation of labour markets. The accomplishment of this aim is strongly connected with a ‘second phase of the flexicurity agenda’ aiming at identifying ‘ways to better manage economic transitions and to fight unemployment and raise activity rates’. Additionally, the facilitation and promotion of ‘intra-EU labour mobility’ so as to better match labour supply with demand is considered an important input towards the modernisation of labour markets. It also focuses on the role of ‘social partners’ as a way of making full use of the problem-solving potential of social dialogue at all levels (EU, national/regional, sectoral, company) that is required for this modernisation, as well.<sup>844</sup>

Thirdly, the Communication identifies the OMC as the appropriate institutional framework for the shaping of the EU social policy for ‘Europe 2020’ and the following characteristic reference to OMC may be found in the Communication. It explicitly states that the Commission will work ‘to transform the open method of coordination...’ ‘into an instrument to foster commitment by public and private players to reduce social exclusion, and take concrete action, including through targeted support from the structural funds...’<sup>845</sup>

Finally, the Commission communication relies on policy recommendations, for the accomplishment of its objectives, whose operation is articulated around the principle of OMC as they involve monitoring, benchmarks and national reform programmes. It is characteristic that policy recommendations are strengthened with the ability of the

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<sup>844</sup> Ibid. page 18.

<sup>845</sup> Ibid. Page 19.

Commission to issue policy warnings if a Member State fails to act within the time frame provided by the policy recommendation.<sup>846</sup>

The following part evaluates whether the ARD is consistent with the current focus on the mobility of production factors. This issue will be examined in the light of the issue of cross-border transfers due to the great relevance of this issue not only for the mobility of production factors, but more generally for freedom of establishment and freedom of movement. It will be shown that the Directive may promote employees' mobility, as well as the freedom of establishment and movement within the internal market.

## ***5.2 The issue of Cross-Border Transfers revisited***

Eight years after the initial study conducted by Sir Bob Hepple on the issue of cross-border transfers on behalf of the Commission, the Commission confirmed the prominent role of this issue within the scope of the ARD and the EU social agenda more generally. This confirmation was expressed by means of a new study on this issue published in 2007.<sup>847</sup> Subsequently and on the basis of the findings of this study, the Commission announced the launch of the first phase of consultation of social partners provided for in

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<sup>846</sup> Ibid. 28; for a view that, long before the recent addition of policy warning mechanism by the Commission's Communication 'Europe 2020', the EES and more particularly the 1999 National Action Programmes provided for an intensification of the 'peer review' process 'with the performance of each Member State being reviewed in greater detail by other Member States', see E. Szyszczak, 'The Evolving Employment Strategy' in J. Shaw (ed) *Social Law and Policy in an evolving European Union* (Hart Publishing, Oxford 2000), 213; a similar view is taken by Deakin and Reed, S. Deakin and H. Reed (n 827) 93.

<sup>847</sup> CMS Employment Practice Area Group 'Study on the application of the acquired rights directive (ARD) to cross-border transfers of undertakings' (Study N<sup>o</sup> VT/2005/101, September 2006) <<http://ec.europa.eu/social/BlobServlet?docId=2445&langId=en>> accessed 07 July 2012.

article 154 TFEU ‘on the question of whether the Directive should be modified to clarify its application to cross-border transfers of undertakings’.<sup>848</sup>

Both these documents indicate the significance that the Commission attaches to the issue of cross-border transfers. This emphasis is connected with the current focus on mobility for the future of social Europe. This interrelation is captured well by Sciarra who observes that ‘disputes over transfers of undertakings are strictly connected with the functioning of the market and with legislation structurally designed (...) to favour the mobility of businesses across frontiers’.<sup>849</sup>

The Commission’s attention to this issue is further justified by ‘an economic environment influenced by globalisation, the enlargement of the EU and the consolidation of the internal market’ that results in an increase in the ‘number of outsourcing or delocalisation operations (restructuring operations where the activity is relocated or outsourced outside the country’s borders)’, as concluded by the Commission’s 2007 invitation for consultation.<sup>850</sup> This is also verified by empirical evidence, as according to data from the European Restructuring Monitor of the European Foundation for the Improvement of Living and Working Conditions, the number of cross-

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<sup>848</sup> Commission of the European Communities ‘First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses’ (Brussels) < <http://ec.europa.eu/social/BlobServlet?docId=2442&langId=en> > accessed 07 July 2012.

<sup>849</sup> S. Sciarra, ‘Integration Through Courts: Article 177 as a Pre-federal Device’ in S. Sciarra (ed), *Labour Law in the Courts, National Judges and the European Court of Justice* (Hart Publishing, Oxford 2001) 29.

<sup>850</sup> Commission of the European Communities ‘First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses’ (n 848), para 9.

border transfers increased steadily from 10 at the beginning of data collection in 2001 to 109 in 2005.<sup>851</sup>

The study on cross-border transfers was prepared by the law firm CMS Employment Practice Area Group<sup>852</sup> with a three-fold aim. Firstly, it identifies the problems that arose from the way in which different Member States implement the ARD; secondly, it considers the existing solutions provided by international private law in the event of cross-border transfers; thirdly, it suggests amendments that could be made to the ARD so as to overcome the identified problems.

The study starts by observing that the Directive applies, in principle, to cross-border transfers and, according to its wording, the decisive criterion for its application is the ‘place of origin of the business to be transferred’ (article 1 par. 2). Thus, it seems that the Directive may also apply to cases where the business is transferred to a third country, as long as it was located before the transfer within the territory of a Member State. The main problem is that, despite the fact that the Directive provides for its application to cross-border transfers, it does not give solutions to potential conflict of laws.<sup>853</sup>

There are different understandings of the concept of the ‘transfer of undertakings’ that could possibly lead to ‘conflict in a cross-border situation in case national jurisdictions involved have differing requirements for the application of business transfer

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<sup>851</sup> These figures are available at <http://www.eurofound.europa.eu/emcc/erm/index.php?template=searchfactsheets> accessed 07 July 2012.

<sup>852</sup> According to its website ‘CMS aims to be the best European provider of high-quality legal and tax advice’ and ‘has a common culture and a shared heritage that is distinctively European. With more than 5,000 people working in 54 offices, CMS has the most extensive footprint in Europe’.  
<<http://www.cmslegal.com/aboutcms/pages/default.aspx>> accessed 07 July 2012

<sup>853</sup> CMS Employment Practice Area Group ‘Study on the application of the acquired rights directive (ARD) to cross-border transfers of undertakings’ (n 852), para 1.1.

law’.<sup>854</sup> The same danger applies with regard to existing national differences concerning the concept of ‘legal transfer’ under the Directive.<sup>855</sup> Secondly, different factual circumstances related to cross-border transfers may result in complicated conflicts of ‘opposing national jurisdictions’ as regards ‘the determination of the governing law and the competent jurisdiction to hear the conflicts cases which may arise’.<sup>856</sup>

The study distinguishes between cases of cross-border transfers entailing transfer of ownership without relocation, which do not seem problematic in terms of the applicable law, and those entailing such relocation. The latter category is further subdivided into cases in which the transfer of business and the relocation take place simultaneously, and those characterized by a time distance between the transfer and relocation or vice versa.<sup>857</sup> Thirdly, the study underlines the practical problems arising from the different level of statutory protection existing in Member States. This is because the rights safeguarded by the ARD depend on the statutory framework implementing the ARD. For example, the performance of the employment contract is closely linked with each particular national system.<sup>858</sup>

Fourthly, cross-border transfers, in the majority of cases, entail a change in the place of work and the absence of relevant provisions in the Directive, due to the delegation of this matter to national autonomy, may generate a lot of questions. Fifthly, the study considers that the cross-border transfers pose difficult problems in terms of the

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<sup>854</sup> Ibid. para 1.3.1.

<sup>855</sup> Ibid. para 1.3.2.

<sup>856</sup> Ibid. para 1.3.4.

<sup>857</sup> Ibid. paras 1.3.3, 1.3.3.1, 1.3.3.2.

<sup>858</sup> Ibid. para 1.4.4.

transferee's obligation to observe the terms of collective agreements regulating the terms and conditions of employment under the transferor (article 3 of the Directive).<sup>859</sup> Finally, it identifies particular problems arising from national differences regarding the application of the ARD to cases of insolvency and transfers to third countries.<sup>860</sup>

Regarding solutions to these problems the study suggests that article 1(2) of the Directive should be amended to provide explicitly that the Directive applies 'provided that the undertaking is transferred within the territorial scope of the Treaty' or 'from one Member State to another Member State'. Otherwise, it is possible that the application of the Directive may be restricted to transfers taking place within the territory of one Member State, which is the case in some Member States, as the comparison between various Member States conducted by this study indicates.<sup>861</sup>

Secondly, in principle, the law applicable to cross-border transfers should be the transferor's law, because the Directive aims at safeguarding the same level of protection after the transfer, as the one enjoyed before it, irrespectively of which precisely was the level of protection before the transfer. The same applies to the definition of key concepts for the application of the Directive.<sup>862</sup> Cases of cross-border transfers of ownership without a relocation of the undertaking are not problematic in this regard.

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<sup>859</sup> Ibid. para 1.9.

<sup>860</sup> Ibid. paras 1.12 and 1.13.

<sup>861</sup> Ibid. para 3.2.1.

<sup>862</sup> Ibid. para 3.3.

As for cross-border transfers entailing a reallocation of the undertaking to another Member State, the study suggests that the Rome Convention<sup>863</sup> will indicate the applicable law with regard to individual rights safeguarded by the Directive. The applicable law, according to the Rome Convention, is the one chosen by the parties (article 3) and if there is no such choice, the law of the place, where the employee performs his services (article 6).

However, the choice of law may not affect the application of mandatory rules (article 6 par. 2). The study does not consider that transfer rules should be deemed mandatory in this sense and proposes an amendment to the Directive providing explicitly that its provisions are not deemed mandatory under the meaning given to this term by the Rome Convention.<sup>864</sup>

Thirdly, the study considers that collective rights do not fall within the ambit of the Rome Convention that deals solely with individual contracts. If the cross-border transfer does not amount to a re-allocation of the undertaking, employees may rely on the Jurisdiction Regulation<sup>865</sup> so as to enforce their rights. On the contrary, in a case of transfers leading to a re-allocation, the national law will indicate the applicable law.<sup>866</sup>

The study suggests that, undoubtedly, the transferee's obligation to observe the transferor's collective agreements applies to cross-border transfers, although wide

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<sup>863</sup> Rome Convention 1980 on the law applicable to contractual obligations (consolidated version) OJ C 027, 26/01/1998.

<sup>864</sup> CMS Employment Practice Area Group 'Study on the application of the acquired rights directive (ARD) to cross-border transfers of undertakings' (n 852), paras 2.3.1 and 2.3.4.1, 3.13.

<sup>865</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ L 12.

<sup>866</sup> CMS Employment Practice Area Group 'Study on the application of the acquired rights directive (ARD) to cross-border transfers of undertakings' (n 852), paras 2.3.4.2 and 2.4.

differences exist between Member States on this issue. Thus, it would be advisable for the ARD to be amended to provide that this obligation also includes the substitution of the clauses of collective agreements with individual contractual agreements, when the observance of collective agreements is not possible due to national law.<sup>867</sup>

As regards the duty of employer's information and consultation during cross-border transfers, the study suggests that this should be restricted to the "essential implications" of a transfer' and the "essential measures" envisaged in relation to the employees'.<sup>868</sup> This is because it would be extremely difficult, if not impossible, for the employers to provide something more than this kind of information in the event of cross-border transfers. Other than that, it agrees with the finding of the previous study of 1998, which argued that this issue poses far-reaching questions that may not be dealt within the scope of a directive.

Additionally, the study concludes that due to the uncertainty connected with the old-age, invalidity and survivors' benefits and the wide national divergences, the ARD should either provide that the national law of the transferor always applies to these cases, or that the Directive does not apply at all.<sup>869</sup> Finally, the study suggests that, due to the significant changes to the employee's status arising from a cross-border transfer amounting to a reallocation of the undertaking to another Member State, the Directive should explicitly provide for the employees' right to object to the transfer.

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<sup>867</sup> Ibid. para 3.4.3.

<sup>868</sup> Ibid. para 3.9.

<sup>869</sup> Ibid. para 3.4.5.

It is true that this right is recognized by the Court of Justice, which allows each Member State to provide for the consequences stemming from its exercise.<sup>870</sup> However, the study considers that this would be meaningless in terms of the Directive's aim of employee protection in the event of cross-border transfers usually entailing the relocation of the undertaking to another Member State, unless a provision is added to the ARD to the effect that the exercise of this right will not affect the rights enjoyed by the employees.<sup>871</sup>

The findings of this study were almost explicitly incorporated in the invitation of the Commission for the first phase consultation of social partners under Article 138(2) of the EC Treaty concerning 'cross-border transfers of undertakings, businesses or parts of undertakings or businesses'.<sup>872</sup> Thus, despite the fact that it was clarified that the study did not express the Commission's view on the issue of cross-border transfers, the Commission incorporated literally the majority of the conclusions of this study, with one major exception regarding the legal nature of the provisions of the ARD under the Rome Convention.

As was shown above, the study suggested that these provisions should not be considered as mandatory rules under the Convention and suggested an explicit clarification to this effect. However, the Commission in the consultation invitation stated explicitly that the provisions of the ARD constitute mandatory rules by virtue of Article

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<sup>870</sup> Case 132/91 *Katsikas* (n 743).

<sup>871</sup> CMS Employment Practice Area Group 'Study on the application of the acquired rights directive (ARD) to cross-border transfers of undertakings' (n 852), para 3.6.

<sup>872</sup> Commission of the European Communities 'First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses' (n 848).

6(2) of the Rome Convention.<sup>873</sup> Therefore, according to the consultation invitation ‘any law chosen by the parties to the employment contract cannot result in depriving employees of the protection afforded by the law that would apply’.<sup>874</sup>

Thus, the overall impression given by these documents is that the Directive may operate quite satisfactorily in the field of cross-border transfers, but the wide discretion left to national laws regarding the implementation of the ARD constitutes a realistic obstacle to this operation, as was proven by the comparative study of different Member States. The best solution to this problem, according to the study, is an amendment of the Directive to provide for its application to cross-border transfers and some additions to its provisions to facilitate its application to cross-border transfers.

However, it may also be concluded by the study that, even under the current form of the ARD, the proper application of some legal tools of international and European law, such as the Rome Convention and Jurisdiction Regulation,<sup>875</sup> may offer quite a satisfactory coverage of cross-border transfers by or under the ARD, even without the same degree of legal certainty and clarity which would arise from an explicit legislative amendment. The Commission seems sceptical about the operation of the ARD in the specific context of cross-border transfers, because the lack of explicit coverage by the Directive ‘might create legal uncertainty for employers and employees’.<sup>876</sup>

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<sup>873</sup> Ibid. para 6.

<sup>874</sup> Ibid. para 6.

<sup>875</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (n 890).

<sup>876</sup> This is the reason why the Commission decided to launch consultation of social partners at Community level on this issue, Commission of the European Communities ‘First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses’ (n 848), para 1.

The following part will indicate the way in which the regulation of cross-border transfers by the Directive may indeed promote the mobility of productive factors, the freedom of establishment and the freedom of movement.

### ***5.3 The coverage of cross-border transfers by the ARD and the facilitation of mobility***

It was indicated above that the increased production mobility was seen by the Commission Communication 'Europe 2020' as one of the responses to the economic crisis. The link between mobility and restructuring in the field of cross-border transfers makes the Directive important in safeguarding this mobility. Indeed, as was shown in the previous part, the Directive, especially by the inclusion of a clause providing explicitly for the coverage of cross-border transfers, seems an appropriate regulatory framework for cross-border transfers.

It may be argued that the application of the Directive could possibly discourage the operation of cross-border transfers and hinder the required mobility of production factors. However, this may not be the case. Firstly, even in times of economic crisis, the Community does not support regulation of restructuring that completely deprives employees of protection, but instead aims to combine restructuring with mitigation of its negative social effects. This arises clearly from the Commission's consolidated report on 'the preparatory workshops for the Employment Summit of May 7, 2009', in which it observed that 'restructuring continues during crisis, indeed probably at a much faster pace than before', but with a need to avoid the worse 'negative employment and social

consequences'.<sup>877</sup> The ARD provides, in principle, an appropriate legal framework for a 'socially acceptable' business restructuring in the field of cross-border transfers.

The second interrelated reason is that the total absence of employees' protection in cross-border transfers might very possibly lead to employee protestations that constitute a practical obstacle to this process, as was found by the 1998 Commission's study on cross-border transfers. This was shown in the illustrative examples of *Viking*<sup>878</sup> and *Laval*,<sup>879</sup> in which the collective action of employees prevented the undertakings from completing the reflagging of its vessel in the former case and the posting of its employees in the latter.

It is true that the undertakings may have taken the authorisation of the Court of Justice to proceed with the reflagging and posting, accordingly; however, this led to serious economic losses and huge delays arising from the judicial proceedings at national level that were further delayed by the need for a reference to the Court of Justice. As a consequence of these delays and the huge cost accompanying them, Laval was declared bankrupt.<sup>880</sup> It is highly unlikely that the recent economic crisis calling for urgent measures on behalf of the undertakings, which often constitute their last resort for avoiding bankruptcy, enables the undertakings to be involved in such serious delays.<sup>881</sup> Thus, safeguarding employees' agreement may be the only way for the undertakings to

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<sup>877</sup> European Commission 'the preparatory workshops for the Employment Summit of May 7, 2009'. <<http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=173&furtherEvents=yes>> accessed 07 July 2012

<sup>878</sup> Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779.

<sup>879</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>880</sup> O. De Shutter (n 768) 126.

<sup>881</sup> S. Laulom (n 841) 202, 204.

avoid this situation and the implementation of the ARD in cross-border transfers may indeed safeguard this consent.

This chapter indicated that particular elements of the OMC may be combined with the logic of standard-setting directives. Additionally, it was argued that standard-setting directives played and continue to play a role in the regulation of social Europe and some of the criticisms against the regulation of the employment relation through labour standards were addressed. Finally, it was shown that the ARD may be implemented consistently with some of the reflexive elements of the OMC and the Directive may also facilitate the mobility of productive factors being a key concern of the ‘Europe 2020’ Communication.

## **6. Conclusion**

The findings of this chapter offer some insight into the potential for the ARD to remain continuously effective in regulating restructuring in view of constantly evolving and fast-changing economic and social pressures. Hence the study finds reason to be optimistic about the prospects for the ARD and other standard-setting directives in the future of social Europe, arguing that the ARD has a significant role to play in safeguarding employees’ mobility, which is a key concern for the future direction of EU social policy. To appreciate this fully, it was shown in this chapter that the current emphasis on reflexive law does not undermine the significant role of directives such as the ARD, but, on the contrary, hard law regulation and collective self-regulation in the field of labour relations supplement each other quite effectively.

Firstly, it is possible for these directives to accommodate a wide scope for collectively agreed derogations and, in this way, to develop an important reflexive potential in the form of self-regulation. This will offer the advantage to these directives of being adaptable to a variety of standards depending on the needs of different enterprises and sector of activities while, at the same time, they constitute a minimum level of protection. Secondly, reflexive law theory with its emphasis on consensus and wide dialogue between various actors may indeed contribute to the setting of standards being characterised by a great degree of consensus and, thus, to a better democratic foundation for them, as indicated by Commission's recent Communications.<sup>882</sup>

The observations of this chapter on the usefulness of labour standards may prove particularly important in the context of the current financial crisis. Indeed, recent work by Barnard highlights the deregulatory dangers for national labour law arising, to a greater extent, from the Memoranda of Understanding (MoU) and, to a lesser extent, from the Euro plus Pact (EEP). Initially, Barnard observes that

The Lisbon Strategy 2000, the EES, and Lisbon's replacement, the EU 2020 strategy, form a (controversial) part of the DNA of the European Union. Much has been written of the new governance methodologies, and in particular of the OMC, which have been developed in order to attain these strategies. The EPP adds yet a further layer to the wedding cake of strategies. It has been developed out of the same intergovernmental methodology--ie European Council led--and its birth has been overseen by the European Council. The elephant in the room has always been the question of the effectiveness of this approach.<sup>883</sup>

Barnard then goes on to argue that traditionally, the EU 'has been seen as something of a bastion against deregulation at national level, and at least this body of directives

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<sup>882</sup> European Commission Communication 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (n 745).

<sup>883</sup> C. Barnard, 'The financial crisis and the Euro Plus Pact: a labour lawyer's perspective' (2012) 41 (1) ILJ

continues to provide a floor of rights. Yet, now the EU (...) has become responsible for the very deregulation it resisted for many years'.<sup>884</sup> This deregulatory tendency was verified in this thesis by the findings of the comparison between the Greek and UK law on transfers and especially by the recent amendments of Greek law on dismissal law, which entailed a significant reduction of employment protection.

In this sense, it may be considered ironic that the EU, as was repeatedly underlined in this thesis, from an early stage of the European integration fought against social dumping and now 'may be responsible for precipitating a race to the bottom' in itself, as the examples of reforms to Portuguese law referred by Barnard indicate. These Portuguese reforms entail a number of cuts in the employment field that may mean that Portuguese law becomes 'rather British'.<sup>885</sup>

In this context, transnational labour standards may prove to be a reliable and tested force that could potentially contribute to the restraint of this deregulatory challenge to national labour laws, as is recognized by Deakin and Rogowski:

There needs to be a reassertion of the binding force of the floor of rights set by directive, a clarification of the autonomy of member states to develop their own approaches to labour law and social policy above the floor, and a strengthening of transnational social dialogue. These reforms would not, of themselves, produce new solutions of the kind needed to address the organizational and technological transformations affecting labour law, but they would help to renew the institutional architecture which has successfully supported the evolution of European labour law to this point.<sup>886</sup>

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98, 108-109 (footnotes omitted).

<sup>884</sup> Ibid. 113

<sup>885</sup> Ibid.

<sup>886</sup> S. Deakin and R. Rogowski (n 742) 28-29.

Hence Deakin and Rogowski perceive legal instruments providing for a floor of rights as being still significant for the future of European labour law. Indeed, this thesis highlighted the positive function that may be performed by standard setting instruments, such as the ARD, if they operate within a reflexive framework. In this setting, the general principles of proportionality and legitimate expectations constitute the theoretical and normative framework within which, standard setting instruments may operate effectively by securing both an important reflexive potential to their implementation and, at the same time, a safeguard against ‘disproportionate’ outcomes.

This framework may be seen in Collin’s words as contributing to a different business structure that expands ‘the principals for whom the management might be considered to be working to include the workers and the broader community’.<sup>887</sup> Indeed, the emphasis on employees’ legitimate expectations that might not be violated without good reasons, which also satisfy the requirements of the proportionality principle, may be seen a step towards the direction of building an ethos for businesses that will place the objective of compliance with employment legislation above ‘a purely business oriented cost-benefit calculus’.<sup>888</sup> There are clear signs in case-law of this judicial tendency by a close scrutiny of the employers’ incentives behind their decisions and the readiness to condemn openly employers’ conduct that ‘indicate calculated disregard for the obligations imposed by’ employment law.<sup>889</sup>

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<sup>887</sup> H. Collins (n 793) 24.

<sup>888</sup> Ibid.

<sup>889</sup> As was shown above Lord Oliver of Aylmerton in *Litster* was highly critical of the employer’s conduct in this case, observing that the fact the employer ‘was asked specifically whether the business was being taken over by Forth Estuary’ and ‘said that he knew nothing about a company called Forth Estuary Engineering (...) indicates a calculated disregard for the obligations imposed by regulation 10 of the Regulations’ [1990] 1 AC 546 (HL), para 565; Similarly, Bogg observes that ‘in cases like *Kalwak*,

The advantage of our proposed framework is that, while it places emphasis on the protection of employees' legitimate expectations, it is also compatible with flexibility to the extent that it does not unduly restrict the employer's interests, by targeting only those limitations of these expectations that are disproportionate having regard to the social goals of the employment legislation. In this context, this framework is also based on the readiness of employees to waive part of their protection in cases, where this is required by an overriding interest of the enterprise, such as the safeguarding of its viability.

Hence this framework is based on two interrelated dimensions, namely a commitment on behalf of employers to the protection of employees' legitimate expectations and the willingness of employees to sacrifice part of their protection for overriding company reasons with the proportionality test being the safeguard of the genuineness of these reasons. These two dimensions may contribute in the long run to an efficient balance of employers and employees interests that is required for the smooth functioning of long-term relationships, such as employment relations.

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*Protectacoat* and *Autoclenz* the terminology of "sham" rightly draws attention to the employer's very deliberate (and unscrupulous) insertion of clauses into the written documentation with the main purpose of circumventing statutory protections', A Bogg, 'Sham self-employment in the Court of Appeal' (2010) 126 *Law Quarterly Review* 166 [*Case Note*], 166, 170.

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