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# On Social and Economic Factors in the Developing European Labour Law

Reasoning on Collective Redundancies, Transfer of Undertakings  
and Converse Pyramids

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## **ARBETSLIV I OMVANDLING WORK LIFE IN TRANSITION**

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# Foreword

The article “On Social and Economic Factors in Developing European Labour Law. Reasoning on Collective Redundancies, Transfer of Undertakings and Converse Pyramids” published in this report was written by the researcher Jari Hellsten. The report is the first publication from the research project “From Internal Market Regulation to European Labour Law”.

Looking at the interrelationship between social and economic factors is an interesting approach to EC employment law. The discussion has its concrete basis in existing EU legislation in the form of the Directives on Collective Redundancies and Transfer of Undertakings, both discussed in the first part of the report. It also reveals some new openings for a European debate, such as the cross-border applicability of the Transfer of Undertakings Directive, explored earlier by Professor Jonas Malmberg. The second part is mainly theoretical and contributes to understanding and explaining the developments and the state of the art of EU labour law, not just in the context of the internal market but also in a broader sense.

The project is financed by the Finnish Work Environment Fund, the Finnish Ministry of Labour and several Finnish trade union organisations. It has been conducted in cooperation with the Swedish National Institute for Working Life (Arbetslivsinstitutet) and its labour law research group. The project focuses on issues such as the social dimension of the free provision of services and of competition law, subjects which have been studied by the Arbetslivsinstitutet for several years.

The Finnish project is led by Niklas Bruun as research manager and Jari Hellsten as researcher. It is based at the Centre of International Economic Law (CIEL) at the Law Department of the Hanken School of Economics and Business Administration in Helsinki. The work does not emerge from a doctrinal vacuum since the project is well coordinated with the research activities in Stockholm. CIEL is engaged in permanent co-operation with the Institute and the Law Department at the Copenhagen Business School, one result of which is the EU labour law newsletter *EU & arbetsrätt*. As part of this collaboration the ideas of the second part of the report now published were subject to an extensive discussion in November 2004 with many useful comments and suggestions from the members of the EU labour law group at Arbetslivsinstitutet during Jari Hellsten's visit to Stockholm. Since Arbetslivsinstitutet has established itself as the leading Nordic research environment for EU labour law it is well suited to publishing the article in its publication series “Work Life in Transition”. The choice of forum will hopefully result in the article reaching interested circles not only in the Nordic countries but also in other European Union member states.

On behalf of Jari Hellsten and myself I wish to express my thanks to the Finnish authorities and organisations for financing the project and to Arbetslivsinstitutet for publishing this report.

Stockholm, 10 May 2005

Niklas Bruun  
professor

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# Abstract

This paper explores the relationship and interplay of economic and social dimensions in the EC legal order. The paper comprises two interlinked chapters. The first one includes a recap of the history until the 1970's of the E(E)C as necessary to discuss the directives on collective redundancies and transfer of undertakings (acquired rights). When EC employment law emerged in the 1970's, the Treaty of Rome remained intact, which means that only a change in the shared system of values explains this emergence. This change does not reveal any surprises in the Collective Redundancies Directive but with the Transfer of Undertakings (Acquired Rights) Directive the 'what, when and why' questions inevitably lead to a recognition of the cross-border applicability of the Directive. It is logical to assert that the Directive covers also cross-border corporate transfers. The transfers so governed occur between EC/EEA Member States and from them to third countries. This requires us to reconsider many of the central notions of the Transfer Directive. The natural normative question is: what are the rights and obligations transferred? It seems that at least the notion of transfer, economic dismissal reasons at a transfer, collective agreement and law applicable necessitate rethinking and even reconsidering settled case law. This way 'social' (fundamental social rights) faces 'economic' (fundamental economic freedoms) on a cross-border level. Corporate cross-border transfers highlight many of these problems which, besides, may depend on a Community approval of larger mergers.

The second chapter of the article explores some theoretical attempts to explain the relationship between economic and social. It first presents the theory of converse pyramids as maintaining a rather straightforward dominance – even up to *minutiae* – of economic (and an undistorted internal market) over social. Such a rigid hierarchy thinking maybe was justified until the 1970's. However, the author maintains that this theory is liable to several structural problems, linked even to the nature of the Community and its competence. The EC is a unique legal order, and its social constitution is *a fortiori* of such a nature. Examples concerning amongst others the right to strike, safety of machinery and competition rules in relation to collective bargaining (on the basis of case *Albany*) prove that precedence has been given, in at least some cases, to the social factor. Accordingly, sometimes, such as with safety of machinery, there is just one normative pyramid left. However, the author does not maintain any predicted dominance of the social factor either but believes that a versatile assessment in cases must take place. It remains to be seen whether and to what extent the European Constitution will affect this issue.



# Chapter I

## 1. On the Development of the Social Dimension in the EU

The Intergovernmental Conference in October 2004 adopted the Constitutional Treaty for Europe. Even as not ratified and entered into force, this landmark development justifies, with respect to social and labour law, a retrospective review of some important normative developments that have occurred since the foundation of the European Economic Communities.

My aim is to discuss the interplay of economic and social considerations since the beginning the European Economic Community. There is no doubt that the EEC was founded on an overwhelmingly economic Treaty. The social dimension was merely ancillary. However, it has grown significantly over the years and today the question about EC Labour Law is already justified – let it be that this historical continuum has no end. In other words, my thesis is that with the entry into force of the Treaty establishing a Constitution for Europe the originally ancillary social factor in the EU would finally attain in general terms an equal footing with the economic dimension. Still, the EU on the one hand remains bound by the internal market philosophy while on the other hand it already seems to be close to declaring a breakthrough of independent European Labour Law. However, in order to be able to assess the present situation and the likely shape of future developments, it is necessary to recap the history in its main outlines.

As a background factor I would mention that in reality the economic and social dimensions are inseparable. I would also mention that ‘economic’ and ‘social’ do have many meanings, depending on the context. These two underlying facts can be assumed to apply to everything discussed in this article without further repetition. There can e.g. be no real social rights without an adequate economic basis. All economic activity pays, but it is a separate issue whether we should be concerned with how much something pays if it does not destroy the payer, i.e. the employer. However, this distributive aspect is not explored further here. My main focus is on development of the justifications for European Labour Law, describing the path up to nearly declaring the breakthrough of a real European Labour Law. The fairness or integrity of the justifications is one important angle.

My historical coverage must also remain limited to the parts of EC labour law that are discussed here. I shall pick up from issues prior to Maastricht especially the Directives on Collective Redundancies and Transfer of Undertakings.

## 1.1. Origin in the EEC Treaty

International agreements between independent states do not emerge in a social and political vacuum. Hence, before entering into reasoning on a European and at the same time normative level, it is appropriate to recall in brief the broad Europe-wide social climate in the founding Member States of the 1950's. I rely on a nutshell explanation given by *Jean Degimbe*, a high officer emeritus of the DG Social Affairs of the Commission.

When negotiating the Treaty of Rome, the wounds opened by the Second World War were barely healed. At the same time, economic expansion without precedent was already happening, which presumably helped to solve the social problems that were present after the war. Lack of manpower prevailed instead of unemployment. The majority of economic and trade union leaders assumed further growth in favour of employment and better working conditions. Among the social partners in the founding Member States, diversity existed, of course, but across the six states a strong culture of negotiation prevailed, often anchored in the war-time resistance. Besides, the communist trade union movement was strong in Italy and France. Therefore, it was understood at the time that the various European texts should not take initiatives that could have disturbed or been misunderstood by the political 'circles', by preferring (European) law instead of negotiations. All these factors formed at least one background reason why social policy did not gain more weight in the Treaty of Rome.<sup>1</sup> To this explanation I may just add that at an organisational level the social partners were more than halfway national: UNICE was certainly established in 1958 (with its roots tracing back to 1949) but the ETUC in its present form was established only in 1973.<sup>2</sup>

This broad explanation can be transferred to the normative level via the European Coal and Steel Community (ECSC). It shows that the contents of the EEC Treaty as to the role of social policy were not entirely inevitable. The ECSC incorporated some social dialogue and it included a wider competence for the High Authority of the ECSC than for the EEC Commission, even the competence to regulate minimum wages (Article 68 ECSC). The ECSC conducted an adaptation policy for surplus manpower (retraining) as well as for social housing. In

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<sup>1</sup> Jean Degimbe, *La politique social européenne, Du Traité de Rome au Traité d'Amsterdam*, p. 18-19. This is not to say that there would not have been struggles at the national level during 50's. Further on, Degimbe refers also to a qualified diversity in legislation and praxis of the six states: between the German "Mitbestimmung" and the Italian and French praxis, there were even conceptual differences in trade unionism and also different approaches in leading economic activities.

<sup>2</sup> Degimbe denotes neutrally that at that time the power relations at the Community level were 'strongly different' from today, 'notably from the social point of view' (my translation). *Ibid.*, p. 61. See that also the union side started its cross-border co-operation within the European Coal and Steel Community.

sum, it was more social in its content than the EEC.<sup>3</sup> But the ECSC embodied only a partial (functional and sectoral) integration, and the forthcoming EEC was functional too, especially after the failure of the draft European Political Community.<sup>4</sup> Economic integration should precede political integration, as was highlighted in the Beyen Plan of 1952-3 and a later Benelux memorandum of 1955, the latter laying the foundations for the later conclusion of the EEC Treaty.<sup>5</sup> The European *Economic* Community emerged.

While the leading Articles 2 and 3 of the Treaty of Rome did not include any ‘social policy’ (only the Preamble included it, in ‘economic and social progress’), the flag provision of the EEC’s social policy was for decades in Article 117 EEC. It first declared the necessity to promote improved working conditions and standard of living, ‘so as to make possible their harmonisation while the improvement is being maintained’ (upward harmonisation). It then added a credo, as follows:

[The Member States] believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and the approximation of provisions laid down by law, regulation or administrative action.’

How did this almost religious faith in the fruitful effect of the Common Market emerge at the intergovernmental level, next to the socio-political developments mentioned above?<sup>6</sup>

The Treaty founders relied on two preceding reports: an economic report produced by the ILO (Ohlin Report)<sup>7</sup> and an economic-political Spaak report.<sup>8</sup> The latter’s broad line as to policy areas to be harmonised, as well as to the institutional structure of the Community, was realized quite as such in the Treaty of

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<sup>3</sup> See e.g. Brian Bercusson, *European Labour Law*, Butterworths, London, p. 45-6, Degimbe, pp. 49-58.

<sup>4</sup> See e.g. Kapteyn and van Themaat, *Introduction to the Law of the European Communities*, third ed. 1998, p. 9-13.

<sup>5</sup> *Ibid.*, p. 11 and 13.

<sup>6</sup> I recall that also Article 100 EEC (now Article 94 EC) required – to work as a legal base for E(E)C law approximating national laws etc. – a *direct* effect to the establishment or functioning of the common market.

<sup>7</sup> International Labour Office, ‘Social Aspects of European Economic Cooperation’ (1956) 74 *International Labour Review* (ILR) 99.

<sup>8</sup> Officially: Rapport des Chefs des Délégations, Comité Intergouvernemental, 21. Apr. 1956. The whole report is available in French on the address <[http://aei.pitt.edu/archive/00000996/01/Spaak\\_report\\_french.pdf](http://aei.pitt.edu/archive/00000996/01/Spaak_report_french.pdf)>. In German it is e.g. in Schulze und Hoeren, *Dokumente zum Europäischen Recht*, Band 1, Gründungsverträge; Springer, Berlin 1999, p. 752-822. An abridged English version (20 pages) is available on the address <<http://aei.pitt.edu/archive/00000995/>>.

Rome.<sup>9</sup> Both reports rejected any general harmonisation in the social sphere, counting on the market's basic ability to correct distortions of competition. The Ohlin report anyway noted the economic impact of differences in social legislation and benefits<sup>10</sup> that might justify harmonisation in certain limited areas such as equal pay and working time. In the case of harmonisation, the report foresaw that clarity would be required. Otherwise trade would be seriously distorted and the harmonising measures would not be directed against the essential prerogatives of the States concerned.<sup>11</sup> However, in general terms the report relied on higher productivity balancing the burden of better social standards. Changes in exchange rates were a possible further means of achieving the same balance, thus preventing any 'race to the bottom'. This position relied essentially also on

'... the strength of the trade union movement in European countries and the sympathy of European governments towards social aspirations, to ensure that labour conditions would improve and not deteriorate.'<sup>12</sup>

The Spaak report was built essentially on regarding workers and employees as market factors.<sup>13</sup> Free movement of labour was seen as crucial for any prosperity but otherwise the Community should not interfere in the States' powers to regulate working conditions. Hence, the EEC Treaty essentially enshrined only the free movement of workers, supplemented by the European Social Fund (Article 123 EEC) and the co-ordination of social security for migrant workers (Article 51 EEC, now 42 EC). However, former Judge of the European Court of Justice, *G. Federico Mancini* has succinctly described the status of labour law in establishing the Community. I present it here as explained by Lord *Wedderburn* of Charlton, with his quotations. Hence, according to *Mancini*, the Treaty of Rome was concerned primarily with the creation of 'a European market based on competition'; employed labour was only 'inextricably involved'; the free movement of labour may have 'beneficial social effects', for example on discrimination or low pay: if so, all the better – but 'it is nothing more than that.'<sup>14</sup> *Catherine Barnard* has called this basic structure

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<sup>9</sup> Catherine Barnard, however, refers (Barnard, *EC Employment Law*, 2<sup>nd</sup> ed., Oxford 2000, p. 4), to Otto Kahn-Freund who has asserted that the Spaak committee's views were perhaps not as clearly reflected as might have been the case, perhaps because the relevant provisions were drafted only at the end of a crucial conversation between the French and German Prime Ministers. Kahn-Freund, 'Labour Law and Social Security', in *American Enterprise in the European Common Market: A Legal Profile*, eds. Stein and Nicholson (University of Michigan Law School, Ann Arbor, Mich., 1960)

<sup>10</sup> ILR, p. 85

<sup>11</sup> Ibid., p. 116.

<sup>12</sup> Ibid., p. 87.

<sup>13</sup> See e.g. pages 19-20, 60-1 and 88-91 of the Spaak report.

<sup>14</sup> Lord Wedderburn of Charlton, *European Community Law and Workers' Rights After 1992: Fact or Fake?* In Lord Wedderburn, *Labour Law and Freedom, Further Essays in Labour Law*, Lawrence & Wishart, London 1997, p. 251. In his note 17 (p.275) Lord Wedderburn refers to Mancini, 'Labour Law and Community', (1985) 20 Ir. Jur. (n.s.) 1 at pp. 2, 12, 15.

‘a victory for the classic neo-liberal market tradition: there was no need for a European-level social dimension because high social standards were “rewards” for efficiency, not rigidities imposed on the market.’<sup>15</sup>

The limited nature of Community labour law in the beginning of the EEC must be assessed also in the light of the state of national labour law in the six founding Member States at that time. In broad terms, it was still in its post-war evolution and did not contain much basis for Community regulation.

In describing the features of EC labour law as enshrined in its initial Treaty model *Spiros Simitis* and *Antoine Lyon-Caen* in their essay *Community Labour Law: A Critical Introduction to its History*<sup>16</sup> set forth (and distinguish) three elements: (i) harmonisation, (ii) justification for regulatory activity for the Community and (iii) statist or public syndrome.

(i) As a perceived principle, Article 117 EEC proclaimed ‘upward harmonisation’ but Article 100 included as a method only the ‘approximation’ of law, which meant a realistic coexistence of different social systems. Upward harmonisation, as carefully distinguished from either co-ordination or approximation, was ‘not concerned with the expression of legal rules, only their teleology’.<sup>17</sup>

(ii) ‘Justifications’ for Community legislation *Simitis* and *Antoine Lyon-Caen* note as restrictive, being linked exclusively to competition. Besides, they note how Community experience ‘to date’ [until 1995-96] supports the thesis that no such approximation is necessary.<sup>18</sup> They further ask how one might distinguish between selfish or opportunistic action by enterprises and a genuine distortion, and ‘what argument will demonstrate convincingly that some particular disparity is likely to affect the functioning of the Common Market’. While these arguments were still raised against to the draft Posting Directive during the 1990’s, they conclude how,

[a]t all events, the close tie between Community social policy and the requirements of competition lends all its weight to a severe diagnosis which

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<sup>15</sup> Barnard, *EC Employment Law*, 2. ed., Oxford University Press 2000, p. 2.

<sup>16</sup> In Davies et al., (eds.), *European Community Labour Law*, Liber Amicorum Lord Wedderburn. Clarendon Press, Oxford 1996, pp. 1-22.

<sup>17</sup> *Ibid.*, p. 4 where (in footnote 9) they refer to Rodière, ‘L’harmonisation des législations européennes dans le cadre de la CEE’, [1965] *Revue trimestrielle de droit européen*, p. 336. – Judge Romain Schingten has remarked that one should read Article 117 in the context of the Preamble of the Treaty (economic and social progress, second recital), as well as in the light of Article 2 EC (high level of social protection and raising of the standard of living). He, too, ex cathedra notes the social factor as corollary and some kind of sub-product of the reinforcing economic power. Schintgen, ‘La longue gestation du droit du travail communautaire: De Rome à Amsterdam’; in Rodriguez Iglesias et al. (eds.), *Mélanges en hommage à Fernand Schockweiler*, Nomos, Baden-Baden 1999, p. 551-2.

<sup>18</sup> *Ibid.*, p. 5.

has lost none of its relevance: “the Treaty of Rome did not go as far as the 1919 Treaty of Versailles went”.<sup>19</sup>

(iii) The third element in the initial model for *Simitis* and *Lyon-Caen*, the ‘statist or public syndrome’ meant that the Treaty, notwithstanding the conviction that labour law is in every Member State a result of independent evolution, conferred on the Community authorities the power to construct a form of Community labour law, however limited its justifications and scope. At the same time this crucially meant action covering only public entities, state provisions and co-operation between Member States (under Article 118 EEC). Hence, no social partners were seen or recognized by the text of the original Treaty.

Resuming, *Simitis* and *A. Lyon-Caen* describe this model as

‘social harmonisation as its perceived principle, competition as its dynamic, and an institutional view of labour law as associated with the State...’<sup>20</sup>

This conclusion *Simitis* and *Lyon-Caen* anchored by referring to three cases. In *Zaera* the Court affirmed that Article 118 in no way affected the regulatory competence of individual Member States in the social field.<sup>21</sup> Already in *Defrenne III*<sup>22</sup> it declared that Article 117 was essentially programmatic. In *Sloman Neptune* it asserted that ‘Article 117 of the EEC Treaty is essentially in the nature of a programme. It relates only to social objectives the attainment of which must be the result of Community action, close cooperation between Member States and the operation of the Common Market.’<sup>23</sup>

The broad analysis of *Simitis* and *Lyon-Caen* is easy to share. The original Treaty was controversial in itself and foresaw no social partners. In sum, the lot of any community social and labour law was hard in the beginning of the EEC. Together with monetary and budgetary policies, social policy remained, as the Spaak report recommended, purely a matter for the member state governments.

As to competition-linked provisions in the Treaty, two addenda are still in place. First, Article 91 EEC was enacted as a measure against possible dumping in the internal market. There is no way of linking this with its possible application of social grounds. Presumably such practice never appeared. It was only in the Treaty of Amsterdam that this provision was repealed. Second, as further safety valves against market distortions, Articles 101 and 102 were enacted, justifying Community action to combat distortions of competition due to disparities

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<sup>19</sup> Ibid., p.5-6.

<sup>20</sup> Ibid., p. 6.

<sup>21</sup> Case 126/86 [1987] ECR I-3696, paragraph 16. In *Zaera* the Court however added that while Article 117 EEC was programmatic, it was to be taken into account in interpreting and applying the other provisions of the EC Treaty and secondary Community legislation in the social field; paragraph 14.

<sup>22</sup> Case 149/77 [1978] ECR 1365.

<sup>23</sup> Case C-72/91 [1993] ECR I-887, paragraph 25.

in existing or draft laws. In theory, these provisions covered also distortions due to disparities in labour law.

From today's perspective it is, however, worth noting that already the Spaak report mentioned areas for corrective and distortion eliminating action: equal pay, working time, as well as overtime bonuses and paid holidays.<sup>24</sup> This 'second pillar' of European labour law *Maximilian Fuchs* has denoted, referring to *Rolf Birk*, as 'labour law motivated by competition'.<sup>25</sup> However, in this way the Spaak report already incorporated the future 'duality' (or interplay) between the economic and social dimensions. In any case, following equal pay in Article 119 EEC, the retention of the existing equivalence of paid holiday schemes was enshrined in Article 120 EEC. This provision still exists in Article 142 EC; it was not referred to by the Working Time Directive 93/104/EC (WTD) notwithstanding the minimum paid annual holiday established by the WTD. Furthermore, it appears in rudimentary form even in the Treaty establishing a Constitution for Europe (Article III-215), but for whom and what?

A third prominent example of these 'aspirations of competitive labour law' was the third Protocol annexed to the EEC Treaty on 'Certain Provisions Relating to France'. According to its letter, the Commission was to authorise France to take protective measures if the establishment of the common market did not lead, by the end of the first stage (1962), regarding the basis for overtime payments (hours worked beyond which overtime pay was due) and the overtime payments themselves, to a result corresponding to the average in France in 1956. France never invoked this safety valve. And without checking, it is evident that in the preparations for the 1993 Working Time Directive nobody read out this Protocol in a Council Working Group or in the European Parliament.

## 1.2. Summing up the Founding History of the EEC

Historically the end result of the European project as a European Economic Community was a semi-inevitable outcome. It meant, modifying a little the description of Simitis and A. Lyon-Caen of European labour law, social (upward) harmonisation as its proclaimed principle; competition as its dynamic; and an institutional view of labour law as something that was associated with the State. The sole piece of law dealing with a social issue, was essentially the market orientated free movement of workers.

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<sup>24</sup> The Spaak report denotes these as both sources for distortion (p. 62-3 of the French report, p. 791 in the compendium of Schulze and Hoeren) and as in any case subject to a special effort of progressive harmonisation measures (p. 65-66 of the French report, p. 793 in Schulze and Hoeren).

<sup>25</sup> Fuchs, *The Bottom Line of European Labour Law (Part I)*, *IJCLLIR*, Vol. 20/3 2004, p. 158. He refers to Rolf Birk, 'Arbeitsrecht – Freizügigkeit der Arbeitnehmer und Harmonisierung des Arbeitsrechts', in: C.O.Lenz (ed.), *EG-Handbuch. Recht im Binnenmarkt*, 2nd ed., Herne/Berlin, 1994, p. 369.

Following the functional integration idea (theory) the EEC also established, in its particular way, the dichotomy between the economic and the social dimensions. With the almost sole exception of gender equality, there was the corresponding competence dichotomy between the Community and the Member States. Hence, the economic and social dimensions were, at this level, in a broader sense but also normatively divided. The point is that at the EEC level the division between economic and social became crucially more highlighted than is at present the case nationally. At the national level it is easier to see that, as in real life, the economic and social dimensions are not divisible, while on the *normative* level the division is, of course, everywhere. However, in real life wage (or salary) for a worker (or employee) is a social factor, up to Omega, but it is at the same time pecuniary, i.e. it is economic. From an employer's point of view it is at least economic. It may also have a social dimension too, but I will not explore for the present whether it is relevant to speak about the social meaning of pay from an employer's point of view. In addition, no social benefit can be realised without the necessary economic foundations.

The original EEC Treaty, even with its fragmented social provisions and its ideological and practical dominance of economic integration, still managed to incorporate the necessary foundations for future development including development of the interplay between the economic and social dimensions. In trying to explain this I will use the normative instrument of dividing (or dissecting) the economic and social dimensions.

European social and labour law developed very little from the beginning of the Common Market until the early 1970's (one exception to this was Regulation 1612/68).<sup>26</sup> In order to cover in this paper the broad line of developments up to today, I will pass over this early dormant period in this paper.

## 2. New Wave of 1970's

During the 1970's the Community increased essentially its legislative activity in social matters. This took place without changing a comma in the EEC Treaty. The Equal Pay Directive (75/117/EEC),<sup>27</sup> the Collective Redundancy Directive (75/129/EEC),<sup>28</sup> the Equal Treatment Directive (76/207/EEC)<sup>29</sup> and the Transfer

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<sup>26</sup> I recall that the debate on the Commission's possibility to come up with initiatives was high from the beginning. See e.g. Kåre F. V. Pedersen, *Steg för steg in i framtiden*, Arbetslivsinstitutet, Sverige, Arbetslivsrapport 1997:12, p. 6-8.

<sup>27</sup> Officially: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

<sup>28</sup> Officially: Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

of Undertakings Directive (in UK called the Acquired Rights Directive; 77/187/EEC)<sup>30</sup> were adopted. It is appropriate to add to this wave also the so-called Insolvency Directive (80/987/EEC).<sup>31</sup> The confirmation in the case *Defrenne II*<sup>32</sup> of the direct effect of Article 119 EEC on gender equality in pay fits into the same wave.

We may ask: what was behind this legislative activism? There are several explanatory political and economic factors. First, trade unions became more active *vis-à-vis* the Community since the late 1960's. During the same period, especially in France and Italy, a strong political movement occurred being directed at modifying the prevailing economic policy and system. Thus, the standing tripartite Standing Committee on Employment was founded in 1970 and the European Social Fund was reformed in 1971. In addition, important political moves concerning the EEC occurred in Germany and France. Chancellor Willy Brandt

'had several reasons for making the development of an EEC social agenda an early goal of the new German political philosophy. He and his party, the Social Democrats, were committed to social progress, particularly in the employment field. In addition, the introduction of Community worker protection and worker rights legislation compatible with German legislation would undercut the argument of German employers that the proposed domestic legislation would reduce the competitiveness of German industry. Community employment legislation would also eliminate the incentive for employers to shift investment from Germany to other European countries.'<sup>33</sup>

In France President De Gaulle retired in 1970 and his successors were much more Europe-minded. The United Kingdom, Ireland and Denmark joined a Community in which the Franco-German axis was dominant.

At the same time, the first signs of future economic problems were seen as the Community acquired three new Member States.

With this background the Heads of State (with the new Member States' presence) decided to give a signal in favour of the social dimension of the Com-

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<sup>29</sup> Officially: Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

<sup>30</sup> Officially: Council Directive 77/187/EEC of 14 February 1977 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.

<sup>31</sup> Officially: Council Directive of 20 October 1980 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.

<sup>32</sup> Officially it was case 43/75 *Defrenne v. Sabena*, [1976] ECR 455.

<sup>33</sup> M Shanks, 'The Social policy of the European Communities' (1977) CMLR 377. Michael Shanks was Commissioner for Social Affairs in 1970's.

munity. The communiqué of the Paris summit in 1972 noted that economic expansion was not a goal in itself but it was especially a means of alleviating differences in standard of living. The economy also required the participation of all of the social partners. This should lead to better quality of life. It also noted that the Member States

‘attached as much importance to vigorous action in the social field as to the achievement of Economic and Monetary union. They consider it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community.’

Following this, the Council on 21 January 1974 adopted the Commission’s proposal for a Social Action Programme.<sup>34</sup> It included more than 30 different measures, but strictly read, only three direct and new legislative initiatives were mentioned: the Transfer of Undertakings and Collective Redundancy Directives. The third initiative was achieving gender equality in access to employment and vocational training, advancement and working conditions (realised via the Equal Treatment Directive 1976/207/EEC). Already before the adoption of the Action Programme the Commission had submitted a proposal for an Equal Pay Directive (1975/117/EEC). The progressive involvement of workers and their representatives in the life of undertakings was a fifth issue in the sense that it later led, after preparations lasting some twenty years, to the European Works Council Directive 94/45/EC. A sixth issue in the field of employment law was ‘the designation as an immediate objective of the overall application of the principle of a standard 40-hour working week by 1975, and the principle of four weeks annual paid holiday by 1976’; thus an objective and a principle. The latter became realised by the Working Time Directive 93/104/EC but the former is just inside the 48 hours’ week that includes over-time work. A seventh issue in employment law was the protection of workers hired by temporary employment agencies. No legislative instrument was expected, and the issue is still open.

An interesting offshoot was the commitment ‘to facilitate, depending on the situation in the different countries, the conclusion of collective agreements at the European level in appropriate fields’. This, the legal preconditions included, was subject to debate also in the doctrine.<sup>35</sup> From today’s perspective this idea is easy to describe as ultra-voluntaristic at that time, given the normative base in the EC Treaty. However, the mere inclusion of this point in the Action Programme reflects an attempt to create something new.

It is a matter of taste whether these four directives and three issues (as added to by the offshoot) are sufficient to qualify this new approach as a social policy approach or *sozialstaatlicher* (social policy) approach as the German term used

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<sup>34</sup> OJ C13, 12.2.1974.

<sup>35</sup> See e.g. Gérard Lyon-Caen, *Négociation et convention collective au niveau européen*. *Revue trimestrielle du droit européen*, 9(1) janv.-mars 1973, p. 589-593.

by *Maximilian Fuchs* reads.<sup>36</sup> Given the market-driven Treaty of Rome, maybe the term is justified in the EC context, as backed up by the measures outside employment law (on migrant workers, vocational training, social security, safety and health etc.). *Jeff Kenner* has called it a ‘New Deal’ that was intended to give the Community a ‘humane face’.<sup>37</sup> Commissioner Shanks has asserted that it:

‘...reflected a political judgment of what was thought to be both desirable and possible, rather than a juridical judgment of what were thought to be the social policy implications of the Rome Treaty.’<sup>38</sup>

In the context of ‘what was both desirable and possible’, it is clear that resorting to the enactment of secondary EC law in the field of labour law in a way meant a recognition that the Common Market, contrary to what is implied in the Treaty (Article 117 EEC), did not bring about any quasi-automatic approximation, let alone harmonisation, of national social systems. Under their heading ‘Impasses’ *Simitis* and *A. Lyon-Caen* manifest this by referring to the Green Paper of 1975 on employee participation where the Commission stated candidly:

‘A sufficient convergence of social and economic policies and structures in these areas will not happen automatically as a consequence of the integration of Community markets.’<sup>39</sup>

The Commission, however, tempered this judgement with some hope, by stating:

The objective is gradual removal of unacceptable degrees of divergence between the structures and policies of the Member States.’

Because the objective was not enforced by any instrument, integration of the market did not nurture harmonisation, but rather disparities just seemed to increase. For *Simitis* and *A. Lyon-Caen*, ‘as a consequence, the initial plan lost all credibility.’<sup>40</sup> They note the lack of real questions about the credibility of an EC social law (‘unified Europe with a social ambition’) and further pick up a prompted search of new vocabulary: ‘the appearance of the word ‘convergence’’. This

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<sup>36</sup> Fuchs, p. 159. In *The Bottom Line of European Labour Law* (Part II), Fuchs denotes the period of 1970s as ‘the heyday of European social policy-making and European labour law; *IJCLLR* Vol. 20, Issue 3, 2004, p. 436. In the conclusions, loc.cit. p. 443, he describes it how ‘the genuinely social concern adopted by national labour law systems managed to establish itself on the European stage’, as reflected by the 1974 Social Action Programme. I don’t doubt this ‘genuinely social concern’ as such. I, however, denote that it wasn’t too powerful on the European stage, as my example of the Collective Redundancy Directive, explained *infra*, shows. It remained essentially procedural.

<sup>37</sup> Jeff Kenner, *EU Employment Law*, Oxford 2003, p. 24.

<sup>38</sup> M Shanks, *European Social Policy Today and Tomorrow* (1977), p. 13. Quoted by Brian Bercusson, *op.cit.*, p. 51.

<sup>39</sup> Employee Participation and Company Structure, Green Paper of the Commission of the European Communities, *EC Bull.*, SU 8/75, p. 10. Referred to by *Simitis* and *Lyon-Caen*, p. 7. The point was the role of employees in the decision-making process within companies.

<sup>40</sup> *Ibid*, p. 7.

did not just reflect exhibited growing uncertainty but – for *Simitis* and *A. Lyon-Caen* – affected the very conception of Community social policy, witnessed by the manner in which it was partially recast in the Single European Act.<sup>41</sup> Hence, *Simitis* and *A. Lyon-Caen* clearly mean the withdrawal from any real attempt towards upward harmonisation as masked by this ‘convergence’. We will come across this magic word later in my explanation of the Collective Redundancy Directive.

‘Harmonisation’ (‘alignment’) was another magic word, forming the link or synthesis, as *Bercusson* puts it, between the European labour *law* and social *policy*. Expressing the latter in the language of the Common Market law resulted in this harmonisation (alignment) by directives of the 1970’s that are reflected in an ECOSOC publication of that time: *The Stage Reached in Aligning Labour Legislation in the European Community*.<sup>42</sup> We will also find ‘harmonisation’ in the Collective Redundancy Directive, questionable as to its credibility.

Whatever term (harmonisation, convergence, social policy approach, New Deal) is used, this legislative activity had Article 94 (ex 100) EC as the legal base, apart from Article 308 (ex 235) EC for the Equal Treatment Directive (76/207/EEC). Both Articles employ in their very wording the effect of national and EC law on the common (internal) market.<sup>43</sup> The simple reason for resorting to Articles 94 and 308 EC was that the original Social Chapter of the Treaty did not contain any legal base like Article 42 (ex 51) in social security. It is therefore appropriate to look a bit deeper into the directives on Collective Redundancies and Transfer, so as to verify to what extent the common market effect was a real one or whether it was just paying lip service for an appropriate choice of the legal base. These two directives *a priori* did have the possibility of enacting on core issues in an employment relationship.

These directives are fruits of the common market thinking, as applied in 1970’s. Although their basics are still in force today, I will take the liberty of describing them up to the present. I will later on note the possible effect of the Treaty amendments and the 1989 Social Charter of the EU.

## 2.1. Collective Redundancy Directive

The Collective Redundancy Directive (CRD), with Article 100 as its legal base, is a landmark of the legislative activity of the 1970’s, a time-related product of the market-orientated social (employment) law of the EEC. Its basics have not

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<sup>41</sup> *Ibid.*, p. 8.

<sup>42</sup> Economic and Social Committee of the EEC, Brussels 1978, p. iv; referred to by *Bercusson*, *European Labour Law*, Butterworths, London 1996, p. 51.

<sup>43</sup> Article 94 EC deals with approximation of national rules that ‘directly affect the establishment or functioning of the common market’. Article 308 EC may be resorted to as a legal base for EC measures ‘necessary to attain, in the course of the operation of the common market...’ The difference in wording is not worth of too much attention.

evolved since then. Some of its features describe the overall state-of-art in EC employment law, even up to today. It further addresses the problem of the interaction of, or the striking of a balance between the economic freedom of an employer to stop his activities (or to be imposed to do so in liquidation) and the needs and/or social rights of the workers concerned.

Both the original directive (75/129/EEC) and the present one (98/59/EC) refer in the Preamble (third Recital) to an ‘increasing convergence’ of national provisions as to procedure but also, remarkably, to measures ‘designed to alleviate the consequences of redundancy for workers’. I will mention the background to the directive. In 1973 AKZO, a Dutch-German multinational enterprise in chemicals, engaged a major restructuring by dismissing some 5,000 workers as a consequence of the oil crisis. The apparent strategy was to dismiss workers in countries where it was cheapest to do so.<sup>44</sup> The ensuing outrage led to a proviso in the Social Action Programme and to the Directive in 1975. While the Preamble of the directive (first Recital) regarded it as important to afford greater protection to workers, the Directive was still adopted as being essentially procedural. And so it is still today.

Dismissing where cheapest is a rather manifest ‘common market effect’. Redundancy (severance) payments are, next to being essential factor in dismissal costs, core provisions in alleviating the consequences of mass redundancies for workers. Still, the original directive only imposed an obligation to consult workers’ representatives on the means of mitigating the consequences of redundancy, with a view to reaching an agreement. The revision in 1992 (92/56/EEC) supposed that such payments are made, and, if so, imposes an obligation to consult the employee representatives on ‘the method for calculating any redundancy payments other than those arising out of national legislation and/or practice’ (Article 2(3)(vi)). The amendment of the Directive in 1998 was only of a consolidation nature and naturally kept this watered-down solution. The reality still today is that there are essential differences in redundancy payments. The broad line is that there are no statutory or collective agreement-based payments in Finland and Denmark (except for certain white collar workers) while in Sweden since 2004 the payments are covered by a confederal collective agreement between the Swedish LO and the employers central organisation Svenskt Näringsliv (Confederation of Swedish Enterprise). The highest payments are in Austria, Germany and Spain.<sup>45</sup> In the new Member States such payments exist at least in

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<sup>44</sup> Blanpain, *European Labour Law*, 7. rev. ed., Kluwer Law International 2000, p. 381.

<sup>45</sup> On the major differences of these payments, see Jari Hellsten, *Provisions and Procedures Governing Collective Redundancies in Europe*, Finnish Metalworkers’ Union; September 2001 (Hellsten 2001). As an example of high payments one may refer to a case called ‘Kimberly Clark’, in fact *France v. Commission*, C-241/94 [1996] ECR I-4551. The judgment denotes the key figures (paragraph 28). A paper mill in Rouen, France, dismissed 207 workers and salaried employees. The collective agreement concerned required average severance pay of EUR 21,340 (FF 140,000). The sum fixed in the social plan that was

Hungary, Poland and Czech Republic.<sup>46</sup> In its last official proposal of January 2002 on corporate restructuring, the Commission misleadingly asserted that fair compensation in the form of redundancy payments would be a ‘well-established practice in all [the then 15] Member States’.<sup>47</sup>

Hence, the Preamble of the original Directive referred, after the ‘increasing convergence’, this being the new jargon of the 1970’s,<sup>48</sup> to the ‘measures designed to alleviate the consequences of redundancy for workers’, as does the Directive in force (of 1998). Still, the Directive does not harmonise the most essential alleviating measure, at the same time also the most essential cost factor, namely the severance payments.

However, one may see a real ‘common market effect’ also in Article 4(1) of the directive, according to which

‘Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3 (1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.’

This *de facto* set up a minimum length for negotiations. Besides, Article 4(3) enabled the authorities to prolong the period up to 60 days and accepted even wider extension powers enacted by the Member States.<sup>49</sup> In this sense the right to prolong the negotiation period up to 60 days was a peculiar mix of a minimum and maximum provision. In the end, the 60 days’ maximum is not strictly true, and, indeed, Article 5 stated and still states the minimum nature of the Directive. However, setting up the minimum length of negotiations, unless the authorities accept a shorter period in given cases, is a relatively small interference in the functioning of the (labour) market and imposes the necessary time frame for, in most cases, seeking solutions for retraining and other mitigating measures. Hence, the directive is essentially procedural. It does not lay down substantives rules as to which reasons and circumstances justify dismissals.

*Bercusson* discusses the harmonising effect of the Directive, also by referring to two surveys covering Belgium, France, Germany, Italy and UK. The first one, concerning redundancy provisions in the textile industry, revealed essential differences also after the Directive both in consultation and selection procedure, and

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implemented was EUR 60,260 (FF 395,000) inclusive of training contribution. In addition, the State Employment Fund paid training aid (that was regarded as prohibited state aid). First phase of consultation of the Community cross-industry and sectoral social partners, p. 13;

<sup>46</sup> See Hellsten (2001).

<sup>47</sup> See the document *Anticipating and managing change: a dynamic approach to the social aspects of corporate restructuring.* ). First phase of consultation of the Community cross-industry and sectoral social partners, p. 13; <[http://www.europa.eu.int/comm/employment\\_social/labour\\_law/docs/](http://www.europa.eu.int/comm/employment_social/labour_law/docs/)>

<sup>48</sup> See the description of Simitis and Lyon-Caen on p. 6, *supra*.

<sup>49</sup> See Article 4(3), second subparagraph.

in financial compensations. The second survey, concerning formal law in these countries revealed essential differences regarding the definition of 'collective dismissal', procedures prior to dismissal and redundancy payments. In conclusion, he states 'it is difficult to describe this process as, or ascribe it to, a wholly effective policy of harmonisation of labour law in the European Community'.<sup>50</sup>

The European Court of Justice has also discussed the nature of the Collective Redundancy Directive. Amongst others the lack of employee representation generated the infringement case *Commission v. United Kingdom*.<sup>51</sup> The Court characterised the directive, as follows:

16 By harmonising the rules applicable to collective redundancies, the Community legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for Community undertakings.

This characterisation of general type e.g. *Catherine Barnard* has presented as marking a recognition of the dual nature, economic and social, of the Collective Redundancy Directive.<sup>52</sup> The dual nature is true, indeed by definition: it is difficult, if not impossible, to find real protection of workers (social factor) that would not cause costs (economic factor) to the employer. However, even the harmonisation of procedure was just partial, as the Court noted later in the judgment (paragraph 25). It was sufficient to invalidate (i.e. to declare as contradicting with the Directive) the traditional voluntary trade union recognition system in the UK (paragraphs 26-7 of the judgment). A further necessary clarification concerning this case is in that the Court by no means assessed the cost factor but obviously deduced the economic (cost) factor expressed in paragraph 16 from the first Recital of the Directive that referred to 'taking into account the need for balanced economic and social development within the Community.'<sup>53</sup> There was no point in the case necessitating any such assessment of costs. In fact, so far as I know, no official document of the EC machinery entails any comprehensive assessment of these costs. They are left hanging in the air while any expert accepts that the cost factor is still a real thing.

However, one may still maintain that the Court's reference to harmonising the costs of collective redundancies as a purpose of the Directive was essentially illusory. It harmonises them only in so far as the employer is burdened by the minimum period (30 days) for negotiations prior to giving the notice.

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<sup>50</sup> Bercusson, p. 53-64; citation at 64. The survey on the textile industry was first published in *European Industrial Relations Review* No 51 (March 1978), p. 7; referred to by Bercusson on p. 62. The survey on formal law was published in *European Industrial Relations Review* No 76 (May 1980); Bercusson p. 63 refers to a table on its p. 19.

<sup>51</sup> Case C-383/92 [1994] ECR I-2479.

<sup>52</sup> Catherine Barnard, *EC Employment Law*, second edition, Oxford, University Press, 2000, p. 24.

<sup>53</sup> The same statement still flourishes in the second Recital of the Directive in force, 98/59/EC.

### 2.1.1. Corporate Responsibility

Within the procedural framework there is, however, one provision that is worthy of remark, namely the establishment by the 1992 amendment (Directive 92/56/EEC) of a corporate responsibility in Article 2(4). The information and consultation obligations

‘shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.’<sup>54</sup>

Article 2(4) means in practice that a daughter company must hold the consultations before the mother company decides on redundancies. Otherwise there is a breach of procedure, leading to compensation for the workers. The Explanatory Memorandum of the proposed Amending Directive gave details on the impact of the internal market. Growing internationalisation was seen as resulting increasingly in cross-border corporate restructuring of companies on which there was a loophole in the original directive. The Amending Directive was intended to block it by setting up a strict responsibility on the daughter company for decisions taken. The structure was not, however, a complete novelty because already in case *Rockfon A/S v Specialarbejderforbundet i Danmark* the ECJ confirmed the interpretation that the employer could not free itself from the directive’s obligations by entrusting, in a group of companies, decision-making to a unit separate from the employing unit.<sup>55</sup> In sum: establishing this corporate responsibility had a real common market reason, and the Amending Directive was intended to improve the position of workers. Within this procedural framework the economic and social factors were combined.

As *Bercusson* has pointed out, in the preparations of the original directive there was some debate about covering also the grounds for dismissal. At least France wanted this. It ‘considered that the aim of the directive should be to protect workers against collective dismissals. But the text proposed by the Commission ... was more concerned with the interests of the undertakings.’ German and UK delegations reported that the proposal of the Commission was intended to establish criteria by which the labour market worked properly.<sup>56</sup> Anyway, given the reference in the Preamble also to Article 117 EEC, it would have been

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<sup>54</sup> On this provision, see e.g. *Bercusson*, p. 230-3.

<sup>55</sup> Case C-449/93 [1995] ECR I-4291, paragraph 30.

<sup>56</sup> *Bercusson*, p. 51. Citations presented by him, with reference to *European Industrial Relations Review* No 2 (February 1974), p. 2 at pp. 3 and 5; No 4 (April 1974), p. 18 at p. 19.

a reasonable expectation that the directive would have tackled at least the level of redundancy payments. While this did not happen, the cost balancing effect of the directive in reality is confined to the effect of establishing the minimum period for negotiations, if it is discernable at all.

In covering the deficiencies in the Collective Redundancy Directive, it is necessary to mention how the obligation to alleviate the consequences of mass redundancies is weakened by being only an obligation to consult the employee representatives on these measures. There is no European framework set up for a social plan although there are examples that are well established (with necessary traditions) in Austria, Belgium, France, Germany and the Netherlands. They, too, imply an essential cost factor.

### *2.1.2. Looser Requirements for Multinationals?*<sup>57</sup>

A further issue falling under the common market effect would have been, by definition, the substantive grounds for collective dismissals that are mainly the so-called ETOP-reasons: economic, technical, organisational and productivity reasons.<sup>58</sup> Another aspect is that the directive covers comprehensively any reason that is not linked to the workers.<sup>59</sup> Anyway, the question on substantive grounds, i.e. appreciation of the ETOP-reasons is in a common (internal) market context emphasized by the further pinpoint whether the grounds are looser for multinational companies. I maintain that in future, not just internationally but also within the internal market, as enlarged in 2004, we will face relocations *à la* Hoover (France – Scotland in 1994) towards the new Member States with radically lower wage and overall production costs. Immediately, a sharp question arises whether a simple drive to greater profit justifies closures and redundancies in ‘old’ Member States. The issue is also by definition linked to Transfer of Undertakings Directive while the closures and relocations may well take place within a multinational group of companies (maybe even in the context of a merger of two multinationals). Other way round, the Transfer Directive includes provisions (in Article 4) on dismissals by ETO-grounds (economic, technical or organisational grounds), and one essential issue is, of course, which entity on the employer side satisfied these ETO-grounds.<sup>60</sup>

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<sup>57</sup> This section draws on Hellsten 2001, p. 35-6, but merits to be presented also in this wider context discussing the development, scope and rationale of EC employment law.

<sup>58</sup> On ETOP-reasons, as well as on governing collective redundancies in general in Denmark, France, Germany, Italy, Netherlands, Spain and UK, see Umberto Carabelli and Leonello Tronti (eds.), *Managing Labour Redundancies In Europe: Instruments and Prospects. Labour*, Volume 13, Number 1, Blackwell Publishers 1999.

<sup>59</sup> See e.g. a recent judgment *Commission v. Portugal*, C-55/02, 12.10.2004, nyr. Portugal has infringed its obligations because the national implementation law covered only redundancies for structural, technological or cyclical reasons. E.g. liquidation cases fall out.

<sup>60</sup> See section 2.2, ‘Transfer of Undertakings (Acquired Rights’) Directive’, *infra*.

To simplify, at least in Austria, Belgium, France and Germany the national law defines dismissing with ETOP-reasons as an *ultima ratio*. This tends towards dismissing simple profit-maximisation as legally valid grounds for a closure and/or transfer of production within the national jurisdiction. A national SME presumably cannot escape such an *ultima ratio* condition. While CDR is silent on dismissal grounds, it seems that the only real brake or imperative for multinationals comes from their need to safeguard their image, i.e. that a too rough closure/redundancy policy might harm their image and make it less attractive. Besides, a multinational often has possibilities to adjust its economic results in its different units. Furthermore, the case law referred to by *Gérard Lyon-Caen* from France hints towards the outcome that a multi-sectoral multinational has no corporate responsibility to help its divisions if they get into trouble. In conclusion, *Gérard Lyon-Caen* asserts that we come close to admitting that different, and looser, rules exist for multinationals, as this is manifest to an increasing extent.<sup>61</sup>

This issue, i.e. whether there are looser rules for multinational companies regarding dismissal grounds, should be debated officially in the EU. They are fore-runners in relocating production to new Member States within the internal market, as well as to third countries. The issue is, whether they are entitled to do it with the sole purpose of improving profitability. Irrespective of whether the answer is ‘yes’ or ‘no’, these relocations may happen with the benefit of EU subsidies from the Cohesion Fund or state aids accepted under Article 87(3) EC. This just sharpens further the question about fair compensation for workers made redundant from establishments that are closed down in the ‘old’ Member States. If the answer is ‘no’, the conditions for it should become defined by the EU. If the answer is ‘yes’, as stated above this further sharpens the question about fair compensation (redundancy payment) to workers made redundant. This would be a minimum in balancing economic and social factors regarding the Collective Redundancy Directive.

### 2.1.3. Concluding on Collective Redundancy Directive

My conclusion on the Collective Redundancy Directive is clear. The original Common Market intention was and still is in fact real, and the first Recital promised and still promises greater protection for workers, but the corpus Articles keep very little thereof. Except the strict responsibility of the daughter company in Article 2(4), the Directive remains essentially procedural. My thesis is that the enlarged internal market imposes an obligation to reconsider this lack of substantial protection. On the other hand, the EC Treaty since Nice offers the

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<sup>61</sup> Gérard Lyon-Caen, *Sur le transfert des emplois dans les groupes multinationaux*. Droit social, mai 1995, pp. 489-494. The case he refers to is Thomson, Cour de cassation 5.4. 1995. This French conglomerate transferred a tv-tube factory from Lyon to Bresil.

tiny possibility of legislating on termination of employment contracts by qualified majority, if the Council first unanimously takes a decision to apply it (Article 137(3) EC, last sentence).

## **2.2. Transfer of Undertakings (Acquired Rights') Directive**

The Transfer of Undertakings Directive is, especially as to its scope, a Pandora's box with some 40 judgments of the Court of Justice, augmented by several rulings of the EFTA Court. I will leave out most of the details in the case law and discuss only two interesting aspects directly connected with the common market justification, effect and nature of the Directive: the procedure and cross-border applicability of the Directive.

As usual, the common (internal) market context in the Directive is described in its Preamble with short terms, only, as follows:

(2) 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 undertakings or businesses to other employers as a result of legal transfers or mergers.

(3) 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.

(4) Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced.

While every word is potentially significant in this description, I will pass over any detailed reasoning thereon in this article and concentrate on my two main points. However, the scope is worth a couple of general remarks. First, it is essential to understand that the Directive, since its amendment by Directive 98/50/EC, covers also undertakings in the public sector if they are engaged in economic activities, whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive (Article 1(1)(c)). On the other hand, the Directive does not apply to seagoing vessels (Article 1(3)). It is reasonable to suppose that there are detailed rules in national laws and that there are particular problems related to employment conditions of seagoing staff. Nonetheless, it is a legitimate expectation that the European legislator would openly ground this kind of exclusion that has been valid already for nearly 30 years. Seagoing staff is in principle in special need of protection by European law, procedural rules included, due to working onboard. However, in conclusion one may state that the traditional

double purpose and interplay of economic and social factors is denoted as the rationale of the Directive.

### 2.2.1. Procedures and Nature of Directive

The procedural part, hence information for and consultation of employee representatives in the Transfer Directive includes certain but now negligible differences in relation to the Collective Redundancy Directive. This is illustrated by infringement case *Commission v. UK* of 1992 (hereinafter ‘Transfer judgment’).<sup>62</sup> As in its sister infringement case concerning UK law regarding collective redundancies,<sup>63</sup> explained *supra*, the Court of Justice confirmed that the traditional, voluntary trade union recognition system in UK did not comply with the compulsory employee representation scheme of the Transfer Directive. It seems clear that the cross-border applicability of the Directive creates tension also in its procedural provisions. The question about possible/alleged cross-border information, consultation and negotiations arises. I will take the liberty of leaving it as a question in this paper, without attempting to answer it.

In addition the overall purpose of the Transfer Directive was described in terms identical to those in the sister case: ensuring comparable protection for workers’ rights and harmonising the costs for employers (paragraph 15 of the Transfer judgment). As in the sister case, neither did this case display any real analysis of the cost factor. Further on, also in this case the Court noted the purpose of partial harmonisation on the procedures. One has to see the reference to workers’ rights and harmonisation of costs as an overall description by the Court, without that having any real legal consequences. It is also noteworthy that Advocate General did not present this dual purpose of the Directive.<sup>64</sup>

The dual purpose as noted by the Court is, of course, true in the sense that the Directive deals with workers’ rights that in this case have a direct cost effect. The elementary provision in the Directive (Article 3(1)) transfers the obligations arising from an employment contract or relationship to the transferee, by virtue of the transfer. This was a direct penetration into UK law that foresaw a termination of a work contract in the context of such a transfer.<sup>65</sup> Furthermore, the Directive guarantees in (now) Article 3(3) the previous working conditions, as follows:

Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or

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<sup>62</sup> Case C-382/92, ECR [1994] I-2435.

<sup>63</sup> Case C-383/92 ECR [1994] I-2479. The Court gave this judgment, as well as the judgment referred to in the previous note, by sitting in plenum.

<sup>64</sup> Joint Opinions (on 2 March 1994) of Advocate General Van Gerven in cases *Commission v. United Kingdom*, C-382/92 and C-383/92.

<sup>65</sup> See e.g. Catherine Barnard, *op. cit.*, p. 446.

expiry of the collective agreement or the entry into force or application of another collective agreement.

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

Whether a cliché or not, this provision means a certain prohibition (for at least one year) against competition with low (or lowered) labour standards, even a fundamental prohibition, as *Bercusson* has described it. Even in the French law the Directive imposed changes, at least in protection of workers' representatives, transfer of debts and safeguarding the workers' rights arising from collective agreements.<sup>66</sup> The prohibition is just emphasised when read together with the principle of continued employment relationships.<sup>67</sup> However, the economic or managerial prerogative was guaranteed by enshrining already in the original Article 4(1) that the Directive does not prevent dismissals for ETOP-reasons.<sup>68</sup> In Germany the interpretation of the national implementing law (Bürgerliches Gesetzbuch, Section BGB 613a) has meant a rather straightforward application that Labour Courts quite easily hold dismissals within the guaranteed period as consequences of the transfer, leading to essential compensation. Besides, such a lawsuit reflects an individual right which is not possible to outlaw in a collective solution (agreement) in a transfer situation. This often leads to individual agreements in which the worker resigns with a considerable severance payment.<sup>69</sup>

However, enshrining the right to dismiss for ETOP-reasons has led *Fuchs* to denote the dual nature of the directive, but differently from that marked by the Court in the case *Commission v. UK*. Namely, *Fuchs* interprets 'economic' in the overall legal construction in such a way that the Directive does not endanger (or challenge) restructuring of enterprises by transfers (mergers included).<sup>70</sup> The right to dismiss with ETO-reasons finally guarantees this restructuring as such while the absolute prohibition against competition with low (or lowered) labour standards, at the end of the day, is limited to one year following the transfer. Hence, in discovering the most fundamental issue within the dual (economic and social) nature of the Directive, it seems logical to adhere to the position of *Fuchs*

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<sup>66</sup> See A. and G. Lyon-Caen, *Droit social international et européen*, 8th ed., Dalloz 1993, p. 306, fn 2.

<sup>67</sup> Bercusson, p. 235.

<sup>68</sup> Article 4(1) (first subparagraph): 'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.' To be precise, Article 4(1) counts only 'ETO-reasons' (economic, technical or organisational ones) while productivity related ones are not counted.

<sup>69</sup> Experience from Finnish multinationals show that these payments for people made redundant in Central Europe can be even of some 60.000 to 80.000 euros plus possible retirement benefits.

<sup>70</sup> Fuchs, *The Bottom Line of European Labour Law* (Part II), IJLLIR Vol. 20, Issue 3, 2004, p. 437.

instead of that expressed, in general terms and *obiter dictum*, by the Court in the case *Commission v. UK. Fuchs* highlights, as I do, the realisation of restructuring; differing from this the Court referred to harmonising costs. The Directive harmonised the costs, indeed, but only to the extent of the period of one year with guaranteed working conditions.

Seen from another angle, the Transfer Directive was and still is important because it introduced collective agreements into the normative structure of EC employment law. It used and uses them as direct sources of rights, even though any definition of the agreements was left up to national law. The original Collective Redundancy Directive did not recognise them at all,<sup>71</sup> and even the revised Directive 92/56/EC used them only indirectly, requiring information concerning planned severance payments if they deviated from the collective agreement concerned. At a similar level, hence as a direct source of law, the EC legislator used collective agreements as direct instruments in employment law just in the Posted Workers' Directive in 1996 (96/71/EC).

A further difference in relation to the Collective Redundancy Directive was the penetration of EC law into individual employment relationships that the Transfer Directive established. In that sense it was elementary for the development of EC employment law. The biggest part of the ECJ's 40 or so rulings concerns the very definition of a transfer, i.e. the scope of the Directive. The most important in this sense is the case *Christel Schmidt*.<sup>72</sup> The Court (fifth chamber) concluded that the Transfer Directive was to be

'interpreted as covering a situation in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee'.

*Fuchs* denotes how the Court has often attempted to solve the problems that have arisen by applying an extensive and teleological interpretation based on the aim of protecting and ensuring employee rights as found in the Preamble.<sup>73</sup>

As to the broad line of the Transfer Directive, changes in 1998 by Directive 98/50/EC were essential ones, when it e.g. established the corporate responsibility in Article 7(4) as in the Revised Collective Redundancy Directive (Article 2(4) of Directive 92/56/EC). Also the definition of a transfer was added in 1998, based on case-law and it now reads as follows:

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<sup>71</sup> See that Article 2(1) of the CRD imposes to negotiate with the aim to reach an *agreement*. It clearly can be a collective agreement under a national Act on Collective Agreements (if there is any; there isn't in UK and Denmark).

<sup>72</sup> Case C-392/92 ECR [1994] I-1311.

<sup>73</sup> *Fuchs*, op.cit., p. 437.

1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.  
(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

The amendments in 2001 were of consolidation, only. One may well criticise the definition as being still vague as *Mulder*, who does not discuss any cross-border applicability of the Directive, does in his recent monograph.<sup>74</sup> On the other hand, he equally regrets that the structure is rigid and that there is no space for practical solutions by collective agreements.<sup>75</sup> Well, in fact there is space for better, hence stronger, national laws and collective agreements due to the minimum nature of the Directive (Article 8). In this sense it is a *sui generis* product of the Common Market thinking of the 1970's, having kept this strong tie to the 'market' where employees are *de facto* commodities to be bought and sold. Remarkable also is that the Council kept the legal basis of Article 94 (ex 100) EC, without any objection by the Parliament. As a whole, the Transfer Directive represents a logical path of evolution, where the Court has been the driving force. I leave aside in this paper whether the judicial activism of the Court has maintained its line after *Schmidt*.

From a constitutional point of view one may of course ask whether it still is logical to keep Article 94 EC as the legal basis for an instrument whose 'main purpose is ... to ensure that restructuring of undertakings within the Common Market does not adversely affect the employees in the undertaking concerned.'<sup>76</sup> Article 94 EC keeps the European Parliament in a consultative position, while Article 137 EC as the basis would lead to co-decision in applying it. Obviously, the codification itself explains this.

### 2.2.2. Cross-Border Application of the Directive

While the Transfer Directive is the crystallisation of the single market justification in EC employment law in force, it is strange that out of some 40 preliminary rulings of the Court on this Directive (plus six rulings of the EFTA Court), there is no European case involving a cross-border transfer. Does the Directive apply to such transfers, when the employer e.g. relocates a factory from one

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<sup>74</sup> Bernard Johann Mulder, *Anställningen vid verksamhetsövergång*, Iustus Förlag, Lund 2004, p. 349. He finds it as a 'vague and undefined wording in the Directive'.

<sup>75</sup> *Ibid*, p. 357 (in English summary).

<sup>76</sup> COM (94) 300 final, 8 September 1994, paragraph 1.

Member State to another? The answer is in the interpretation of Article 1(2) that reads, as follows:

This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.

The Commission published its first proposal for the Directive soon after adoption of the Social Action Programme by the Council in 1974.<sup>77</sup> Already that proposal gives the final answer to the basic question about the cross-border applicability of the Directive. Namely, the Commission laconically reasoned, as follows:

‘From the territorial point of view it appears necessary to protect the rights of workers whether these changes in undertakings take place within the territory of one Member State or within the territories of Member States.’<sup>78</sup>

Hence, the cross-border applicability was a deliberate intention. A further consideration was that the protection should cover transfers from a Member State to a third country, as follows:

‘For the same reasons it appears necessary to extend Community legal protection for workers to cover changes which take place in undertakings within the territory of one or more Member States and within that of a non-member country.’<sup>79</sup>

Here, too, no hesitation is noted. Thus, in principle the Directive covers a case in which a U.S. multinational company decided to relocate a plant from Finland to China. However, the Commission saw the enforcement problems involved, as follows:

‘For legal reasons, however, it is not possible to impose the planned Community rules on non-member countries. In such cases, therefore, Article 1 provides for the application of this proposed Directive only in so far as undertakings situated within the territory of the Common Market are involved. This can be of practical importance first and foremost when undertakings or plants in non-member states are incorporated in undertakings situated in the Community.’<sup>80</sup>

Again, the proposal is convincing. The China case is covered, as to obligations burdening the transferor within the Community. Equally, a transferee within the

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<sup>77</sup> See COM (74) 351 final/2 of 29.5.1974. The title was ‘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.’

<sup>78</sup> Ibid, p. 5.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

Community is subject to the Directive's rules. But the Commission went on, as follows:

‘But the proposed Directive is also legally applicable when undertakings or companies situated in the Community are incorporated in undertakings in non-member states. This is the case when the change *affects* the rights of workers in plants which, irrespective of such incorporation, are situated in the territory of a Member State and to which the laws of that Member State are applicable in accordance with the rules of international private law’<sup>81</sup> (italics by JH).

The rights in a Member State bestowed by the Directive clearly cover first and foremost dismissal protection where the core of the Directive according to Article 4(1) means that the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. Employment relationships are transferred. A separate issue crucially is who may resort to dismissals for economic, technical or organisational reasons. This issue formed one of the two questions answered in judgment *Dethier*, delivered in 1998. The outcome *prima vista* looks simple: both transferor and transferee may resort to ETO-dismissals.<sup>82</sup> However, I will come back to this point (see section 3.3.1) in discussing the practical consequences of a cross-border application of the Transfer Directive.

However, coming back to the principal cross-border effect, the Commission proposed a corpus text in Article 1, as follows:

‘... irrespective of whether such merger or takeover is effected between undertakings in the territory of one or more Member States or it is effected between undertakings in the territory of member States and undertakings in the territory of member States and undertakings in third countries.’<sup>83</sup>

In 1975 the Commission published a revised proposal that strengthened further this cross-border aspect. With the logic of the 1974 proposal it proposed a corpus text in its draft Article 1(3), as follows

‘This Directive shall apply where and insofar as the transferring or dependent undertaking is situated in the territory of the Member States of the

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<sup>81</sup> Ibid.

<sup>82</sup> Case C-319/94, *Jules Dethier Équipement SA v. Jules Dassy and Sovam SPRL*, ECR [1998] I-1061, paragraph 37.

<sup>83</sup> See COM (74) 351 final/2, fourth page of the text including the draft directive (there is no page numbering in this part of the COM document). The Preamble (the sixth ‘whereas’) backed this up with the following wording: ‘Whereas workers must be likewise safeguarded where the merger or transfer is effected in the territory of the Community and the acquirer is a person or undertaking situate[d] in the territory of a third State.’ The expression ‘situate’ is unambiguous in this context; for clarity’s sake I add a letter ‘d’.

European Economic Community or the transfer or concentration affects an undertaking within that territory involved in such a transaction.’<sup>84</sup>

This proposal led to the adoption of the Directive in 1977 with Article 1(2) in the form still in force, as quoted above. The wording was shortened but the logic of a basic cross-border applicability was kept. At the same time, the Council replaced the expression ‘the territory of the *Member States*’ of the 1975 proposal by a more straightforward ‘the territorial scope of the *Treaty*’. This illustrated the non-significance of national borders in this context, taking cross-border transfers as something that would arise naturally within the territorial scope of the Treaty.<sup>85</sup>

I would like to develop the argument on Article 1(2) briefly with a somewhat simplified CILFIT-test.<sup>86</sup> First, there are linguistic differences in other places of the Directive, but not here regarding the cross-border applicability as such.<sup>87</sup> It is of course true that notions like ‘undertaking’, ‘business’ and ‘a part of a business’ might become more difficult to handle on the European rather than on a national scale, but I will set this aside now. Second, the wording in Article 1(2) purely textually operates with the location of the business or undertaking to be transferred. It might be unclear whether the seat of management or of actual activities is decisive if they are in different Member States. *Jonas Malmberg* notes that a permanent place of running the business might decide, not the formal location of the seat of management.<sup>88</sup> However, in most cases the seat and business place are in the same country. Hence, purely textually, Article 1(2) operates with a business situated within the Community, broadened now by the EEA; thus, Iceland, Lichtenstein and Norway are also covered. A textual interpretation thus leads to the conclusion that it covers cross-border transfers. This is confirmed by the lack of any contravening element in the text. Third, a contextual inter-

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<sup>84</sup> See COM (75) 429, p. 4 of the text including the draft directive. Its grounds in the sixth ‘whereas’ of the Preamble read, as follows: ‘Whereas employees must likewise be protected in the territory of the Community where a person or undertaking situated in the territory of a third country is involved in the transaction.’ Ibid, p. 3. Underlining is original. The Preamble of the Directive 77/187/EEC, as adopted, did not include any such ‘whereas’. This perhaps paved the way for the cross-border application becoming de facto forgotten.

<sup>85</sup> In fact, lacking ‘the Member States’ in the very wording of Article 1(2) first drew my attention in exploring a possible cross-border applicability of the Directive. Otherwise the Directive includes 18 references to different legislative options within the Directive plus that the Directive is a minimum Directive, as enacted in Article 8. Indeed, the Member States have no substantially legislative role concerning the territorial ambit as defined by Article 1(2).

<sup>86</sup> Case 283/81 *CILFIT* [1982] ECR 3415. As to a CILFIT test, see e.g. Tuomas Ojanen, *The European Way. The Structure of National Court Obligation Under EC Law*, Gummerus Kirjapaino Oy, Saarijärvi 1998, p. 192-96. As to case *CILFIT*, see also, footnote 188, *infra*.

<sup>87</sup> As to these differences, see e.g. case 135/83, *Abels*, [1985] ECR 469. I pass here to what extent the present Directive 01/23/EC manages to iron out the differences.

<sup>88</sup> Jonas Malmberg, *Arbetstgares ställning vid gränsöverskridande företagsövergångar*, *Svensk Juristtidning* 2004 No. 4, p. 794-5. He refers to Lunning & Toijer, *Anställningsskydd*, 8 uppl. s. 243, and to Klingsten, *Ansättningsretlige aspekter ved virksomhedsoverdragelse*, DJØF 2002, p. 17.

pretation, bound first to the Common Market of 1970's, leads to the same interpretation. Namely, there was no real reason, and it would have been in fact illogical, to exclude the protection from cross-border transfers. Besides, given the clear intention of the Commission to cover cross-border transfers it would have led to a storm if the Council had tried to invalidate it. Nothing shows such an intention and it would be insulting to suppose that there would have been any such hidden agenda.

Further on, the European legislator repeated Article 1(2) TD as such in the amending directive 98/50/EC. This is elementary in interpreting the EC law provision concerned in its historical context, in the light of its *travaux préparatoires*, in its evolution and application, and finally in the light of Community law as a whole. Besides, the interpretation of 'Community law as a whole' has to be effective and consistent as judgment *Albany*, paragraph 60, tells us.<sup>89</sup> I therefore maintain that the cross-border applicability of the Transfer Directive is a fact of EC law.<sup>90</sup> This is also the starting point of *Jonas Malmberg* in his excellent article 'Arbetstgares ställning vid gränsöverskridande företagsövergångar' where he reasons over 15 pages mainly on the practical consequences of this as to jurisdiction, choice-of-law and practical consequences of changes in the labour law applicable.<sup>91</sup> I believe that the reason for the lack of any European case law on this provision is that trade unions and employees have either been unable to bring the cases to courts, or they have reached negotiated solutions that have excluded the court.

The only somewhat grey issue regarding the cross-border application of the Directive is the fact that the Council in 1977 dropped from the wording of Article 1(2) the second element of the 1975 proposal, namely the applicability of the Directive by virtue of an *effect* of a transfer:

‘... the transfer or concentration *affects* an *undertaking* within that territory *involved* in such a transaction...’

This draft proviso either would have broadened the applicability even to transfers taking place between employers (companies) established outside the EEC, or it would have established good grounds to maintain so. Therefore, because it was ambiguous and it lacked enforceability outside the Community, the Council obviously dropped it. The inevitable conclusion seems to be that there is a lack of any

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<sup>89</sup> See case *Albany International*, C-67/96 [1999] ECR I-5751. The English wording of paragraph 60 ('interpretation of the provisions of the Treaty as a whole which is both effective and consistent') is a bit clumsy. The French version ('interprétation utile et cohérente des dispositions du traité, dans leur ensemble') proves that 'effective' and 'consistent' do qualify the interpretation, not the Treaty. – As to judgment *Albany*, see Chapter II, section 2.6, *infra*.

<sup>90</sup> It is, by definition, a case as such whether the national implementing laws manage to realise this. I pass it in this paper.

<sup>91</sup> See footnote 88, *supra*.

protection under EC law for transfers from third countries into the EC (and EEA), as well as for formal transfers between two countries outside the EC/EEA. These transfers may adversely affect the position of workers who are already employed by receiving companies. The former feature is what *Catherine Barnard* has also found, calling it ‘a significant gap in the protection of workers’. I know there is a similar lack in national laws. However, she does not discuss further the cross-border applicability of the Directive to cross-border transfers within the EC/EEA.<sup>92</sup>

However, this was the ‘what, when and why’<sup>93</sup> of the wording

‘...undertaking, business or part of a business to be transferred is situated within the territorial scope of the Treaty.’

Thus, how it became the very tool in the territorial applicability of the Directive. It applies to cross-border transfers. It is finally clear that only this interpretation is in harmony with the establishment of the *Common* Market and its evolution to the *Single* Market, reaching now the qualification of the *Internal* Market. One has to see this cross-border applicability also in the light of the philosophy prevailing on the Internal Market: a development of *improving* working conditions as enshrined already in Article 117 EEC that (i.e. the improvement) for a part should ensue ‘from the functioning of the common market’. It still lies in Article 136(3) EC. The Treaties are not blind to a gaping hole in the protection of workers when they face the very crux of the internal market effect at issue: a *cross-border* transfer of an undertaking whose simple motive is just an improvement of *profitability*. There is no hole, as I am sure will be confirmed by a court judgment in future.

### 2.2.3. *Applicability to Corporate Cross-Border Transfers*

There remains one important question, namely the applicability of the Directive when the cross-border transfer takes place within an international group of companies (consolidated corporation).

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<sup>92</sup> Catherine Barnard, *EC Employment Law*, 2. ed., Oxford University Press 2000, p. 469. She notes also the exclusion of a transfer between subsidiaries outside the EEA whose head office, only, is located within the Community. As to other literature, e.g. Silvana Sciarra (ed.), *Labour Law in the Courts*, Hart Publishing, Oxford 2001, includes 98 pages dealing with the Directive, produced by Davies, Lulom, Valdés Dal-Ré and Lo Faro, but none of them seems to discuss cross-border transfers.

<sup>93</sup> See Spiros Simitis and Antoine Lyon-Caen, 1996, (see note 15) p. 3, assert that it is better not to think EC law solely as a product of the legal system itself or as a compromise of the social forces. Both may be true at the one and same provision. Hence, Simitis and Lyon-Caen highlight that there is no EC labour law *per se*. The implication is obvious: what has to be studied is when and why a shared system of values emerged, qualifying the concepts we have on EC labour law. To my mind, the same approach (‘what, when and why’) is *mutatis mutandis* normally useful at separate norms, too.

The necessary additional issue of applying the Directive to a group of companies is in Case *Allen et al. v. Amalgamated Construction Co. Ltd*<sup>94</sup> in which the European Court of Justice gave its preliminary ruling on 12 December 1999. I will hereinafter refer to it, with one exception, as *Amalgamated Construction* because this better captures the *essentiale* of the case. Even the very titles of the proposals of the Commission for the Directive in 1974 and 1975 referred to ‘the retention of the rights and advantages of employees in the case of mergers, take-overs and *amalgamations*’ (italics by JH). The applicants in the main proceedings were twenty-three of the miners who worked for Amalgamated Construction Co. Ltd (ACC) until they were made redundant. They were taken on, after a break of a weekend, only, by its sister company AM Mining Services Limited (AMS) under less beneficial terms and conditions of employment. Being later made redundant by that company, they were taken on again by ACC but with worse employment conditions than those earlier applied to them by ACC. The miners claimed these previous conditions with their suit. ACC and AMS belonged to AMCO Corporation PLC (AMCO) that had some ten other companies within the AMCO Group. There was a Group headquarter which performed certain functions, such as personnel, payroll and accountancy, on a central basis for the subsidiary companies.

The rationale for the European Court of Justice in blocking this kind of *spiral*, instead of a direct race, to the bottom within a group of companies was to apply to it the Transfer Directive that is normally, and tellingly, called the Acquired Rights Directive in the UK. The judgment follows the Opinion of Advocate General *Ruiz-Jarabo Colomer* who presented a succinct but sufficiently detailed overview *ex officio* of the previous case law and he consistently applied it and the purpose of the Directive in this concrete case.<sup>95</sup> With his framework the Court reasoned and concluded on the applicability to a group of companies, as follows:

16. The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred (Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12, and Case 324/86 *Tellerup v Daddy's Dance Hall* [1988] ECR 739, paragraph 9).

17. It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with

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<sup>94</sup> Case C-234/98 [1999] ECR I-8643.

<sup>95</sup> Opinion delivered on 8 July 1999.

specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard.

There is nothing ambiguous in this assertion. The Directive does cover transfers between subsidiary ('sister') companies within a corporate business structure. Besides, I recall that this conclusion is a natural consequence of previous case law. It was just a small Chamber of the Court that 'visited' Ny Mølle Kro in 1987 and then Daddy's Dance Hall in 1988 but these landmark cases, too, were part of a natural evolution.<sup>96</sup>

Unusual but telling in *Amalgamated Construction* at the same time was the argument put forward by the employer (the alleged transferee) that a group of companies fell outside the Directive because the subsidiaries are not autonomous economic actors. Hence, the employer resorted to the hard core of any Internal Market regulations: competition rules that notoriously are fundamental in the internal market.<sup>97</sup> The Court weighed this argument *vis-à-vis* the social purpose of the Directive, as follows:

18. That conclusion [i.e. to apply the Directive to transfers within a group of companies] is not affected by the judgment in *Viho v Commission*, cited above, [98] in paragraphs 15 to 17 of which the Court held that Article 85(1) of the EC Treaty (now Article 81(1) EC) does not apply to relations between a parent company and its subsidiaries where those companies form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action on the market, but carry out the instructions issued to them by the parent company controlling them.

Thus, the Court outlawed the argument in law without any hesitation. It then gave its two grounds, the first one reading, as follows:

19. That concept of undertaking is specific to competition law and reflects the fact that, without the concordance of economically independent wills,

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<sup>96</sup> As to these cases in this evolution, see Barnard, *EC Employment Law*, Oxford University Press 2000, p. 455-7.

<sup>97</sup> I rhetorically recall paragraph 36 of Case *Eco Swiss China Time v. Benetton*, C-126/97, [1999] ECR I-3055, where the Court stated, as follows: '36 However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.' The keywords of the judgment are: 'Application by an arbitration tribunal, of its own motion, of Article 81 EC (ex Article 85)' and 'Power of national courts to annul arbitration awards.' It deals with the very judicial constitution of the EC.

<sup>98</sup> See Case C-73/95 P *Viho v Commission* [1996] ECR I-5457.

relations within an economic unit cannot constitute an anti-competitive agreement or concerted practice between undertakings within the meaning of Article 85(1) of the Treaty.

This meant that the employer had put forward arguments in the wrong context. A clearer translation might perhaps express, at least in Euro-English the fact that competition rules cannot apply to agreements within a group of companies because the subsidiaries are not independent. The authentic French wording spells this out better.<sup>99</sup> However, the second argument, in fact the concluding argument in weighing competition rules and the social purpose of the Directive, came one step further, as follows:

20. *Nothing* justifies a parent company's and its subsidiaries' uniform *conduct on the market having greater importance* in the application of the Directive than the *formal separation* between those companies which have distinct legal personalities. That outcome, which would exclude transfers between companies in the same group from the scope of the Directive, would be *precisely contrary to the Directive's aim*, which is, according to the Court, to *ensure, so far as possible, that the rights of employees are safeguarded* in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor (see, in particular, *Ny Mølle Kro*, cited above, paragraph 12, and *Daddy's Dance Hall*, cited above, paragraph 9) [italics by JH].

The outcome is easy to summarise: the social purpose of the Directive weighed more than the economic governance factor (or any competition law thinking). 'Nothing' justified an outcome *a contrario*. One may also presume that there will never come a 'something' to turn this conclusion one day the other way round. It also shows the context, role and reach ('*so far as possible*') of the safeguarding effect of the Directive. Even though this reasoning comes only from a Chamber, it is not merely *obiter dictum* but a precise stock-taking of the principal defence of the employer. I think it is worth presenting again later in this article when discussing on a more general level the interplay and balance between economic and social factors in the EU (see section "On Pyramid (Hierarchy) Thinking"<sup>100</sup>).

The Court followed in full the proposal of Advocate General Ruiz-Jarabo Colomer. He just used a few more words in arguing the invalidation of the

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<sup>99</sup> '19 En effet, cette notion d'entreprise est propre au droit de la concurrence et résulte du fait que, en l'absence de concours de volontés économiquement indépendantes, les relations au sein d'une unité économique ne peuvent être constitutives d'un accord ou d'une pratique concertée entre entreprises, restrictifs de concurrence au sens de l'article 85, paragraphe 1, du traité.'

<sup>100</sup> See Chapter II, section 2.7, *infra*.

competition law argument.<sup>101, 102</sup> I maintain that the (*ad astra*) absolutely same ‘nothing’ in *Amalgamated Construction* applies equally to cross-border transfers and therefore nothing justifies an exclusion of cross-border *corporate* transfers from the scope of the Directive. Corporations or their constituent parts can be formed, sold, bought, merged etc. as much as the owners decide. The essential point of labour law is that it takes or regulates the employer and employees taken together, not the latter as puppets tied to the owners’ pens. This is also the core of the Transfer Directive that is intended to allow the workers ‘to remain in employment with the new employer on the terms and conditions agreed with the transferor’ (end of paragraph 20 of *G. C. Allen and Others v. Amalgamated Construction CO. Ltd*). At the same time it is a real thing.

I conclude that the Transfer Directive does cover also corporate cross-border transfers.

### 3. Cross-Border Transfers in Practice

Given my reasoning *supra*, it is necessary to test it in brief on concrete cases. They are from a legal point of view, so far as I can see, of three types: (i) an intra-Community transfer, hence between two EC/EEA Member States; (ii) a transfer from an EC/EEA Member State to a third country; and (iii) from a third country to an EC/EEA Member State. Any fourth alternative is not relevant, I think, because the Council in 1977 dropped from the scope of the Directive transfers between sister companies with a seat outside EC/EEA and just a headquarters in the EC/EEA.

An inevitable preliminary context is the practical transfer of the workers and employees concerned. In real life it takes place only seldom, mainly involving executives and some experts. Anyway, the right to move is by definition covered by the fundamental right to free movement within the EC (type (i)). In fact, it is not just a right but EC law (the very Transfer Directive) even pushes, or, as stated

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<sup>101</sup> See paragraphs 45-47 of the Opinion. For him the competition law argument was just an *aberratio ictus*, a hit in the air, and ‘of no assistance...in deciding’ on the applicability of the Directive to transfers within groups of companies (paragraph 47).

<sup>102</sup> A case quasi-identical to *Amalgamated Construction* is C-449/93 *Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] ECR I-4291. It concerned the interpretation of Article 1 of Directive 75/129/EEC on Collective Redundancies. Paragraphs 29 and 30 show that an ‘establishment’ forming part of a group, as well as the group itself, cannot, by playing with an establishment’s dependant position, to circumvent the Directive’s obligations. In paragraph 30 the Court stated, as follows: ‘[...] an interpretation of the term "establishment" like that proposed by Rockfon would allow companies belonging to the same group to try to make it more difficult for the Directive to apply to them by conferring on a separate decision-making body the power to take decisions concerning redundancies. By this means, they would be able to escape the obligation to follow certain procedures for the protection of workers and large groups of workers could be denied the right to be informed and consulted which they have as a matter of course under the directive. Such an interpretation therefore appears to be incompatible with the aim of the Directive.’

*ex curia*, allows them the opportunity to *remain in employment with the new employer on the terms and conditions agreed with the transfero*<sup>103</sup> – the workers and employees to move along the transfer. I repeat that I will set aside now an essential part of the practical and legal difficulties linked up to this, and would again refer to the presentation of *Jonas Malmberg* in *SvJT*.<sup>104</sup>

An elementary doctrinal paradigm is that it is impossible to give fully-fledged answers to all the problems that the cross-border applicability of the Transfer Directive reveals. Hence, I will have to leave many issues as, hopefully, relevant questions.

### **3.1. Type (iii), Transfers From Third Countries into EC/EEA**

I take the liberty to say some words first on type (iii), a transfer from a third country into EC/EEA. I first venture to repeat my presumption that there are hardly any national employment laws dealing with this type of case. The right to enter the EC, i.e. the immigration law also enters this legal framework and this seems to be worthy of further reasoning (but not here). The only landmark exception in the employment law (mainly dismissal and possible career rules) worthy of separate reasoning in another place, might be the Swedish system of selection order, in which the employees are qualified (put into a dismissal order; ‘turordning’) strongly depending on their entrance to service. It is a detailed legal structure, to an essential degree governed, or governable, by collective agreements with particularities *à la suédoise*.<sup>105</sup> Workers and employees transferred enter the system but then we face the question on the dismissal rules that perhaps bound the transferor. In any case, the second ruling in case *Dethier*<sup>106</sup> seems to mean that the extra-Community workers and employees may address claims against an intra-Community transferee.

The minimum nature of the Transfer Directive might have relevance also under type (iii). Additionally, the terms and conditions/rights and obligations transferred might even be exotic ones, in theory, because the business transferred under this type can come from any place in the world. There can be special questions even linked to fundamental rights.<sup>107</sup> It is clear that the EC/EEA applies its fundamental rights in such a case. But I close case (iii) in this paper.

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<sup>103</sup> See *Amalgamated Construction*, paragraph 20, quoted in section 2.2.3. *supra*.

<sup>104</sup> See footnote 88, *supra*.

<sup>105</sup> As to a nutshell explanation on order of selection, see e.g. Tore Sigeman, *Employment Protection in Scandinavian Law*, in Peter Wahlgren (ed.), *Stability and Change in Nordic Labour Law; Legal Abbreviations*. Scandinavian Studies in Law, Volume 43, Stockholm Institute for Scandinavian Law, 2002, p. 270-1.

<sup>106</sup> See section 3.3.1., *infra*.

<sup>107</sup> As an example, let it be other way round, I may mention the case of Saudi-Arabia where e.g. collective agreements are still banned. This became clear in judgments of the Labour Court of Finland, cases TT 169/1979 and TT 135/1980, concerning construction works of a

### 3.2. Type (ii), Transfers From EC/EEA Member States to Third Countries

Reasoning on the case of type (ii) is *a priori* heavily dominated by the lack of any enforceability outside EC/EEA – with perhaps relevant exceptions e.g. in the case of Switzerland which has special arrangements with the EU/EEA. When a U.S. headquarters in 2004 decided to relocate an accumulator factory from Kemijärvi, Finland, to China, it seems reasonable to suppose that the removal, quite apart from the practical quasi-impossibility of the workers moving, did not give much scope for the application of EU Directives. EC law is not enforceable in China. The enforceability problems diminish if the parties agree to apply Finnish law to those who are removing. However, the question about the protection guaranteed by the Transfer Directive arises also in this case, even if it is in, let us say, normal cases enforceable only against the transferor within EC. Here we come close to enforceability making social protection a real thing.

But, and here comes the hard point derived from the purpose of the TD, as applied in *Dethier*: dismissals shortly before the transfer by the transferor may be in many cases unlawful under Article 4 TD. Here we might face even some mailbox problems if let us say the company running the plant in Kemijärvi happens to be ‘emptied’ before relocating the factory to China. This is what might be a relevant angle. Without trying to point out any separate case I note that we might face situations where it is even justified to maintain abuse (such as by establishing a mail box headquarters outside the EC/EEA) of EC law occurring, especially *if* the transferor’s right to resort to ETO-dismissals is recognized for cross-border transfers. In case *Centros* the Court had to take stock on a case where a Danish family company registered its seat in the UK and wanted to register only a branch in Denmark despite all the business occurring only in Denmark. By this means the company evaded the application of the rules governing the formation of companies which in Denmark are more restrictive as regards the paying up of a minimum share capital. As imposed by the Treaty, the Court had to accept this. However, the Court – with all 15 judges present – added a safety valve against any abuse of EC law by stating in the second part of the ruling, as follows:

“That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards

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Finnish company in Saudi-Arabia. The Finnish collective agreement of building sector covered also works carried out abroad by workers posted from Finland.

private or public creditors established in the territory of the Member State concerned.”<sup>108</sup>

I would highlight that the lack of enforceability in third countries on the one hand and the close connection, even a possible joint responsibility, between the transferor and transferee may lead to a search for guidance in cases like *Centros*. Its labour law angle is that the case deals with share capital of a company that is meant to protect both public and private creditors of the company. Employees are also in the potential position of private creditors with their pecuniary claims on severance payments, notice payments, compensations for information and consultation infringements etc. However, I close cases of type (ii) with these short remarks.

### 3.3. Type (i), Intra-Community (EC/EEA) Transfers

The effects of transfers under type (i) are complicated. I will consider it from a strictly legal angle and omit any references to any practices and policies e.g. in inducing investments. The cases may also be rather complicated. They might involve a European Company (*Societas Europaea* (SE)) but I will not consider this feature at present. Equally, they might include collective agreements of variable categories. They might include also the joint consideration of the Collective Redundancy Directive and the Transfer Directive. There might be European Works Councils (EWC) involved or labour-intensive temporary agencies.

I shall add one structural aspect under my type (i). Namely, in practice mergers may imply a concentration covering more than two Member States but ‘collecting’ the workers and employees by a cross-cross-cross-border transfer into one (or two or three) Member State(s). This can happen in the modern world e.g. when some expert removes immediately following a removal of IPRs (like a watch dog lawyer). Is it a part of a ‘business’ transferred?

The transferor and transferee are not entitled to dismiss by virtue of the transfer. However, an important issue is whether both the transferor and transferee are, in the cross-border context, entitled to resort to Article 4(1), second sentence, hence to the proviso:

‘This provision shall not stand in the way of dismissals that may take place for *economic*, technical or organisational reasons entailing changes in the workforce’ (italics by JH).

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<sup>108</sup> Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, judgment by the full Court, [1999] ECR I-1459. The judgment created a vivid debate on theories concerning the company law applicable; see e.g. the papers for a Symposium on “The Centros Decision of the European Court of Justice and Its Consequences”, April 28-29, 2000, King’s College, London. In judgment *Inspire Art Ltd*, C-167/01 [2003] ECR I-1155, the full Court 30.9.2003 again confirmed that freedom of establishment was justified to invoke, ‘*save where the existence of an abuse is established on a case-by-case basis*’; see the end of the second ruling.

The wording seems to imply that each of them could dismiss workers for ETO reasons in the same way that they could reduce any other expense of operation. In this context I recall that judgment *Dethier*<sup>109</sup> recognised the use of ETO dismissals for both parties. I note two types of problems.

First, this proviso also applies ‘economic’ as a notion under this ‘undertaking’ in a cross-border move. I maintain that it also raises a question about the meaning of economic in this *cross-border* context. I refer to the distinction made by *Pélissier* between *qualitatively* economic (‘cause économique *qualificative*’) and *justificatively* economic (‘cause économique *justificative*’) dismissal reasons.<sup>110</sup> The former means to qualify the dismissal, to rank it in the category of ‘dismissal by economic reasons’ and to apply consequently all the rules adhering to dismissals for economic reasons: procedure, priority in re-engagement, right to re-training. It differs from a justificative reason if it is analysed as a simple causal mark without any research on its exactitude or reliability. On the contrary, the *justificatively* economic reason allows the court to determine whether the dismissal is justified, i.e. compatible with the law.<sup>111</sup> It also requires a double causal link to be established so as to justify a dismissal: (i) between abolition or modification of jobs and the dismissal, as well as (ii) between the abolition and modification of jobs and the economic difficulties of a company.<sup>112</sup> It also implies an in-depth study of whether the grounds invoked by the employer are of a real and serious character (‘caractère réel et sérieux’). Hence, while the wording of Article 4(1) seems to imply ambiguously that the employer has rather free hands, at least the French doctrine (and jurisdiction, says *Pélissier*) guides one to read the provision as ‘justificatively economic’. The French and German expressions seem to lead to the same conclusion: ‘changements sur le plan de l’emploi’ and ‘Gründen, die Änderungen im Bereich der Beschäftigung mit sich bringen.’ It remains to see what was meant by travaux préparatoires.

The Commission’s proposal of 1975 denotes in its draft Article 6(1) that ‘A transferor or transferee may dismiss employees on the occasion of a transfer ... only for pressing business reasons.’ The explanatory memorandum states that ‘economic common sense’ dictated this. This was said to be of importance e.g. in relation to a transfer to be carried out ‘to restore health to economically weak undertakings.’ Dismissals ‘may even prove unavoidable.’ Further on, any definition of ‘pressing business reason’ was left for the Member States, *but*, along with the purpose of the Directive,

‘... reliance on pressing business reasons to carry out dismissals is possible only if all possible solutions within the undertakings such as transfers to

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<sup>109</sup> See footnote 82, *supra*.

<sup>110</sup> Referred to also by Gérard Lyon-Caen; see *Droit social*, mai 1995, p. 490.

<sup>111</sup> Jean Pélissier, *Chronique*, La cause économique du licenciement, *Revue de Jurisprudence Sociale*, 8-9/92, p. 527.

<sup>112</sup> *Ibid*, p. 531.

another acceptable job, measures for readjustment and retraining have first been exhausted.’<sup>113</sup>

This clearly means that the Directive did not mean to give a free hand for dismissals but entrenched itself behind the justificatively economic reasons. However, the rationale for the provision, which corresponds to the present Article 4(1) TD without spelling out the ‘pressing business reasons’ but only ETO reasons, was to enact a ‘uniform’ provision to cover the situation where some Member States accepted dismissals due to the transfer and some did not. As confusing as this may be, I see that the purpose was *Pélissier’s justificatively economic*. This explanation is also in line with the protective purpose of the Directive in relation to which dismissing with ETO reasons obviously was intended to be an exception liable to a narrow interpretation.

Second, judgment *Dethier* is there, stating that the transferor is entitled to make ETO dismissals. It merits a deeper insight.

### 3.3.1. Case *Dethier*; Further Basic Questions

I will pass over the issue whether the (groups of) companies really diminish their manpower so as to get a better price from the transferee. However, at least in the context of a cross-border merger the parties may address each other with demands and agreements as to the level of manpower in a forthcoming *joint* undertaking. In such a case both are *de facto* in a position of transferor and transferee, at least if such a merger is viewed on the basis of the transfer as a whole! With this I mean that, in such a context, at a level of a subsidiary a simple closing down of a factory may take place, by transferring or even breaking up the machines etc., without any formal *transfer agreement* concerning *that* factory. This might justify maintaining that *Dethier* is not enough to settle at least cross-border mergers, if not at all the cross-border cases. On the other hand, *Dethier* – in the second sentence of its second ruling – operates with ‘... employees unlawfully dismissed by the transferor *shortly before*...’ the transfer. The issue is that this time factor obviously has to be reassessed at least for larger corporate restructuring operations. They may take up to a year within a complex of agreements at least allegedly falling under the Directive. A further relevant aspect is that such a complex cross-border (European) merger may depend on the approval of the Commission under the Merger Regulation No 137/2004. Besides, the approval may be conditioned and further affect the time factor.

But also the *definition of a transfer* looks inaccurate in this kind of a (corporate) merger context where a joint venture is established. The definition (in Article 1(1)(b)) now operates with the notion of ‘an economic entity *which retains its identity*, meaning an organised grouping of resources’ (italics by JH).

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<sup>113</sup> See p. 9 of the explanatory memorandum in document COM (75) 429 final.

E.g. a daughter company located in Member State A can be transformed into a reseller and its manufacturing activities be relocated into Member State B. There they can be transferred to one, two or more factories<sup>114</sup> kept within a joint venture. Some parts of the production concerned in the new joint venture may be sold out as a part of the business plan. In a nutshell, the manufacturing activities can be *absorbed* to new entities abroad. My thesis is that the definition in Article 1(1)(b) does not cover this kind of absorption appropriately.

As such, the crucial paragraphs 36 and 37 of *Dethier* read, as follows:

36 Accordingly, inasmuch as Article 4(1) precludes dismissals from taking place solely by reason of the transfer, it does not restrict the power of the transferor any more than that of the transferee to effect dismissals for the reasons which it allows.

37 The answer to the first part of the second question referred for a preliminary ruling must therefore be that, on a proper construction of Article 4(1) of the Directive, both the transferor and the transferee may dismiss employees for economic, technical or organisational reasons.

A natural preliminary remark is that *Dethier* was delivered in 1998 on the traditional path of case law. In addition, a small Chamber delivered it, obviously not encountering any elementary cross-border questions that needed to be answered. Anyway, it includes, in paragraph 36, the idea that Article 4(1) does not restrict the transferor *any more* than the transferee. This might become important in a situation where the dismissal protection is not equal in the Member States concerned. One might thus defend an interpretation that a restriction imposed on the transferee could be enlarged to cover also the transferor. A strong argument against the transferor dismissing for ETO reasons is the fact that dismissing for those reasons implies a stock-taking on the future need of manpower, which, at least outside winding-up and liquidation cases, is by definition a task or obligation of the transferee. In joint ventures they act together, of course. To say more would require a complete CILFIT-test to be done on Article 4(1), second sentence. Besides, also this *Dethier* context may imply collective agreements via manpower clauses as in the case of several German multinational groups in 2004 (Volkswagen, Siemens etc.). This means that the notion of a collective agreement becomes this way, too, exposed to a CILFIT and Albany-test<sup>115</sup> in this new cross-border context.

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<sup>114</sup> Besides, such relocation can be done – in a highly sophisticated production – in a relay stile, meaning that the production flow is not interrupted.

<sup>115</sup> See especially paragraph 60 of Albany that declares the effective and consistent interpretation of the provisions of the Treaty as a whole. On this, see Chapter II, Section 2.6, especially footnote 188, *infra*.

There is also a link to the debate launched by *Gérard Lyon-Caen* on potentially looser requirements for multinational companies.<sup>116</sup> It seems, however, that it is not feasible to set up in a consistent manner a separate threshold for multinational companies because it would just create a new battlefield concerning the contents of *such a notion*. If *Dethier* is to be reconsidered in the cross-border context, it seems that only the cross-border effect itself may serve as a yardstick. Another issue is that obviously a merger (where the employer changes) as such would be a possible yardstick, while one has to see that a European merger does not necessarily mean realising a formal merger at national level concerning every entity covered. However, I take the liberty to assume regarding this issue that today the Chamber would refer a cross-border case to a plenum.

### 3.4. Applicable Law

It seems appropriate to reason by following the traditional path of evolution in cases without doubt within the Transfer Directive, evolution as *de facto* dominated by the Court. In so doing the applicable law etc. consequences for the workers, *sensu lato*, of the transfer are natural ones; the pension rights may cause, as to applicable law, perhaps a problem *sui generis* when the cross-border aspect is added. I do not claim it is at the end of the day so it is one classical issue to be put under this cross-border test called ‘Amalgamated TD International’ (ATDI). However, I will set aside the Rome Convention on applicable law, as well the relevant case law.<sup>117</sup> A strong presumption is that *lex loci laboris* prevails. On that basis, I will try to present some case-related aspects.

Following the traditional path of interpreting the Transfer Directive, the applicable law would obviously change with the transfer itself although the Directive is silent on this point. This could mean e.g. in the case of workers transferred from Finland to Germany that they logically come under the German dismissal rules. The special regulation in Germany of course is § BGB 613a, with an individual *Klagerecht* (right to complaint and oppose, at least in theory, a transfer), often leading to individual agreements with high severance payments. But does enjoying such a right require that the worker or employee really use his *right* to remove? While it is his right, it is difficult to reason that it would turn out to be also his obligation by an EC law provision that is meant to *protect* him! This is of practical importance e.g. in a case where the restructuring implies a cross-border transfer of type (i) but the works in practice still continue for quite a time in a plant to be transferred (closing down, continuing for a time the customers’ order etc.) The question is whether the *lex loci laboris* really changes if the workers do

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<sup>116</sup> See section 2.1.2. *supra*.

<sup>117</sup> Malmberg (*SvJT* 2004/4, p. 803) refers – at employees removing along the transfer – to cases C-383/95 *Rutten*, [1997] ECR I-57, paragraph 18; C-125/92 *Mulox*, [1993] ECR I-4075, and C-37/00 *Weber*, [2002] ECR I-2013, paragraphs 53 and 54.

not remove in practice as most often happens. At least if they claim to be removed but are dismissed by the transferor shortly before the transfer, it might be justified to give them the possibility of invoking the law binding the transferee.

One could also consider a transfer the other way round, i.e. imagining relocating a factory from Germany to Finland. The background is that dismissal protection is in Germany essentially stronger than in Finland, although the German system relies a lot on practical agreements and a well established practice, courts included. However, what would then be the implications for those Germans removing, and for those not doing so? For Germans removing, the traditional logic of the Directive seems to change the law applicable immediately, always, of course, subject to Article 3(3) as to terms and conditions in the collective agreement concerned. I will put 3(3) aside now. Anyway, the traditional broad line might be for Germans removing to Finland that they immediately end up under Finnish dismissal rules which, as to severance pay in law, include nothing (and the practice is quite fragmentary).<sup>118</sup> What happens to those remaining in Germany? Does the law applicable to them change immediately by the transfer? I recall that so far the case law, contestable as such in this new framework, recognises the right of the transferor to resort to ETO dismissals. There are of course strong reasons to claim that for all of those remaining in their country, whether continuing some close-down works or not, the law applicable does not change, the reason being that they do not remove; they keep their locus. But there should be also at least a safety valve in the interpretation of *the rights and obligations transferred* meaning that the employees remove with their statutory dismissal protection if it is higher than in the receiving Member State. A further justification for this might be in Article 4(2) TD that confirms how, in cases with 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 employment relationship.

A further source for legal exercises under applicable law comes from the optional joint liability under Article 3(1). This, too, inevitably leads one to look at the implementation of Directives 77/187, 98/50 and 01/23.

### 3.5. Concluding Remarks

If I try to conclude the approach that seems necessary, it might require some further preliminary remarks. First, the Transfer Directive's evolutionary path is something we cannot change. Deriving from this, the classical Transfer Directive analysis should be continued in this new framework of Amalgamated TD International (ATDI). There are many further questions. What are finally the rights and obligations to be transferred? What happens e.g. to the right to strike in this

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<sup>118</sup> Anticipating counter-arguments I denote that periods of notice are not essentially longer in Finland than in Germany.

context, which is enshrined in and would get its constitutional guarantee in the Treaty establishing a Constitution for EU?

But I still feel that this ‘classical TD path’ in a new framework is not enough. An effective and consistent interpretation of the provisions of the Treaty as a whole requires more. It strongly implies a social dimension, even at the level of fundamental rights, in a cross-border context, in relation to the fundamental economic freedoms. Amalgamated TD International requires one to think from a new perspective even concerning some fundamental notions applicable to the Internal Market, like ‘undertaking’ (or business, part of business etc.). There is no definition in the Treaty for an undertaking, and the problem continues in the Directive. A joint reconsideration of ‘economic’ is a must when reading Article 4 TD in this new ATDI framework. In so doing I dare to recommend as a tool the distinction made by *Pélissier* (by some others, too, in other countries<sup>119</sup>) with *qualitatively* economic (*économique qualitative*) and *justificatively* economic (*économique justificative*). Furthermore, given the example of labour-intensive companies, it seems necessary even to think about the relationship between the Transfer Directive and posting of workers within the framework of free provision of services. A particular source of problems may lie in the draft Directive on the Provision of Services.<sup>120</sup> What is the difference between a TD transfer and a case in which workers are posted to another Member State, formally temporarily but in practice on a permanent basis? Another pinpoint means that a labour-intensive company is subject to a cross-border transfer; consider the effect of putting e.g. the German special protection afforded by § BGB 613a into this context; is there a risk that the protective effect of ATDI would be undermined by quasi-postings? Finally I recall the lot of collective agreements, right to strike and EWCs in this context. Research is needed, indeed, bearing in mind how corporate cross-border transfers may imply a large economic interest but the multinational groups of companies must be subject to substantially the same rules as SMEs.

#### 4. Closing the Historical Circle

As shown above, the essential contents, both the merits and the deficiencies, of the Collective Redundancy and Transfer of Undertakings (Acquired Rights) Directive do stem from and rely on the Single Market context of the 1970s. The Single European Act itself did not change a comma in their wordings. On the other hand, the market philosophy introduced corporate responsibility in information, consultation and negotiation with a view to reach an agreement with employees’ representatives, first in 1992 in the Redundancy Directive and then in

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<sup>119</sup> In this sense, see the publication in footnote 58, *supra*.

<sup>120</sup> See COM (2004) 2. As to its implications to employment issues, see a memorandum of Professor Niklas Bruun on the public hearing of the European Parliament 11.11.2004; [www.europarl.eu.int](http://www.europarl.eu.int).

1998 in the Transfer Directive. An essential purpose was to fill a legal loophole regarding the *cross-border* corporate responsibility of appropriate procedure,<sup>121</sup> however, without establishing a direct possibility of launching law suits against a controlling undertaking abroad.<sup>122</sup> A fact is that these amendments did not create any cross-border debate on the substantive provisions of these directives. These amendments were (and still are) based on the 1989 Community Charter of Fundamental Rights of Workers, referred to by the respective Preambles.

The Maastricht Social Policy Agreement had only an indirect influence on these directives, notably by giving the legal basis for the EWC Directive. The Treaty of Amsterdam enshrined the new Social Chapter in the Treaty by incorporating the Maastricht Agreement. The Nice Treaty only gave rise to the tiny possibility of enacting on dismissals by qualified majority, requiring a prior unanimous decision on the procedure (Article 137(3) EC, last sentence). Article 136 EC incorporated the old Article 117 E(E)C. In this sense, it is somewhat surprising that the Transfer Directive, as codified by the Directive 01/23/EC, thus under the Treaty of Amsterdam, no longer refers to social upwards harmonisation, as the original Directive of 1977 did in its Preamble's last 'whereas', as follows:

‘Whereas it is therefore necessary to promote the approximation of laws in this field while maintaining the improvement described in Article 117 of the Treaty,’

However, this link to upward harmonisation obviously is within reach by relying on the Treaty as a whole. But literally, the Transfer Directive is now without its formal tie to the Social Chapter. In this sense one might maintain that the Transfer Directive is now even more than before exposed to the market philosophy while it is substantively essentially stronger than the Collective Redundancy Directive. The paradox is that the latter, as codified by directive 98/59/EC still includes this tie to the Social Chapter, as follows:

‘(7) Whereas this approximation must therefore be promoted while the improvement is being maintained within the meaning of Article 117 of the Treaty;’

It is not my purpose to exaggerate the significance of these differences and this paradox; they rather might reveal something about the legislative process under the flag of Social Europe! I shall not expose them to a ‘what, when and why’ test in this paper. However, the letter of the EU Constitution would not change the position and legal landscape regarding these directives. It is another story completely what an effective and consistent interpretation of the Constitution might be one day. In the meantime, it is fair to point out that the Collective Redundancy

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<sup>121</sup> See the Commission's Action Programme of 1989, as quoted by Bercusson, p. 230.

<sup>122</sup> See the Commission's Explanatory Memorandum, as quoted by Bercusson, p. 232.

Directive is blighted by essential shortcomings while the Transfer of Undertakings (Acquired Rights) Directive is obviously the strongest and most penetrating element in the legal structure that we already partially may call European Labour Law.

# Chapter II

## 1. Social and Economic in EC Law; Pyramid (Hierarchy) Thinking

In his essay *Converse Pyramids and the EU Social Constitution*<sup>123</sup> Professor Barry Fitzpatrick has made a remarkable effort to conceptualise the status of *social law* in the EU's legal order. It was written just before the adoption of the EU Charter of Fundamental Rights in 2000. It is worth discussing because it represents a way of thinking about the EU from many angles. It is not, however, easy going; his 21 pages come with 142 footnotes.

These converse pyramids need to be read as a time-related product of thinking, and, in the end, *Fitzpatrick*, after having reasoned especially on gender equality, addresses first the (even 'revolutionary') possibilities included in Article 13 EC. Second, he hints that the EU Charter of Fundamental Rights might alter fundamentally the focus of multi-level governance on social policy issues. 'This converse pyramid hypothesis need not be deterministic.'<sup>124</sup> However, the Charter did not alter the division of competences between the Community and Member States, not even as incorporated in the Constitutional Treaty. His pyramids reflect 'stone work' (like statues) for *acquis communautaire for the period* from Rome 1957 to (post-)Amsterdam 1997. I will take the liberty to present and analyse this pyramid thinking, first without referring to arguments now present in the EU Charter of Fundamental Rights and draft Constitutional Treaty.

### 1.1. Presenting Pyramid Thinking

Pyramid thinking is based upon the dominance of the integrative interplay between national and Community competence, Member States striving to retain competence over areas central to their own national hierarchies (or pyramids) of values. Without denying theories of multi-level governance within the EU, Fitzpatrick holds that the competences, as these "limited fields" have expanded, partly by use of Article 308 EC but primarily through Treaty amendments, can be presented as a straightforward spectrum, as follows:

"a continuum between pure intergovernmental politics at the one end of the spectrum and supranational politics at the other ... It is therefore perfectly

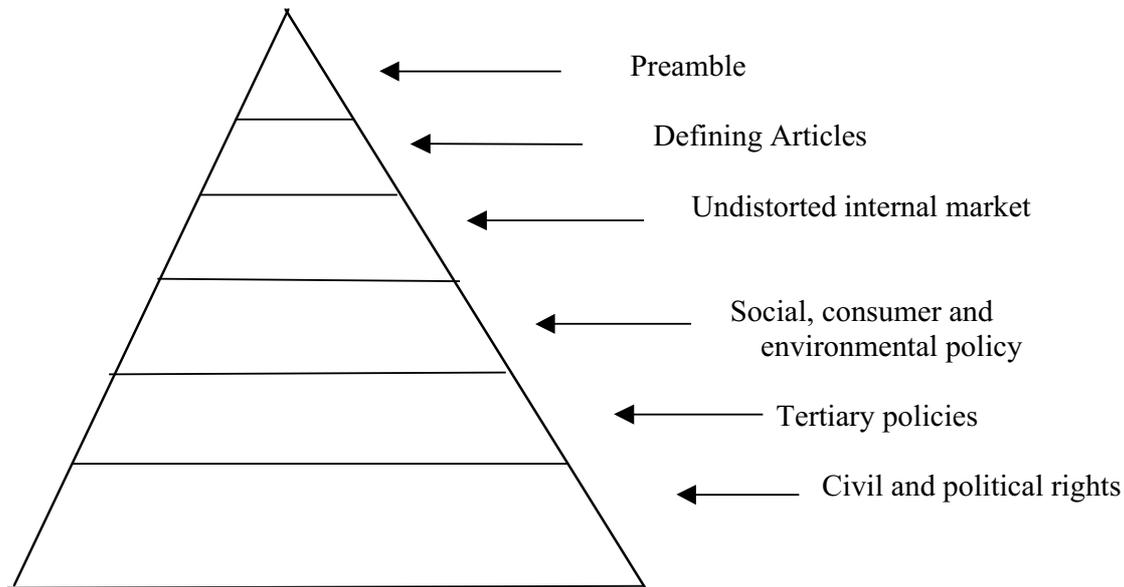
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<sup>123</sup> In Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, p. 303-324. (Fitzpatrick).

<sup>124</sup> *Ibid.*, p. 324.

possible for different areas of Community policy to be located at different points along the spectrum”.<sup>125</sup>

In pyramid thinking this spectrum is essentially hierarchical, which Fitzpatrick then epitomises as a pyramidal structure of the EC Treaty:



**Figure 1.** EC Treaty (Fitzpatrick 2000, p. 305).

As to the apex (the Preamble), *Fitzpatrick* notes the laudable aspirations such as “an ever closer union among the peoples of Europe”, and most notably for social lawyers, “the essential objective of their efforts the constant improvement of the living and working conditions of their peoples”.<sup>126</sup> Further on, he notes how the European Court has “on numerous occasions” treated this originally obviously “stratospheric” Preamble “as an overarching set of defining Community aspirations”.<sup>127</sup> He then refers to the *economic* aspirations of “steady expansion”, “balanced trade and fair competition” and “unity of their economies” “with the

<sup>125</sup> *Ibid.*, p. 305. Fitzpatrick refers 8in his footnote n. 9) to P Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, in P Craig and G De Búrca (eds.), *The Evolution of EU Law* (Oxford, University Press, 1999), 1-54, at 21. On behalf of Paul Craig I can just regret that Fitzpatrick manages to hint that it would really be Craig who has come up with the ‘mathematics’ concerned. In reality they were political scientists A. Stone Sweet and W. Sandholtz. They had written ‘European Integration and Supranational Governance’ in (1997) 4 *JEPP* to which Craig refers to. It would, therefore, be even justified to nickname this spectrum as a ‘Fitzpatrick constant’. Craig well presents on the spot concerned the thinking within political science BUT he does not, of course not, try to smuggle this kind of mathematics into a constitutional reasoning on European law.

<sup>126</sup> First and third recitals of the Preamble.

<sup>127</sup> Fitzpatrick refers at this point only to case 43/75 *Defrenne v. Sabena* [1976] ECR 455, where, in para. 10, the Court invoked the third recital ‘to justify the social objective’ of Article 141 [ex 119] EC. Fitzpatrick, p. 305, footnote 13.

sound of which the social objectives resonate”.<sup>128</sup> This finally and still reflects, “despite a change in nomenclature, an overwhelmingly economic Treaty and hence a hierarchy of norms within which economic objectives take priority.”<sup>129</sup>

For me, this is the core of rigid pyramid thinking in the EU context. Economic leads the tango, social tries to follow. We’ll see.

In the ‘defining’ or ‘opening’ Articles (2 and 3) of the EC Treaty *Fitzpatrick* includes the minor amendments of Maastricht and Amsterdam,<sup>130</sup> followed by the enshrining of European citizenship (Articles 17-22 EC) and the new Treaty base for legislation against discrimination in Article 13 EC. These developments reflected, no doubt, ‘at least a cosmetic shift of emphasis away from a purely economic pyramid but without altering the economic focus of these “apex Articles”.’<sup>131</sup>

Further on in the European economic constitution, the top substantive layer, logically, concerns the creation of an undistorted internal market. The *fundamental* market freedoms are followed by essential ancillary policies such as agricultural and transport policy, and nowadays by the EMU, vital to the ultimate achievement of an undistorted internal market. Only after these core principles have been stated is attention ‘diverted’ to ‘secondary, “middle layer”’ issues such as social policy. The ambivalence of the EU towards social policy is highlighted by the absence, until Amsterdam, of an effective Treaty base for a broad social legislation that could be enacted by qualified majority voting (QMV). Further on, the negative integration effects triggered (often referred to as “spill-over”) environmental and consumer policy. They are both now striving for positive integrationist standards.

As to social policy in the middle layer of the hierarchy, it belongs there because it was originally included in the Treaty. Despite this and the ‘more extensive Treaty bases now available’, Community social legislation seems to have been ‘rarely (underlining here) motivated by internal market spill-over.’ Exclusion of the rights and interests of employed persons from QMV under Article 95 EC contributed to this lack of “spill-over”. Finally, internal market issues retain the potential to create such spill-over controversies in the future, as evidence of which *Fitzpatrick* refers to case *Albany*, a ‘clash between competition policy and the right to free collective bargaining’.<sup>132</sup>

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<sup>128</sup> Fourth and fifth recitals of the Preamble.

<sup>129</sup> *Fitzpatrick*, p. 306.

<sup>130</sup> Maastricht added ‘high level of employment and of social protection’ in Article 2 EC. Amsterdam refined these further, in adding ‘equality between men and women, ... [and] a high degree of competitiveness and convergence of economic performance.’

<sup>131</sup> *Fitzpatrick*, p. 306.

<sup>132</sup> *Ibid.*, p. 307. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* is case C-67/96 [1999] ECR I-5751, judgement of the Court in plenum of 21.9.1999. As to the judgment in general, see Bruun and Hellsten (eds.), *Collective Agreements and Competition Law in the EU*, DJØF 2001 (Bruun and Hellsten). *Albany* and its sister cases *Brentjens*, C-

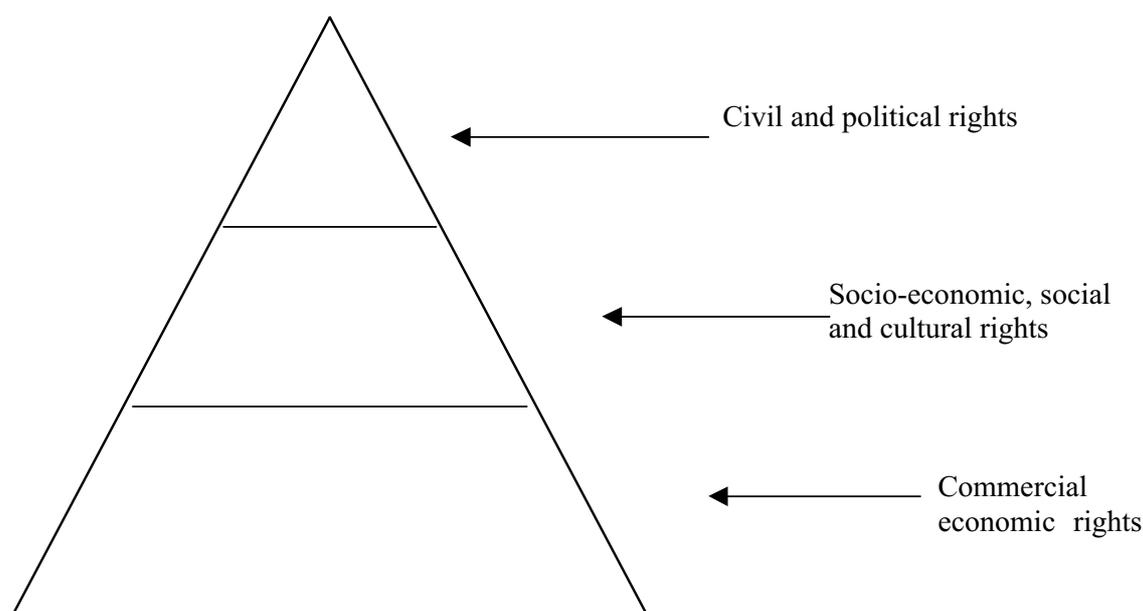
Tertiary policies (economic and social cohesion, R&D, education, vocational training and youth), falling largely out of any harmonisation, have not challenged the economic core of the pyramid itself. Regarding civil and political rights Fitzpatrick refers to the UN Covenants that do not include any commercial rights.

Finally, *Fitzpatrick* recounts the well-known deficiencies in civil and political rights while recognising the progress made. However, his conclusion is that

‘...only in the “top level” of the EU pyramid, within the scope of the internal market, [...] the EU legal system achieves a level of comprehensiveness and coherence which justifies the designation of “constitution”. Since the earliest days of the European Court, it is this economic pyramid, a European economic constitution, which takes precedence over a subsequent, inconsistent national law.’<sup>133</sup>

### 1.1.1. A Politico-Socio-Economic/Citizenship Pyramid

As a theoretical but simultaneously traditional example of a constitution *Fitzpatrick* presents a ‘citizenship pyramid’ that is the converse of the EU structure:



**Figure 2.** A citizenship pyramid (Fitzpatrick 2000).

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115-117/97, and *Drijvende Bokken*, C-218/97, dealt with a single sectoral pension fund – each running a supplementary occupational pension scheme established by a sectoral collective agreement that had been declared binding *erga omnes*. This meant that every worker in the three sectors concerned had to be affiliated to the sector’s fund unless the fund itself granted an exemption. The companies concerned wanted to dispense with the compulsory affiliation by arranging, according to them, similar or better pension benefits for a lower price outside the fund. They invoked the EC competition rules (Article 81 [ex 85] EC).

<sup>133</sup> *Ibid.*, p. 309. Underlining added.

With the citizenship pyramid as a mirror, *Fitzpatrick* maintains that

‘Both within a grand sweep through the EC Treaty, and but also within the minutiae of it, the EU’s economic pyramid [i.e. EC Treaty pyramid] is almost precisely the *converse* of ... a “traditional” constitutional structure.’<sup>134</sup>

However, *Fitzpatrick* sees social rights as a sandwich both in the middle of the Community pyramid and also in the interaction between these converse pyramids. Then comes the clue:

‘Despite some occasional willingness to use safety valves to protect significant national pyramidal values, “middle layer” areas of competence are intrinsically vulnerable to apparently superior EU economic values. Therefore social law values have to fight their way on to an internal market agenda, for example, in the recent conflict between competition policy and the right to free collective bargaining’<sup>135</sup> (emphasis JH).

The citation describes the deeds of the European Court of Justice. Within EC secondary legislation *Fitzpatrick* does not present such valves.

### 1.1.2. The EU Social Pyramid

As possible for every area of Community policy,<sup>136</sup> *Fitzpatrick* constructs the EU social pyramid, based upon the degree of EU competence:<sup>137</sup>

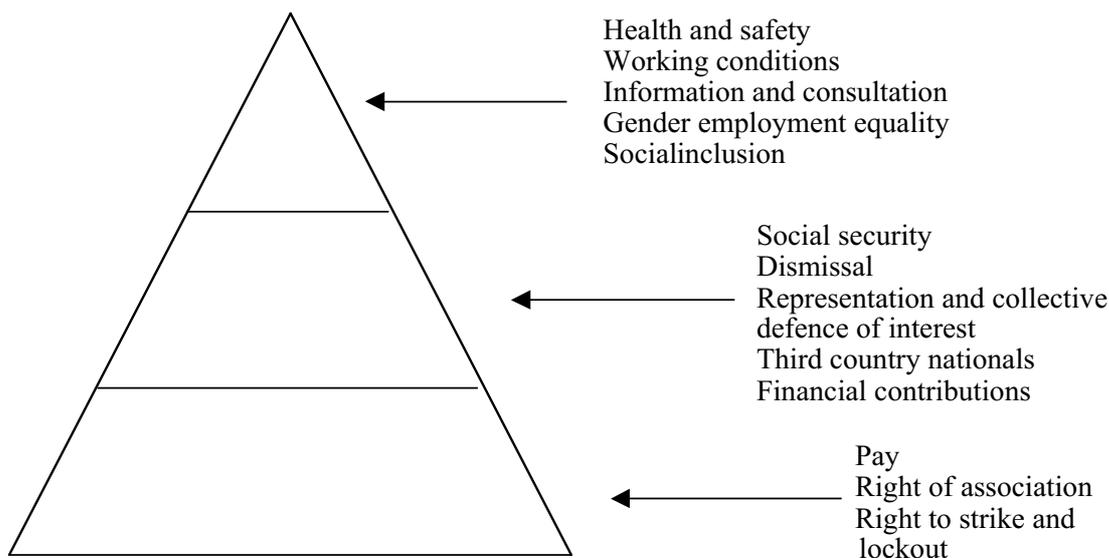
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<sup>134</sup> *Fitzpatrick*, p. 310; underlining added. I remind that there is no constitution in UK, drilling, that too, a visible hole into the pyramid thinking.

<sup>135</sup> *Ibid.*, p. 313. Underlining added. As to the conflict, *Fitzpatrick* refers – in a footnote – to case *Albany*, C-67/96.

<sup>136</sup> *Fitzpatrick* presents conversed pyramids also on sex equality. I leave them aside now.

<sup>137</sup> *Ibid.*, p. 315.



**Figure 3.** The EU social pyramid (Fitzpatrick 2000, p. 315).

*Fitzpatrick* asserts, what is certainly appropriate, that in a genuine social constitution freedom of association would top a social pyramid, followed by protection for other core aspects of collective labour law, for example the right to strike that is excluded from the Social Chapter of the Treaty. Also social security and dismissals would be high up there. It is possible to view the 1989 Community Charter of Fundamental Rights as an attempt to convert the pyramids but it includes flaws, is subject to subsidiarity and its potential as a source of law is limited by its uncertain status.<sup>138</sup> Anyway, *Fitzpatrick* recognises that some potential exists, next to the then draft EU Charter of fundamental Rights and social dialogue,<sup>139</sup> in Articles 136-145 EC irrespective of market integration, while neither a recognisable hierarchy of fundamental social rights nor a consistent and coherent system of social law has emerged from this process.

<sup>138</sup> Ibid, p. 315-6. Concerning the Charter's uncertain status *Fitzpatrick* refers to Advocate General Jacobs' opinion in *Albany*. I recall that the judgement did not follow – especially as to its grounds – the Opinion and the weaknesses counted by *Fitzpatrick* (and Jacobs). See section 2.6, *infra*.

<sup>139</sup> Ability of Social Dialogue to provide the momentum towards an EU social constitution *Fitzpatrick* calls as an under-developed aspect in his essay. Anyway, he holds the prospect brought by Social Dialogue as 'not sustained by its output since its inception'. Ibid, p. 323, footnote 134. *Fitzpatrick* refers to Brian Bercusson, "The European Community's Charter of Fundamental Social Rights of Workers", (1990) 53 MLR 624 at 641. This point of reference is simply too old. Bercusson at the latest in his 'European Labour Law' in 1996 presented social dialogue as a real prospect, and, besides, was able to refer to the very first European Framework Agreement on Parental Leave, reached on 7 November 1995, see pp. 501-570, especially the conclusion on pp. 569-70.

## 2. Criticizing Pyramid Thinking in General

The broad outline of pyramid thinking includes sound perceptions. The EU's social and labour law is generally still market-orientated, fragmented and thin as to collective rights. How much the Constitutional Treaty would change, is another story. However, this thinking or 'model' is liable to severe criticism, as well. Some graves and treasures remain undetected both deep in the EU pyramid and even on its face.

A meta-problem is that this conversed pyramid thinking is built upon the use of national legal orders not just as mirrors but even as building blocks of the EC pyramid – even up to *minutiae*, as Fitzpatrick puts it. It is not my contention that the EC/EU could be separated from its constituent Member States. It is a multi-layer system of governance. However, I would highlight that the EC/EU essentially is what the Member States have done *together* – without that being *a priori* the opposite (converse) to the national legal orders. Hence, more adequate than the *converse* pyramids as the flag of EC law, it seems to be taking the EC/EU as a *unique legal order*.<sup>140</sup> Paradigmatically, its own pyramid should be construed and assessed with this assertion as a basis, not its relation to any other legal order (creature). This unique legal order the President of European Court of Justice 1994-2003, Professor *Gil Carlos Rodríguez Iglesias* has described, as follows:

“So what really distinguishes the European Community from other international organisations is the extent and above all the intensity of the powers which the Treaties have conferred upon it. Thus the Treaty powers include wide legislative, executive and judicial powers in fields traditionally reserved as sovereign to the State, being within its exclusive jurisdiction.<sup>141</sup>

I support this assertion and note that the intensity of powers already gives rise to doubt about an overarching existence of converse pyramids, thus a couple of pyramids. There might be legal features with only one pyramid left.

A related problem is that the hierarchical nature of the EU's (economically dominated) pyramid is, in the converse pyramid thinking, rather directly derived

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<sup>140</sup> I rhetorically recall *Van Gend and Loos*, case 26/62 [1963] ECR 1, *Costa v. ENEL*, case 6/64 [1964] ECR 614 and the Court's Opinion 1/91, [1991] ECR I-6079, on the draft EEA Agreement. In the last mentioned the Court declared (as summarised in CELEX): '[...] the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.' Outside the Court one may, of course, add the prominent role of the Court itself to the essential characteristics of this new legal order.

<sup>141</sup> See 'The European Legal Order from a Constitutional Perspective'; lecture, Copenhagen, 26.4.1999.

from the (so far) division of competences between the Community and the Member States, as well as from the neo-functionalist integration theory followed by establishing (only) the European *Economic* Community. First, how come, if the pyramid theory was correct up to its apex, that for 51 years there was the European Coal and Steel Community with an essentially more social focus (policy) and competences than in the EC/EU? Second, while the ECSC, too, resulted from a market driven neo-functionalist integration (theory), the Commission of the ECSC was even competent to adopt recommendations (corresponding directives in the EEC) on minimum wages (Article 68 ECSC). What would have been the place of such (recommendations) directives in the EC pyramid? This special competence was, of course, deeply market-bound but it would have worked, if ever used, also in protecting the workers concerned. Anyway, my thesis is that (limited) competence does not as such determine the nature of the action very straightforwardly.

A third paradigmatic remark is that while construing pyramids (i.e. conceptualizing EC law) is meaningful as such, it easily leads one to lose sight of the evolutionary nature of EC law, up to the leading Articles of the Treaty, as we will see below. I rhetorically recall the lesson given by the Court in *CILFIT*. Next to linguistic diversity, legal concepts may have different meanings at national and Community level, and, most important now, ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.<sup>142</sup>

A structural remark is that for unknown reasons *Fitzpatrick* does not count the enshrinement of ‘policy in the social sphere’ in Article 3(i) [now 3(j)] EC by the Maastricht Treaty while he clearly uses the expression ‘opening Articles’, hence, covering also Article 3. We’ll find Article 3(j) EC later in case *Albany*. Equally, what *Fitzpatrick* doesn’t express is Article 4(1) (ex 3a(1)) EC, inserted by Article G(4) TEU, that refers to common economic policy, internal market and, important here, to the principle of an open market economy with free competition. In any case it seems natural that the dominance of economic would rely on market economy. Anyway, I leave it open whether Article 4 EC belongs to *Fitzpatrick’s* ‘leading Articles’, and what its impact might be. Such court case doesn’t exist that I know.

While *Fitzpatrick* raises the evidential force of the converse pyramids up to *minutiae*,<sup>143</sup> criticism also on the same line has its place.

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<sup>142</sup> Case 283/81, paragraph 20, [1982] ECR 3415. As to *CILFIT* in relation to *Albany*, see footnote 188, *infra*.

<sup>143</sup> *Fitzpatrick*, p. 310. As a broader source of criticism I refer to the analysis of Miguel Poiares Maduro, ‘We the Court. The European Court of Justice and the European Economic Constitution’. Oxford, Hart Publishing, 1998. Maduro distinguishes – instead of any pyramids! –

## 2.1. EU's Social Pyramid

Some structural remarks preliminarily have their place here. First, the Treaty of Nice introduced the possibility to use QMV to 'middle layer' areas – except at social security – in case that the Council takes a prior unanimous decision thereof (Article 137(2), last sentence).

A paradigmatic problem is that the division of competence at social matters between the Community and the Member States is far from clear. A more serious issue is that the 'bottom layer' areas in Fitzpatrick's pyramid, i.e. pay, right of association, right to strike and lockout, may fall under EU competence. This is especially possible if the social partners at European level conclude an agreement upon them, and the Council transforms such agreement into EU law.<sup>144</sup>

The 'Fitzpatrick constant' (spectrum), leading to one point within a spectrum as describing the Community competence, is maybe the most illusory exactly at social policy. As *Kapteyn* and *van Themaat* put it, Article 3(j) EC on social policy 'offers no peg on which to hang anything about the nature of Community competence or over its scope.'<sup>145</sup> Other Treaty provisions do bring some clarity, of course, but even the European Convention noted how e.g. Article 137(5) EC does not exclusively define the community competence.<sup>146</sup> And, indeed, e.g. Part-Time Directive (97/81/EC) and Fixed-Term Directive (99/70/EC) do extend the non-discrimination principle to pay. As to e.g. freedom of association, our honourable Lord *Wedderburn* already in 1992 held that an EC law instrument thereof would be possible under Article 94 (ex 100) EC.<sup>147</sup> Further hooks invalidating the 'Fitzpatrick constant' are safety and health measures within the free movement of goods and the pay-related Posting Directive under free movement

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three ideal constitutional models in explaining Article 28 (ex 30) EC (the cornerstone provision of the free movement of goods): the centralised, the competitive and the decentralised models. Without sticking to any of these his conclusion is to claim further constitutionalism (i.e. in addition to a formal a constitution, that it anyway also requires). Besides, 'European integration challenges the legal monopoly of State and the hierarchical organisation of law (in which constitutional law is conceived as the "higher law")'. Moreover, 'competition among States' and 'competition among rules' challenge the supremacy of law, subject to market competition. All these require a new constitutional legal theory. *Ibid.*, p. 175. However, as an intermediate step Maduro has pointed out how the Maastricht Treaty stressed 'not only economic efficiency, but also social and redistributive values', calling for a broader concept of the European Economic Constitution and its relation to political values (far beyond anti-protectionism). *Ibid.*, p. 160 et seq.

<sup>144</sup> In general terms about this, see Jari Hellsten, *Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements*. Labour Policy Studies No. 259. Ministry of Labour, Helsinki 2004, Finland. III + 151.

<sup>145</sup> Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3. ed., Kluwer Int., p.1045.

<sup>146</sup> See paras 26-28, p. 14 of the Report of WG XI. Document CONV 516/1/03, REV. 1.

<sup>147</sup> Wedderburn of Charlton, Lord, *Freedom of Association and Community Protection. A Comparative Inquiry into Trade Union Rights in the Member States and into Need for Intervention at Community Level*. European Commission 1992 (stencil). See paragraph 35.1.

of services. I explain both, *infra*. In conclusion, much more precise than the ‘Fitzpatrick constant’, seems to me to be the assertion that if the Member States may reach a qualified majority on a social matter, they are also able to find the necessary EC competence.

*Fitzpatrick* denotes as a challenge the need to elevate the collective rights up to the top of the pyramid. That view is easy to share. And, in any case, the Constitutional Treaty would enshrine the right of association and the right to strike. It will be difficult, if not impossible to qualify them as ‘middle layer areas’ because they will be on an equal footing with the fundamental economic freedoms. The EU Charter of Fundamental Rights is a step in that direction. It will show up in one of my test cases of pyramid thinking, namely in that of Safety of Machinery.

However, I will start with equal pay and the free provision of services because *Fitzpatrick* himself used them as his test cases.

## 2.2. Equal Pay

Describing the overall lot of ‘social’ in the EU, *Fitzpatrick* refers to case *Defrenne II* as indicating how ‘the Court invoked the third recital of the EC Treaty Preamble to justify the social objective of Art. 119 EC.’<sup>148</sup> To be precise, the Court first declared (para. 8) the double aim of Article 119 EC: the need to protect against distortion of competition in those Member States with advanced equal pay policy (para. 9); invoking ‘social’ in the Treaty Preamble as follows (para. 10):

‘... [Article 119] forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.’

After noting how the Treaty founders accentuated this by situating the provision concerned into ‘a Chapter devoted to social policy’, and recapping the social progress marked by Article 117 EEC (para. 11), the resumption, essential in this ‘pyramidal analysis’ came in para. 12, as follows:

‘This double aim, which is *at once economic and social*, shows that the principle of equal pay forms part of the *foundations* of the Community’ (emphasis added).

The Court further recalled (para. 13) the proclamation to realise equal pay by the end of the first stage of the transitional period (enshrined in Article 119(1) EEC). However, the essential assessment is that the Community foundations were (and

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<sup>148</sup> Fitzpatrick, p. 305, footnote 13 referring to paragraph 10 of the judgement.

still are), at once economic and social. Besides, the social factor was granted precedence in this particular case and not just as a safety valve, but following a detected non-working of an internal market spill-over or non-harmonization. Another issue is whether equal pay regulation (of the EU) is seen as a huge political ‘safety sever’ (or Cinderella in the cruel internal market) that justifies the use of the word ‘overwhelmingly’ as qualifying the economic Treaty. However, equal pay in general terms does not fit into rigid pyramid thinking (with economic supremacy) while many details within the ‘equal pay developments’ after *Defrenne II* (and *Barber*) can be qualified as reflecting the dominance of economic over social (equal pay) as *Fitzpatrick* does.<sup>149</sup>

### 2.3. Free Provision of Services

As a means of safeguarding the pyramids, *Fitzpatrick* brings into the argument the free provision of services. His hammer is the case *Unborn Children*<sup>150</sup> in which the Court manifested the inexorable (and possibly too far-reaching) ability of the internal market law to ‘harass’ even highly cultural, religious and social areas of life; and in this case besides the enacted (in 1984) constitutional values, namely the ban on abortion, of Ireland. I agree with this harassment aspect in the pyramid thinking. However, the outcome (by the ECJ) in the case was twofold. The ECJ first concluded that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 50 of the Treaty. This illustrates the ability of ‘economic’ to cover in EC law nearly all forms of activity whatever the remuneration. However, the applicability of the internal market law in the end protected the right of the mother to get information about legal abortion abroad only if the clinics (the economic operators) concerned were involved in the distribution of the said information. The rest (ban on information on abortion by independent actors such as a student organisation) the ECJ left up to national law and thus set aside particularly the freedom of expression, guaranteed by Article 10 of the European Human Rights Convention. This was, in 1991, the Court’s back-door method of evading any direct challenge to the (national) values concerned. An intermediate step taken by the Court was to reframe the question of the national court so that instead of a person’s right to produce information the Court assessed such an alleged right of a student association. The link between the student association and the abortion clinics the Court simply found to be ‘too tenuous’ to fall under Article (ex) 59 of the Treaty. Thus, ‘the case can be interpreted as indicating that fundamental rights of Community law offer first and

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<sup>149</sup> Later in his essay, *Fitzpatrick* explains further developments within the gender equality. That is highly important as such but, however, doesn’t explain draws (like the concept of indirect discrimination) that do not fit in the rigid pyramid thinking.

<sup>150</sup> Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan* [1991] ECR I-4685.

foremost protection to what might be called “factors” of production, instead of individuals or non-profit student organisations.’<sup>151</sup> However, while the case illustrates very clearly the strong and often paradigmatic position of the ‘economic’ dimension in EC law, it does not prove to my mind anything regarding *employment* law.

I take the liberty to present another example within the field of free provision of services, namely the Posting of Workers Directive (96/71/EC). A straightforward application of the principle of economic dominance would mean that the host country of the posted workers would have to tolerate social dumping based on low wages. As case *Bond van Adverteerders and others v The Netherlands State* proves, *economic* aims cannot constitute grounds of public policy within the meaning of Article 46 [ex 56] of the Treaty,<sup>152</sup> thus grounds to restrict the freedom of cross-border provision of services. In contrast, it is, firstly, settled case law that the Member States are entitled to extend their minimum wages (set up either in law or collective agreements) to cover also workers posted from another Member State.<sup>153</sup> Thus, the Member States are *free* to combat economic social dumping, protecting, of course, at the same time the workers concerned. However, adopting a pyramidal way of thinking, this protection of workers, especially that of construction workers,<sup>154</sup> under internal market law and predominance of its economic values could perhaps be (again!) explained as just an example of a safety valve with which values high up in the national pyramids can be safeguarded. Yes or no, I will not pursue this due to the more graphic evidence brought by the Posting Directive.<sup>155</sup>

The directive has had, since 16 December 1999, one crucial effect. It means that the Member States *must* for all sectors extend their law-based minimum wages to posted workers, and, for the construction sector, also wages set up in certain mainly nation-wide collective agreements.

The Preamble of the Directive noted the double need for it: ‘(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.’

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<sup>151</sup> Tuomas Ojanen, *The European Way. The Structure of National Court Obligation Under EC Law*, Gummerus Kirjapaino Oy, Saarijärvi 1998, p. 321, fn. 507. On this judgment in critical sense see also e.g. Deirdre Curtin, *CMLRev.* 29: 585-603, 1992. In a similar case from Ireland, *Open Door and Dublin Well Woman v. Ireland*, The European Human Rights Court deemed that the ban on information violated the freedom of expression. Judgment of 29.10.1992, A-246A.

<sup>152</sup> Case 352/85 [1988] ECR 2085, para. 34.

<sup>153</sup> Cases 61-62/81 *Seco* [1982] ECR 223, para. 14; *Rush Portuguesa*, C-113/90, [1990] ECR I-1417, para. 18; C-43/93 *Vander Elst*, [1994] ECR I-3803, para. 23 and C-369 and 376/96, *Arblade* [1999] ECR I-8753, para. 41. The Court gave the judgments in *Seco*, *Vander Elst* and *Arblade* by sitting in plenum.

<sup>154</sup> See *Arblade*, para. 36.

<sup>155</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

Economic and social are together (cf. the double aim of equal pay in *Defrenne II*). Hence, the Directive transformed the earlier freedom of the Member States into an obligation in European law, thus an element in the EC pyramidal structure. By definition it combats an unlimited freedom to provide services and was, by that reason, also heavily opposed.<sup>156</sup> The Directive does not fit in to a rigid pyramidal thinking. It is also fully in line with Article 50(3) [ex 60(3)] of the very EC Treaty that subordinates free movement of services to the same conditions that national service providers have in the host country. That provision certainly is not any safety valve but, as an incorporated and structural factor, heavily opposes any straightforward pyramidal thinking with respect to economic dominance.

#### 2.4. Right to Strike<sup>157</sup>

What about the right to strike in this context? It is expressly guaranteed in or indirectly protected by several national constitutions. In the EU it was deduced from personnel regulations and also, in *Dansk Slagterier* of 1990, from the concept of a prudent businessman.<sup>158</sup> Thus, the basis was both somewhat artificial and fragile. A further point of reference, although of course not for the UK at that time, was the 1989 EU Charter of Fundamental Rights of Workers. With this thin history the Council adopted the so-called Monti-regulation in 1998.<sup>159</sup>

For the purposes of this reasoning it is necessary to recall the essential contents of the draft Regulation, as published by the Commission in January 1998. Namely, it first included a somewhat vague reference to fundamental rights (Article 1). Then, notably, its draft Article 2 contained the right of the Commission to *decide* on the legality of strike action blocking the cross-border trade:

‘Where the Commission establishes the existence in a Member State of obstacles within the meaning of Article 1, it shall address a *decision* to the

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<sup>156</sup> Examples of the ultra-liberal concept of freedom to provide services are also in the argumentation of companies in cases *Arblade*, C-369/96 (see footnote 153, *supra*), *Finalarte*, C-49/98, [2201] ECR I-7831, and *Portugaia*, C-164/01 [2002] ECR I-787. *Mutatis mutandis* the principal contractor in case *Wolff & Müller v. Pereira*, C-60/03, judgment 12.10.2004, nyr, invoked its constitutional right to carry on an occupation against its law-based liability to pay the national minimum wages as a guarantor to workers of its subcontractor.

<sup>157</sup> As to right to strike in EC law, see Tonia Nowitz, *International and European Protection of the Right to Strike*, Oxford University University Press 2003, especially p. 245-263. With essentially similar line but with more detailed contents PhD Olavi Sulkuinen explained the developments in protection of the right to strike in EC law in his article (in Finnish) ‘Ammattiyhdistysoikeudet Euroopan yhteisön oikeudessa’ (Trade Union Rights in EC Law). Työoikeudellisen yhdistyksen vuosikirja 1999-2000, p. 55-195.

<sup>158</sup> Case C-338/89 [1991] ECR I-2315.

<sup>159</sup> Officially: Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States.

Member State directing it to take the necessary and proportionate measures to remove the said obstacles, within a period which it shall fix'.<sup>160</sup>

If ever realised, this structure would have been a manifest example of the dominance of the economic factor (free movement of goods) over the social factor (the right to strike). But the Council finally adopted a completely different scheme: essentially an information structure, and respect of the national right to strike was proclaimed.<sup>161</sup> While the legal effect of the Regulation within the EC law pyramid is liable to different opinions, it in any case protects a core labour right and does not subordinate it to an economic dominance of the EC treaty pyramid à la Fitzpatrick, to an EC law proportionality test carried out by the Commission etc. A safety clause similar to that in the Monti-regulation is in the Preamble of the Posting Directive, stating that (Recital 22) 'Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions'.

A proper test case of the right to strike in EC law obviously looms in the High Court of London. There, a Finnish ship-owner Viking seeks, in a nutshell, an injunction against ITF and the Finnish Seamen's Union concerning any industrial action (even covering the cause of such an action) related to the planned re-flagging of MS Rosella in another Member State. The grounds are freedom to provide maritime transport services (EC Regulation 4055/86), free movement of workers (Article 39 EC) and freedom of establishment (Article 43 EC). Blueprints of both of the EU's constitutions, economic and social, will be on the desk of the Court, most likely finally in the ECJ.

In conclusion, the Monti Regulation (read together with its *travaux préparatoires*) does not fit into rigid pyramid thinking. If it (as the preamble clause in Posting Directive) is taken as a safety valve, it is remarkable that the regulation is part of EC secondary legislation, enacted by the Council comprising the representatives of the Member States (Posting Directive enacted in co-decision by the Parliament and Council). In the 'safety valve way of thinking' à la *Fitzpatrick* the role of the Court comes up in a misleading way, as if it would be the only body capable of construing these safety valves in the somewhat mystical European law.

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<sup>160</sup> OJ C10, 15.1.1998. Even the name of the draft instrument was telling: Proposal for a Council Regulation (EC) creating a mechanism whereby the Commission can intervene in order to remove certain obstacles to trade.

<sup>161</sup> Article 2 of the Regulation: This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.

## 2.5. Safety of Machinery

Before outlining the pyramid problem concerning safety of machinery I recall *Fitzpatrick's* thesis in its sharpest form: the fundamental economic freedoms of the undistorted internal market dominate over social values that are essentially national. Thus, at the level of this thesis, typically two sets of norms are present: EC norms and national norms. On the other hand, although safety and health tops *Fitzpatrick's* EU social pyramid, it is paradigmatically subordinated to economic freedom (here free movement of goods), in his EC Treaty pyramid. But I also want to highlight that *Fitzpatrick* has not written anything at all about machinery safety in his essay. I do it so as to test whether the pyramid way of thinking is capable of describing adequately such an important legal topic.

However, it is not always the case that when economic and social considerations clash the economic considerations arise from the EC and the social considerations arise from national law. Both the juxtaposed economic and social considerations may arise from EC law as well. Safety of machinery is a graphic illustration of this, and here I mean the safety of workers and employees using the machines, hence not as consumers. To illustrate this, I discuss only the so-called Machinery Directive (MD). Officially it is, as last amended, Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery. Except for one example, I need to take the liberty to pass over its practical application, as well any overall assessment on its effectiveness. It is better suited to safety specialists and I will only discuss how adequately the pyramid way of thinking explains the normative structure concerned.

MD sets the rules concerning the properties of the Machines. More precisely, according to its Article 1, MD applies to machinery and lays down the essential health and safety requirements therefore, as defined in its Annex I. These requirements are compulsory (see Recital 14) and rather simple in general terms. But as a whole, the MD is a remarkable set, almost like a virgin forest of rules. The Directive and its Annexes occupy 46 pages of the Official Journal.<sup>162</sup> One guide published by the Commission (DG Enterprise) is 241 pages long,<sup>163</sup> another one 266 pages.<sup>164</sup> This set of rules has Article 95 (ex 100a) EC as its legal base.

Article 95(3) EC requires that in making proposals for internal market legislation the Commission, concerning health, safety, environmental protection and consumer protection, will take as a base a *high level of protection*, taking account in particular of any new development based on scientific facts. Article 95(3) EC,

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<sup>162</sup> OJ L207, 23.7.1998.

<sup>163</sup> Community legislation on machinery: Comments on Directive 98/37/EC Luxembourg: Eur-Op, 1999-241 p.

<sup>164</sup> Machinery: Useful facts in relation to Directive 98/37/EC. Luxembourg: Eur-Op, 1999-266 p.

second subparagraph, equally requires that '[w]ithin their respective powers, the European Parliament and the Council will also seek to achieve this objective'. MD puts this into practice by stipulating in Article 2(1) how

'Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on the market and put into service *only if they do not endanger the health or safety of persons...*' (emphasis added).

This establishes the principle of risk prevention as the leading essential requirement. Annex I elaborates this requirement and prolongs it to cover, next to normal use of a machine, also uses 'which could reasonably be expected'.<sup>165</sup>

Hence, the requirement for a high level of health and safety is European law, as enacted for the internal market. The Preamble of the MD mentions the internal market twice:

'(2): Whereas the internal market consists of an area without internal frontiers within which the free movement of goods, persons, services and capital is guaranteed';

The Preamble thereafter (Recital (5)) denotes how the Member States are responsible for ensuring the health and safety, in particular, of workers, notably in relation to the risks arising out of the *use* of machinery. The seventh Recital refers to approximation of existing national health and safety provisions 'to ensure free movement in the market of machinery without lowering existing justified levels of protection in the Member States'. Otherwise the philosophy is to produce state-of-art machines; see Recital (14) and the essential safety requirements as specified in Annex I.<sup>166</sup>

Then comes the clue as to the purpose of the MD. Although the name of the instrument operates with *approximation* of the laws of the Member States, implying some space for national rules, the ninth Recital tells us what it is all about:

'(9) Whereas paragraphs 65 and 68 of the White Paper on the completion of the internal market, approved by the European Council in June 1985, provide for a new approach to legislative *harmonisation*; whereas, therefore, the *harmonisation* of laws in this case must be limited to those requirements necessary to satisfy the imperative and essential health and safety requirements relating to machinery; *whereas these requirements must*

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<sup>165</sup> Annex I, Essential Health and Safety Requirements, point 1.1.2(c).

<sup>166</sup> Envisaging criticism I note how Recital (14) refers also to taking account of economic requirements in applying the essential safety requirements. This is already fine-tuning debate. It reflects e.g. a fact that a minimal or just nominal improvement in health and safety may cost enormously and is therefore not feasible. At this fine-tuning level common sense is used in every Member State, as well as in the Commission. However, this debate doesn't invalidate the principle in Article 2(1): only safe products are allowed to the market.

*replace the relevant national provisions because they are essential*’ (emphasis added).

Hence, the MD harmonises. Although it is limited to essential health and safety requirements, it anyway harmonises. I recall that Article 95(4) EC leaves a tiny possibility for the Member States to notify national norms they want to retain after a harmonisation measure. It requires ‘major grounds’ referred to in Article 30 (ex 36) EC. Besides, Article 95(4), second subparagraph, leaves it up to the Commission to confirm such national rules, ‘after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.’ The grasp of the Community is quite perfect, as enacted by the Member States (unanimously, by the way).<sup>167</sup>

It is essential to note that this harmonisation measure (MD) has *de jure* and *de facto* replaced, with respect to the properties of machinery, not with respect to their use, national safety requirements, although national norms are required for its implementation and the EC measure is still a directive and not a regulation. Normally the national laws just repeat the essential safety requirements of the MD and set up the necessary administration and executive surveillance rules. This structure means that only machines fulfilling the (finally rather detailed) essential safety and health requirements are allowed onto the market, even if they would never become marketed in another Member States. Put the other way round, the Member States are (save exceptionally under Article 95(4) EC) not allowed to set up even higher safety requirements – higher than ‘high level’, as to the properties of machines. That is generally possible only with respect to minimum health and safety directives based on Article 137 (ex 118a) EC; see the ‘Use Directive’.<sup>168</sup> In MD, Article 2(2) discerningly notes the Member States’ possibility to lay down provisions for the *use* of machines, ‘provided that this does not mean that the machinery or safety components are modified in a way not specified in the Directive’.

However, and now finally comes the pyramid context: high level of health and safety of workers (the social factor) is a precondition for enjoying the fundamental economic freedom of a product (machinery) to be marketed both nationally and across borders. There is no longer any ‘typical’ converse pyramid structure of norms but only one single pyramid. Social and economic are so

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<sup>167</sup> For the purposes of this writing it is not needed to verify to what extent the Member States have tried or even succeeded in keeping their national safety requirements relating to machinery. I take it granted that they are few, not known for the European labour law audience and dealing with minor issues. Otherwise there would have been cases on MD in the ECJ. Searching among case titles by ‘machinery’ gives some cases but none under MD. That I know the pending case *AGM-COS.MET* is the first one referred to the ECJ under MD. See footnote 169, *infra*.

<sup>168</sup> Officially Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

much tied up that it is not meaningful to try to distinguish them. They are like one package. Equally, it does not seem very fruitful to attempt to distil any rigid, 'EC pyramidal' superiority for either of them. High level of safety is an absolute precondition for market access. And that covers the core of all industries, namely machines. Besides, the same harmonising structure concerns also Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment.

This harmonising structure is obviously difficult to conceive, at least with respect to a pending case in the ECJ, namely *AGM-COS .MET s.r.l. v. Finnish State and Tarmo Lehtinen* (hereinafter: *AGM-COS.MET*).<sup>169</sup> The district Court of Tampere, Finland, has made a reference for a preliminary ruling. The case includes a compensation claim by this Italian company, based upon some public statements of market inspector Lehtinen before the market surveillance decision by which a car lift, that is a machine covered by the MD, was accepted in cross-border trade. Market inspector Lehtinen had expressed safety concerns about it. Amongst others, one question (3 b)) implies also a reference to *national* safety rules as if they were relevant in the case. A special angle comes from the fact that the car lift belongs to the group of specifically risky machines with which even fatal accidents may occur because mechanics have to work under a heavy load, up to some 3,500 kg. The national court bound its *a priori* single relevant question (No.2) only to the MD, not to the Treaty.<sup>170, 171</sup> Another question too (No. 1)<sup>172</sup> concerning restrictions on trade will normally be answered in brief, due to

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<sup>169</sup> Case C-470/03. The questions subject to preliminary ruling are published in OJ C35, 7.2.2004. It is reachable via Internet, <[www.europa.eu.int](http://www.europa.eu.int)>.

<sup>170</sup> The national court asks whether a car lift (used in garages) is contrary to the essential safety requirements because 'in designing the structure account is not taken of the placing of the vehicle on the lift in either driving direction and the load calculations of each lifting arm are not done for the least favourable loading situation'. Being so, the lift was also designed and constructed deviating from the European CEN standard concerned. Indeed, the machine doesn't respect the principle of inherently safe machinery design and construction (Annex I, Essential Health and Safety Requirements, point 1.1.2(a)) and doesn't take account of any reasonably expectable use (Annex I, Essential Health and Safety Requirements, point 1.1.2(c)). An affirmative answer to the national court's question seems manifest.

<sup>171</sup> An *aberratio ictus* is in question No. 2, namely the reference to a *national* standard SFS EN 1493, as if the machine would have been manufactured – instead of Italy – in Finland, and as if this *national* standard would have some specific relevance in the case. In reality, harmonised *European* CEN standards show the state-of-art in technical sense and legally create, when complied with in designing and construction of a machine, a presumption of conformity with the essential health and safety requirements (see Article 5(2) MD). If a standard is not complied with, assessment of conformity is stricter (see Article 8(2) MD) but the same level of safety is required.

<sup>172</sup> Question 1 in the case presupposes that the public statements of the market inspector would be assessed under Articles 28 and 30 EC (concerning free movement of goods). This proves that the national (district) court doesn't know the relevant case law. If there is a harmonisation measure, alleged trade restrictions (or measures with equivalent effect) are assessed only under that harmonisation measure, not under Articles 28 and 30 EC. See judgments (by the Court in plenum) *Vanacker*, C-37/92 [1993] I-4749, paragraph 9, and *DaimlerChrysler*

the logic of these questions 1 and 2, whereas, consequently, the other questions, such as No. 3(a) dealing with proportionality and No. 4 with freedom of expression, will fall. Still, question 2 on the conformity of the lift with the essential safety and health requirements will normally lead to a positive answer (the lift does not conform) and, therefore, just repeating the existing case law concerning question 1: in case of harmonising EC law, alleged trade restrictions are assessed only under the harmonising law, not under Articles 28 and 30 EC.

However, this set of questions raises also a further question about the normative pyramid applicable in this case. Where is the pyramidal Apex this time? A further question is the possible role of proportionality in this context.

I see it as natural that in applying the MD to this case (i.e. answering question 2), the status in principle of protecting human health and life in relation to an economic freedom (free movement of goods) will be tackled in the Court's reasoning. In so doing, it seems natural to resort to the principle of high level of safety and health in Article 95(3) EC. Further on, a review of the establishment of the internal market in Article 3(c), social policy in Article 3(j) and high level of social protection in Article 2 EC would be no surprise. But the question is whether this shortlist is exhaustive and enough to derive or establish the principle that protecting human health and life is an honourable aim that is not subordinated to any proportionality test. This means that not the smallest fatal risk or even risk of injury is acceptable. I recall that, as such, both the overall philosophy behind the MD (only safe products are allowed to the market), as well as its wording in Article 2(1) fully justify a conclusion that the MD in itself is enough to exclude any proportionality test in applying the philosophy of the MD. Different semi-, quasi- or fully bureaucratic matters are, of course, in a different position. Equally, typing errors in instructions can be harmless and rectifiable or allowed by virtue of proportionality, but mistakes in instructions may lead to fatal accidents as well.

The proportionality principle is, however, worth a few more general remarks here. The Treaty on European Union in 1992 enshrined it in Article 5 (ex 3b) EC. This in formal terms seems to push it also into the EC normative pyramid of machinery safety. Literally it is (in Article 5 EC) only a sub-principle of subsidiarity. In case law it is, however, a rather over-arching principle.<sup>173</sup> Even

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*AG*, C-324/99 [2001] I-9897, paragraph 32. However, also in another pending case subject to preliminary ruling, namely C-40/04, *Yonemoto* (see OJC 85/15, 3.4.2004), the referring court, this time the Supreme Court of Finland, makes in its question No. 1 the same mistake. Hence, it refers to Articles 28 and 30 EC in the context of MD. These events seem to prove that 'free movement' of the ECJ judgments is in troubles!

<sup>173</sup> As to proportionality principle in general, I confine myself here to a reference to Kapteyn and van Themaat, pp. 144-8. As to an essential *general* interpretation, they state – without saying anything at all about machinery safety – as follows: '[...] the great emphasis which Articles 2, 3 and 3a [now 4] EC place on the market economy principle should justify an interpretation of Article 3b [now 5] EC in the sense that no more far-reaching interference in

weighing fundamental rights against each other can be seen as one of its reflections, supposing that they in no case could empty one another of their respective contents. This might logically suggest the outcome that safety and health could never get a status overriding or even blocking the free movement of goods. Furthermore, it suggests that a ‘proportionate’ or ‘reasonable’ risk could be accepted or something similar in that line. I do emphasize that this is not just of academic interest. Seeing proportionality as a restriction on interferences in the market mechanism may easily lead to a position where the market freedom is seen as the legitimate driver whereas safety and health is just something corollary. And, indeed, this position is exactly present in question 3(a) in case *AGM-COS.MET*. The referring judge sees it as possible that even a machine not conforming to the MD could be accepted in the market by virtue of the proportionality principle. Equally, the market surveillance decision that launched the whole case *AGM-COS.MET* included, as its bottom line ground affecting the case outside the otherwise counted norms and facts, exactly

‘– proportionality principle applied in the legal system of the European Community.’<sup>174</sup>

And, besides these convulsions, the MD is only a directive while proportionality is in the EC Treaty, a tricky lawyer may say (perhaps invoking *lex superior*). In practice, he/she may intimidate a safety engineer that fully understands the MD and fully respects its purpose but is not familiar with proportionality. The MD does not mention proportionality at all.

If Articles 2, 3 and 95(3) EC (and the MD or, on the other hand, the MD alone) are not enough, and/or if the constitutional traditions common to the Member States are not enough, to support the principle ‘no risk of accidents accepted, no proportionality test in this respect’, the Court obviously has to base itself on Article 2 EHRC that enshrines the protection of human life. In *Schmidberger* the Court sitting in plenum confirmed how the right to life is, unlike freedom of expression or the freedom of assembly, an absolute fundamental right.<sup>175</sup> If the Court does not go this far, it anyway seems to be a legitimate expectation that it in one way or another will decide in the case *AGM-COS.MET* that the protection of human life and health is an honourable aim or principle without being harassed by any proportionality test – it is not possible to be proportionally dead. Neither is a proportionality test relevant with respect to injuries while the

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the market mechanism is permissible than is necessary to achieve the objectives of the EC Treaty’. *Ibid.* p. 145-6.

<sup>174</sup> My translation. This needs to be expressed also in the original language, Finnish: “– Euroopan yhteisön oikeusjärjestelmässä sovelletun suhteellisuusperiaatteen.” The decision-makers obviously mean the legal *order* of the European Community. However, this is not just of unintended comics but a telling example of the sometimes too paradigmatic effect of proportionality principle.

<sup>175</sup> Case C-112/00, judgment of 12 June 2003, [2003] ECR I-5659, paragraph 80.

philosophy in the MD means preventing them all. Discussing an invalidity percentage perhaps allowed by the MD would be too banal from the outset. This would also mean that safety and health, *das Sozial*, in this case is not be subordinated to the economic freedom, i.e. free movement of goods, but the other way round. The economic freedom shall be subordinated to safety and health, a social factor, although precisely in the sense that safety is the absolute precondition for market access.

If one wants to avoid any ‘stratospheric’ inclusion of Article 2 EHRC in the normative pyramid, as well as any normative source above the MD, I do not insist on the above arguments, with the condition that the aim to protect human life and health is declared an honourable one that is not subordinated to the proportionality principle. Even this would mean recognising the *de facto* overriding role that a high level safety and risk-prevention policy have in the combination of economic and social in this type of case. The legal basis for this is also in the constitutional traditions of the Member States, as expressed in the EU Charter of Fundamental Rights. Its Article 31 states, as follows:

Fair and just working conditions

‘1. Every worker has the right to working conditions which respect his or her health, safety and dignity.’

This Article is based – as the Charter’s explanations tell us – on the so-called Framework Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It is the most important community instrument that, however, does not cover the properties of machines, as they appear on the market. It is not in contradiction with the Machinery Directive but includes a comprehensive minimum framework for safety and health measures. Its hierarchy in risk prevention is the same as in the MD, ‘avoiding risks’ is the first consideration (Article 6(2)(a) of the Directive 89/391/EC).

There is nothing in the text of Article 31 of the Charter that would hint at any restriction as to its application *rationae personae*. ‘Every worker’ is addressed. Thus, also workers using potentially hazardous or risky machines are worthy of appropriate protection. On the other hand, the explanations to the Charter refer to Article 140 EC as a source for the notion ‘working conditions’. Article 140 EC, fifth indent, does mention ‘prevention of occupational accidents’. Furthermore, the Charter’s text draws on the European Social Charter (Article 3) and on the Community Charter of Fundamental Rights of Workers (Article 19). Next to these international instruments, the Member States have comprehensively ratified a number of ILO conventions in the field of safety and health. In sum, it is justified to hold that there is a common constitutional tradition of safety and health between the Member States.

The Court’s forthcoming answers to the *AGM-COS.MET* referral seem certain to be that the behaviour of market inspector Lehtinen was not a prohibited res-

triction on trade and the car lift concerned is not in conformity with the essential safety requirements of the Machinery Directive.

Finally, somebody may raise objections to my overall MD reasoning by maintaining that also in B to B business only safe products can be marketed, that nobody buys unsafe ones; that it is therefore not *economic* (profitable) to manufacture and try to sell risky products. In this case safety and health experts of every Member State, as well as the Commission, share the opinion that the machine is risky and does not meet the essential safety requirements of the MD.<sup>176</sup> But being cheaper than products manufactured according to the European standard (EN 1493) concerned, this lift type has anyway been successful on the European market. Economic has this side, too. Manufacturers do have their tendency to use, even abuse, the customer's tendency to save money whenever possible.

However, my conclusion is that machinery safety represents one phenomenon that does not fit into a rigid converse pyramid thinking with economic dominance. On the contrary, it implies a deeply tied package where high level of safety (a social factor) is a precondition for a fundamental economic freedom to be exercised. I should emphasise that this is no guarantee of reaching that high level in practice. Further on the pyramid avenue, there is only one single machinery safety pyramid left for both the EC and Member States. The MD embodies this and has replaced the national norms. Hence, national norms do not set up the safety level but are purely there for execution and reinforcement. But where is the pyramidal apex in the *AGM.-COS.MET* case? Might this be the first case where the European Court of Justice raises the EU Charter of Fundamental Rights into its very reasoning as the Court of First Instance and several Advocate Generals have done? *Jura novit curia*.

## 2.6. Competition Rules v. Right to Collective Bargaining<sup>177</sup>

*Fitzpatrick* refers, without any real analysis, twice to case *Albany International*,<sup>178</sup> first in a footnote proving the avenue that 'internal market issues retain the potential to create such "spill-over" controversies [with social policy] in the future.'<sup>179</sup> Later he notes how

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<sup>176</sup> Data sheet of the Co-ordination of the notified bodies, document CNB/M/08.016, Revision 02 by 1 July 2004.

<sup>177</sup> I recall my aim to publish a separate article on the social dimension in EU competition law. Here I set forth only some elementary features, necessary for the assessment of the pyramid thinking.

<sup>178</sup> See footnotes 132 and 135, *supra*.

<sup>179</sup> *Fitzpatrick*, p. 307, footnote 30. *Fitzpatrick* refers to case notes on *Albany* by Stephen Vousden. I think that Vousden's article brings one example of an unsuccessful attempt to interpret *Albany* by the maxims of competition law. See Bruun & Hellsten (eds.), *Collective Agreement and Competition Law in the EU*, DJØF, Copenhagen 2001, p. 53, footnote 113.

“middle layer”<sup>180</sup> areas of competence are intrinsically vulnerable to apparently superior EU economic values. Therefore social values have to fight their way to an internal market agenda, for example in the recent conflict between competition policy and the right to free collective bargaining.’

As an example of these clashes he then refers – again in a footnote – to *Albany*.<sup>181</sup>

In brief, in *Albany* the question was about the possible immunity of collective agreements *vis-à-vis* competition rules. The outcome established the immunity in so far as the agreements by their purpose (in this case remuneration) fall outside Article 81 (ex 85) EC. Not everybody celebrates; some have regretted the supremacy granted to labour and social dialogue under Article 81 EC.<sup>182</sup> ‘Law and economics’ criticism exists, demanding an economic effectiveness test and even with pondering the positive and negative effects of unionisation etc.<sup>183</sup> A third type of criticism regrets that the decision was not taken directly under Article 81 (ex 85) EC but was based (even) on Articles 2 and 3 EC.<sup>184</sup>

In the context of the pyramid approach, it is, indeed, elementary to conceive the way in which the Court came to its decision in *Albany*. A graphic mirror is the Opinion of Advocate General *Jacobs*. From a traditional competition point of view, he e.g. asked if there is a general exemption of social matters from competition rules regarding agriculture and transport.<sup>185</sup>

The Court construed and answered a similar (but more limited) pre-question about a general exemption for collective agreements from competition rules, but differently.<sup>186</sup> It recounted (in paragraph 54) from Article 3 EC how the activities of the Community are to include not only a ‘system ensuring that competition in the internal market is not distorted’ but also ‘a policy in the social sphere’; it went on by referring to a particular task of the Community ‘to promote through-

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<sup>180</sup> *Ibid.*, p. 313. It is a graphic expression, indeed. For Fitzpatrick, ‘social’ in the leading Articles of the Treaty is mainly of lip service.

<sup>181</sup> *Idem*, Fitzpatrick’s footnote 72.

<sup>182</sup> Marc de Vos, *Collective Labour Agreements and European Competition Law: an Inherent Contradiction* in De Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited*, Kluwer Law International, the Hague 2003, pp. 70-72. For him, Article 4 EC ‘clearly’ presents the common market and its free competition as overarching goals from which no EC policy can be exempted. He laconically continues that ‘(i)f any hierarchy is to be wrung from the TEC, precedence should rather go to competition policy over social policy rather than *vice versa*’; p. 72.

<sup>183</sup> Van den Berg and Camesasca, *Irreconcilable Principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust*. *European Law Review*, Vol. 25. 2000, pp. 492-508.

<sup>184</sup> Xavier Prétot, *La Cour de justice des Communautés européennes et les fonds de pension néerlandais*. *Droit social* 1/2000, pp. 106-110.

<sup>185</sup> Opinion of AG Jacobs 28.1.1999, paragraphs 123-4.

<sup>186</sup> Noteworthy, as to pyramid thinking, the Court did not discuss whether there is sufficient basis in the national law to conclude that there is a fundamental right to collective bargaining, recognisable also under EC law.

out the Community a harmonious and balanced development of economic activities' and recalled 'a high level of employment and of social protection' (Article 2 EC). It further recounted Articles 118 (promotion of cooperation also at collective bargaining) and 118b EC (reference to European social dialogue and possible agreements), as well as Articles 1 and 4(1) of the Maastricht SPA.<sup>187</sup>

This way, the Court construed its EC Treaty pyramid (as applicable in this case). The answer is graphic in paragraphs 59 (*rationae personae*) and 60 (*ratione materiae*) of *Albany* where the conclusion, the setting up of the basic immunity of collective agreements was concluded, as follows:

59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) [now 81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) [now 81(1)] of the Treaty (underlining JH).

As the French wording<sup>188</sup> proves, 'effective' and 'consistent' here qualify the interpretation, not the EC Treaty! Anyway, in balancing between the undistorted internal market (competition rules) and social policy (collective agreements) the latter was given precedence. The Court, in paragraph 59, assessed and declared the (presumably seriously undermined) lot of social policy objectives if the negotiating social partners were subject to competition rules, not the other way round! Certainly, the final conclusion in paragraph 60 did not mean any safety valve for the protection of high national values (free collective bargaining) à la pyramid thinking with economic dominance. It was a fundamental decision made in applying the EC Treaty.

The immunity, however, allows competition law scrutiny in exceptional cases. It means a safety valve for protection of competition values (as in the case of a

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<sup>187</sup> Paragraphs 55-58 of the judgment. Reference to SPA was no majesty crime since the UK in June 1997 declared that it de facto (not de jure) joined the SPA. Besides, the Treaty of Amsterdam introduced Article 136 that refers to the 1989 Charter.

<sup>188</sup> *Il résulte ainsi d'une interprétation utile et cohérente des dispositions du traité, dans leur ensemble,...* This is a unique formula in case law that I know. I recall, however, that interpretation of the 'provisions of Community law as a whole' is an expression used also in case *CILFIT* (see Chapter I, section 2.2.3, *supra*, paragraph 20). Hence, finally the qualification 'effective and consistent' (interpretation) was the novelty so declared in *Albany*.

distortion of competition masked by a collective agreement). Even the immunity for collective agreements as proposed by Advocate General, too, was finally a balance between two sets of norms of the ‘same rank’.<sup>189</sup> However, following his much more competition-orientated analysis he equipped it with competition law filters (good faith, limited to core subjects, no effects on third markets and parties).<sup>190</sup> But it is crucial to understand that a rigid pyramid thinking with the economic’s dominance over social would have led first to the subordination of collective agreements to competition rules and then construing a safety valve for collective labour agreements.<sup>191</sup> The Court did the opposite.

Thus, it was coherent for the Court in this context to take first economic and social together as built into the EC pyramidal structure (like the double aim – economic and social – of Article 119 EEC and the ‘foundations of the Community’ in *Defrenne II*) and then to strike a balance between them. It was not giving an *a priori* absolute precedence to one of them. Effective (*utile*) seems to denote more the outcome in this concrete case, i.e. the precedence of the social factor.

The ironic situation is that e.g. under Finnish and Swedish law the wrath of competition rules on collective agreement has been clearly stricter than the Albany-immunity.<sup>192</sup> Hence, whether it is of *minutiae* or not, the pyramids have the ability to be converse this way, too. However, as to EC law, *Albany* proves that a rigid pyramid way of thinking with economic dominance does not give rise to a sustainable model of assessing and interpreting the EC Treaty in a comprehensive way, even though many individual cases<sup>193</sup> with their *minutiae*, no doubt, reflect the dominance of the internal market rules.

Ultimately, concerning judgement *Albany* as it stands, the Court did not write out in its pyramid, paragraphs 54-58, the ‘stratospheric’ apex of the EC Treaty, namely the Preamble, as it did in 1976 in *Defrenne II*. This time it was no longer needed, following the enshrinement (in the Maastricht Treaty) of ‘high level of employment and social protection’ in Article 2 EC and social policy in Article 3(j) EC. This is a clear indication of a high ‘pyramidal’ (i.e. constitutional) development and its impact on a more practical level. Still, ‘the provisions of the

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<sup>189</sup> Para 179 of the opinion. Another issue is that the pyramid construed by Advocate General did not reach Article 2 EC, neither did he expressly mention ‘policy in the social sphere’ as enshrined in Article 3(j) EC.

<sup>190</sup> Paragraph 194 of the Opinion.

<sup>191</sup> Cf. turning imaginably around the reasoning in para 59 of *Albany*: ‘competition law objectives would be seriously undermined if the negotiating social partners were not subject to Article 81 EC’!

<sup>192</sup> See e.g. Jari Hellsten, *Collective Agreements and Competition Law in Finland*, in Bruun & Hellsten (eds.), *Collective Agreements and Competition Law in the EU*, DJØF 2001 Copenhagen, p. 134, paragraph 45; and Jonas Malmberg, *Collective Agreements and Competition Law in Sweden*, *ibid.*, p. 204-5, the newspaper distribution case, referred to in footnote 63 on p. 205.

<sup>193</sup> See e.g. *Merci*, C-179/90, [1991] ECR I-5889.

Treaty as a whole’ (paragraph 60 of *Albany*) fully cover even that pyramidal apex.<sup>194</sup>

### 2.6.1. Some Post-Amsterdam Remarks regarding *Albany*

The events in *Albany* took place in the early 1990’s. If the Court should have had to apply the EC pyramid as modified by Article 136 of the Treaty of Amsterdam, the European Social Charter and the Community Charter of Fundamental Social Rights 1989 would have perhaps enriched the argument, supporting the outcome reached. Both Charters refer to collective bargaining. But, in that case the Court would have been perhaps bound to give due weight to the ‘functioning of the common market’ that still hides in Article 136(3) EC. Notably, neither was Article 117 EC in the Court’s pyramid, which was logical in the sense that it did not mention collective bargaining.

There remains the effect of the EU Charter of Fundamental Rights and the Constitutional Treaty (when and if it enters into force). With enshrined references to collective bargaining and even to the right to strike they would further strengthen the line of reasoning and the outcome in *Albany*.

## 2.7. Miscellaneous

*Transfer of Undertakings*. Earlier in this article I have shown how the Transfer of Undertakings directive applies also to cross-border transfers and mergers, and covers transfers within a group of companies too.<sup>195</sup> I further recall how in case *Amalgamated Construction* the alleged transferee invoked competition rules and their application so as to prevent the group of companies from falling under the ambit of the Transfer Directive. Finally with the famous ‘nothing’ (*Nothing justifies...*, paragraph 20 of the judgment’) the Court rejected the claim of the company where this ‘nothing’ finally is an assertion based on social values. Anyway, these phenomena as such do not fit into a rigid pyramid way of thinking. Furthermore, if we look at the Transfer Directive as a whole, as a structural factor, we find that on the one hand it does not disturb the managerial prerogative in realising even transfers primarily and solely benefiting the owners. It just smoothens them as any national law in market economy may do, without actually preventing them. On the other hand, it is intended to protect the rights of workers ‘as far as possible’ (as we have learned at least from *Daddy’s Dance Hall* and *Amalgamated Construction*), and it would be in any case unjustified to maintain that within these limits it would be, even in its *minutiae*, just subordinated to the economic aspect, the managerial prerogative.

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<sup>194</sup> In a way, the Court in *Albany* applied a ‘Cheops model’; the Cheops pyramid’s apex has knowingly got worn some 5 to 7 meters. The top level is flat.

<sup>195</sup> See sections I.2.2 and I.3, *supra*.

On a somewhat different line *Bernard Johann Mulder* concludes his reasoning (in his doctoral dissertation of November 2004) on the Directive by writing that

‘The EU Court has in its law-making taken the directive’s aim to safeguard the employees’ rights for granted. This aim to safeguard has, however, not in a particular way been confronted with the *fundamentals of the economic constitution* that govern the legal scene in which the regulations on the transfer of undertaking directive are applicable.’<sup>196</sup>

My thesis is that the cross-border applicability means facing these fundamentals, coming even close to free movement of capital. Based on my reasoning *supra*, there is no reason to believe that the Court would turn the Directive concerning this issue into a non-directive à la rigid pyramid thinking.

*Societas Europaea*. The European Company structure means freedom for business activities throughout the EU/EEA. The way in which the structure handles the representation means in broad terms that an SE gets registered only if there is an agreement on employees’ information, consultation and participation. In the way for example that only safe machines may circulate freely within the internal market,<sup>197</sup> only a SE equipped either with a tailor-made agreement or applying the standard rules may enjoy the corresponding economic freedom (freedom of business). Setting up the SE is thus subordinated to arranging the representation of workers and employees. It is a structural factor that does not fit into rigid pyramid thinking.

### 3. Converse Pyramids in Earth. What Instead?

The EU’s social constitution is so to speak in a marriage of convenience with its economic constitution. Divorce is impossible whilst quarrels sometimes awake the neighbours. It is difficult to reconcile, on the one hand, the fundamental economic freedoms and related provisions guaranteeing the undistorted internal market, and, on the other hand, fundamental social rights.<sup>198</sup>

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<sup>196</sup> Mulder, p. 357; italics by JH.

<sup>197</sup> See section II.2.5.

<sup>198</sup> However, some further clarity could be achieved with a debate on Europe’s ‘social contract’. Both efficiency and distributive justice may qualify its contents. The first choice is, in terms of Maduro, between wealth maximisation and distributive justice; the second is to do with whether we favour a model of economic integration or a model of political integration for Europe. As Maduro has done, I claim that it is necessary to complement the wealth maximisation brought about by economic integration with some form of distributive fairness. See Miguel Poiars Maduro, *Europe’s Social Self: “The Sickness Unto Death”* in Shaw (ed.) *Social Law and Policy in an Evolving European Union*, Oxford, Hart Publishing 2000, p. 349. It remains to be seen whether the ‘highly competitive social market economy’, enshrined in Article I-3(3) of the Constitutional Treaty, together with the insertion of the Fundamental Rights in Part II of the Constitutional Treaty, already means some kind of contract, or whether it is just a modified framework for future quarrels. It is linked also to the debate about the transformation of the original European ‘market citizen’ via the ‘Maas-

However, I will take the liberty to omit any pyramid of the EC Treaty, even though my examples would justify enshrining the social dimension above the economic dimension. As a general description, it would not be correct, given the *acquis* as a whole. Besides, it would hide the reconciliation process. Accordingly, enshrining the undistorted internal market and the social dimension on an equal footing would for example ignore the *de facto* precedence of the social dimension in *Albany*. And, I claim, the reconciliation process between economic and social would not end up with the emergence of an imaginable full-fledged European labour law. In the meantime, the enlargement of the EU will produce some graphic legal illustrations of this economic/social conflict, as the pending Rosella case proves.<sup>199</sup>

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tricht citizen' to a more real 'European citizen'. However, that debate goes far beyond the borders of the 'rough' internal market issues that have filled this paper.

<sup>199</sup> See section II.2.4. After closing the contents of this article the High Court of London has declared in June 2005 (Case No. 2004 Folio 684) i.a. that an action of the ITF and the Finnish Seamen's Union restricting the ability of the employer (Viking) to negotiate with a union in a member state other than Finland on wages in the context of reflagging the Rosella would be contrary to Article 43 EC. Accordingly, the court issued a permanent injunction against an action (incl. causing it) for the purpose of requiring Viking to apply – after the reflagging – the Finnish on equivalent terms and conditions. The judgement is subject to appeal.

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