

**A study of the implementation of the Acquired Rights
Directive in the United Kingdom and other Member
States of the European Community**

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Abstract

The Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses was approved by the Council of Ministers on February 14 1977. It fell to be transposed into national law within two years. In 1979 the Labour Government in the United Kingdom was defeated and a new Conservative Government assumed office. In 1981 the Government transposed the Directive into UK law with great reluctance. Thus a flawed European Directive was transposed into inadequate Regulations by a reluctant Government.

The advent of the Conservative party to power resulted in a change in Government policy away from partnership with the representatives of employees and employers to a policy of de-regulation and an attack on the strength of the trade unions. A series of Employment Acts during the 1980s transformed industrial relations within the country.

Within this changing environment the Acquired Rights Directive appeared as a paradox, as its intention was to increase protection available to employees in the event of a transfer. At the same time the European Court of Justice gradually defined and widened the scope of protection offered by the Directive.

The changing nature of industrial relations in the United Kingdom has been in contrast to that of other Member States of the European Community which are studied here. These Member States are examined as a contrast to the UK approach.

Additionally the European Community has been developing its relationship with the representatives of employees and employers. There has been a process of creating a social dialogue at Community level and the role of the social partners has been of increasing importance.

A central theme of this thesis is that it is this contrast between the approach of the Community and Member States, on the one hand, to the approach of the United Kingdom, on the other, that has contributed to the problems experienced with the Directive. It is likely that problems will also occur with the new Acquired Rights Directive unless there is a short term change of approach by the United Kingdom.

In the longer term, it is argued, there needs to be an acceptance by the Community of the diversity of the Member States so that any such conflicts can be avoided in the future.

UK Statutes and Statutory Instruments

- 1906 Trade Disputes Act
- 1959 Terms and Conditions of Employment Act
- 1971 Industrial Relations Act
- 1974 Trade Union and Labour Relations Act
- 1975 Employment Protection Act
- 1975 Sex Discrimination Act
- 1976 Race Relations Act
- 1976 Trade Union and Labour Relations (Amendment) Act
- 1977 The Safety Representatives and Safety Committees
Regulations SI 1977/500
- 1978 Employment Protection (Consolidation) Act
- 1980 Local Government Planning and Land Act
- 1980 Employment Act
- 1981 Transfer of Undertakings (Protection of Employment) Regulations SI
1981/1794
- 1982 Employment Act
- 1984 Trade Union Act
- 1987 Transfer of Undertakings (Protection of Employment) (Amendment) Regulations
SI 1987/442
- 1988 Employment Act
- 1988 Local Government Act
- 1990 Employment Act
- 1990 National Health Service and Community Care Act
- 1992 European Communities Act

- 1992 Trade Union and Labour Relations (Consolidation) Act
- 1993 Trade Union Reform and Employment Rights Act
- 1994 Deregulation and Contracting Out Act
- 1995 The Employment Protection (Part time Employees) Regulations SI 1995/31
- 1995 The Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations SI 1995/2587
- 1996 Employment Rights Act
- 1996 Health and Safety (Consultation with Employees) Regulations SI 1996/1513

EC Directives

1975 Council Directive 75/117 on the approximation of the laws of Member States relating to the principle of equal pay for men and women OJ 1975 L45/19

1975 Council Directive 75/129 on the approximation of the laws of the Member States relating to collective redundancies OJ 1975 L48/29 and amended by Directive 92/56 OJ 1992 L245/3

1976 Council Directive 76/207 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 OJ 1976 L39/40

1977 Council Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings OJ 1977 L61/26

1980 Council Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer OJ 1980 L283/23

1989 Council Directive 89/391 of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L183/1 of 29 June 1989

1991 Council Directive 91/383 on supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed duration employment relationship or a temporary employment relationship OJ 1991 L206/19

1991 Council Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship OJ 1991 L288/32

1992 Council Directive 92/85 on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding OJ 1992 L348/1

1993 Council Directive 93/104 of 23 November 1993 concerning certain aspects of the organisation of working time OJ 1993 L307/18

1994 Council Directive 94/45 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees OJ 1994 L254/64

List of Cases

Abels v The Administrative Board of the Bedrijfsvereniging Voor De Metaal Industrie en de Electrotechnische Industrie Case 135/83 (1985) ECR 469 (1987) 2 CMLR 406

Adams and others v (1)Lancashire County Council and (2)BET Catering Services Ltd (1996) IRLR 154

Allan and others v Stirling District Council (1994) IRLR 208

Amministrazione delle Finanze dello Stato v Simmental SpA Case 106/77 (1978) ECR 629

Anderson and another v Dalkeith Engineering Ltd (1985) ICR 66

Angus Jowett and Co v NUTGW (1985) IRLR 326

Annette Henke v Gemeinde Schierke and Verwaltungsgemeinschaft 'Brocken' Case C-298/94 (1996) IRLR 701

Bannon v Employment Appeals Tribunal and Drogheda Town centre Ltd (1992) ELR 203

Berg and Busschers v Besselsen Case 145/87 (1988) ECR 2559 (1989) IRLR 447

Berriman v Delabole Slate Ltd (1985) ICR 546

Bork International A/S v Foreningen Af Arbejdsledere Case 101/87 (1988) ECR 3071 (1989) IRLR 41

Botzen v Rotterdamsche Droogdok Maarschippij BV Case 186/83 (1985) ECR 519 (1986) 2 CMLR 50

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BSG Property Services v Tuck (1996) IRLR 134

Buchanan-Smith v Schleicher & Co International Ltd (1996) IRLR 547

Clarkes of Hove Ltd v The Bakers Union (1978) WLR 1 1207

Commission v Belgium Case 77/69 (1970) ECR 237

Commission v Belgium Case 237/84 (1986) ECR 1247

Commission v Council Case 22/70 (1971) ECR 263

Commission v Ireland Case 249/81 (1982) ECR 4005

Commission v Italy Case 382/92 (1985) ECR 2629

Commission v Italy Case 235/84 (1986) ECR 2291

Commission v United Kingdom Case 382/92 (1994) ECR-1 2435

Costa v ENEL Case 6/64 (1964) ECR 585

Council of the Isles of Scilly v Brintel Helicopters Ltd and Ellis and others (1995)
IRLR 6 (1995) ICR 249

Crawford v Swinton Insurance Brokers Ltd (1990) IRLR 42

Curling v Securicor Ltd (1992) IRLR 549

Defrenne v Sabena Case 43/75 (1976) ECR 455

Dines and others v Initial Health Care Services Ltd and Pall Mall Services Group Ltd
(1994) IRLR 336 (1995) ICR 3189

DJM International Ltd v Nicholas (1996) IRLR 76

Dr Sophie Redmond Stichting v Bartol and others Case 29/91 (1992) ECR 3189
(1992) IRLR 366

Duke v GEC Reliance (1988) All ER 626

Duncan Webb Offset (Maidstone) Ltd v Cooper and others (1995) IRLR 633

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105/84 (1985) ECR 2639

Foreningen Arbejdsledere i Danmark v Daddy's Dance Hall A/S Case 324/86 (1988)
ECR 739 (1988) IRLR 315

Foster v British Gas (1990) ECR 3313 (1990) CMLR 833

Francovich and Boniface v Italian Republic Cases 6/90 and 9/90 (1991) ECR 5357

Gale v Northern General Hospital NHS Trust (1994) IRLR 292

Garland v BREL Case 12/81 (1982) ECR 359 (1982) 2 All ER 402

Gateway Hotels Ltd v Stewart and others (1988) IRLR 287

Griffin and others v South West Water Services Ltd (1995) IRLR 15

Hadden v University of Dundee Students Association (1985) IRLR 450

Harrison Bowden Ltd v Bowden (1994) ICR 186

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Hoekstra (nee Unger) v Betuur der Berijfsvereniging voor Detailhanden en Ambachten
Case 75/63 (1964) ECR 177

Ibex Trading Company Ltd v Walton (1994) IRLR 564

Industriebond FNV and Federatie Nederlandse Vakbeweging FNV v The Netherlands
State Case 179/83 (1985) ECR 511

Internationale Handelsgesellschaft GmbH v Einfuhr und Vorratsstelle fur Getreide und
Fittermittel Case 11/70 (1970) ECR 1125

Institution of Professional Civil Servants v Secretary of State for Defence (1987) IRLR
373

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Stauereibetreib & Co Cases 132,138,139/91 (1992) ECR 1 6577 (1993) IRLR 179

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(1994) IRLR 157

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Marleasing SA v La Comercial de Alimentacion Case 106/89 (1990) ECR 4135
(1992) 1 CMLR 305

Marshall v Southampton Area Health Authority Case 152/84 (1986) ECR 723 (1986)
1 CMLR 688

Marshall II Case 271/91 (1993) ECR 4367

McMeechan v Secretary of State for Employment (1995) IRLR 461

Merckx and Neuhuys v Ford Motor Co Belgium SA (1996) IRLR 467

Michael Peters Ltd v Farnfield (1995) IRLR 190

Milligan and another v Securicor Cleaning Ltd (1995) IRLR 288

Mikelson - see the case of Foreningen Arbejdsledere I Danmark v A/S Danmols
Inventar

MRS Environmental Services v Marsh and Harvey (1996) LTL 11/7/96: TLR 22/7/96

Nicole Vaneetveld v Le Foyer and Le Foyer v Federation des Mutualities Socialiste et
Syndicales de la Province de Liege Case 316/93 (1994) ECR 763

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Quinn v Leathem (1901) AC 495

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Price and others (1994) IRLR 72

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R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd
Case 5/94 (1996) ECR 2553 (1996) 2 CMLR 391

R v Secretary of State for Employment ex parte Equal Opportunities Commission and
another (1994) IRLR 176

R v Secretary of State for Trade and Industry ex parte Unison and others (1996) IRLR
438

R v Secretary of State for Transport ex parte Factortame Case 213/89 (1990) ECR
2433 (1990) 3 WLR 852

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IRLR 133

Re Value Added Tax Directives (1982) 1 CMLR 527

Robertson v British Gas Corporation (1983) IRLR 302

Rookes v Barnard (1964) AC 1129

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(1984) ECR 1891

Schmidt v Spar und Leikhasse der Fruheren Amter Bordesholm, Kiel und Cronshagen
Case 392/92 (1994) ECR 1311 (1995) ICR 237

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South Durham Health Authority v Unison (1995) IRLR 407

Spano and others v Fiat Geotech SpA and Fiat Hitachi Excavators SpA Case 472/93
(1996) ECR 4321

Spijkers v Gebroeders Benedik Abbatoir CV and Alfred Benedik en Zonen BV Case
24/85 (1986) ECR 1119 (1986) CMLR 296

Stirling District Council v Allan and others (1995) IRLR 301

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Suzen v Zehnacker Gebäudereinigung GmbH and another Advocate General's Opinion
15.10.96 Case C-13/95

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426

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- Appendix B Comparison of the implementation of two versions of the proposed ARD by two Member States
- Appendix C Comparison between the employer and trade union views on the proposed Directive

Abbreviations

| | |
|---------|--|
| ACAS | Advisory, Conciliation and Arbitration Service |
| APTC | Administrative, Professional, Technical and Clerical |
| ARD | Acquired Rights Directive |
| BDA | Bundesvereinigung der Deutschen Arbeitgeberverbände |
| CAP | Confederacao da Agricultura Portuguesa |
| CBI | Confederation of British Industry |
| CC.OO | Comisiones Obreras |
| CCSP | Confederacao de Comercio e Servicos Portuguesa |
| CCT | Compulsory Competitive Tendering |
| CEEP | European Centre for Public Enterprises |
| CFDT | Confederation Francaise Democratique du Travail |
| CGIL | Confederazione Generale Italiana del Lavoro |
| CGT | Confederation Generale du Travail |
| CGTP-IN | Confederacao Geral dos Trabalhadores Portugueses |
| CIP | Confederacao da Industria Portuguesa |
| CISL | Confederazione Italiana Sindacati Lavatori |
| CNEP | Conselho National de Emprapas Portuguesa |
| CNPF | Conseil National du Patronat Francais |
| CEOE | Confederacion Espanola de Organizaciones Empresariales |
| CPCS | Permanent Council for Social Consultation (Portuguese) |
| CPSA | Civil and Public Service Association |

| | |
|--------|---|
| CRTUPE | Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations 1995 |
| DA | Dansk Arbejdsgiverforening |
| DGB | Deutsche Gewerkschaftsbund |
| DTI | Department of Trade and Industry |
| EAT | Employment Appeal Tribunal |
| EC | European Community |
| ECSC | European Coal and Steel Community |
| EEC | European Economic Community |
| EPCA | Employment Protection (Consolidation) Act 1978 |
| ERA | Employment Rights Act 1996 |
| ETO | Economic, Technical or Organisational |
| ETUC | European Trades Union Confederation |
| EWC | European Works Council |
| FNV | Federatie Nederlandse Vakbeweging |
| GSEE | General Confederation of Greek Labour |
| ICTU | Irish Congress of Trade Unions |
| LO | Landsorganisationen I Danmark |
| NAPF | National Association of Pension Funds |
| NCW | Nederlandse Christelijk Wergeversbond |
| NHS | National Health Service |
| NUMAST | National Union of Rail, Maritime and Transport Workers |
| SEB | Federation of Greek Industries |
| SER | Social and Economic Council (Netherlands) |
| TUC | Trades Union Congress |

| | |
|--------|---|
| TULRCA | Trade Union and Labour Relations (Consolidation) Act 1992 |
| TUPE | Transfer of Undertakings (Protection of Employment) Regulations 1981 |
| TURER | Trade Union Reform and Employment Rights Act 1993 |
| UGT | Uniao Geral de Trabalhadores |
| UGT | Union General de Trabajadores |
| UNICE | Union of Industrial and Employers' Confederations of the European Communities |
| VNO | Verbond van Nederlandse Ondernemingen |

Chapter 1 Introduction

Hypothesis

This thesis is concerned with the implementation of the Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses¹ (hereafter referred to as the ARD) in the United Kingdom and selected Member States of the European Union.

The hypothesis underlying this study is that there is a fundamentally different approach between the United Kingdom and other Member States towards the role and implementation of Community law, particularly with respect to the ARD, and that this has led to significant problems in the United Kingdom. It is suggested here that this proposition is correct and will continue to lead to significant problems unless either the 'corporatist'² and the 'ideological' approaches converge with one another by the removal of one approach or by the creation of a new one that is common to all Member States or, alternatively, the Community accepts that the different approaches require legislation to be more country specific and that there will be variety in the way implementation takes place in different Member States.

Structure of the thesis

Part 1

The first part is concerned with placing the Directive in its legal and social context. This is done by, firstly, (chapter 2) considering the attitudes of governments in the United Kingdom towards consultation and the role of law in industrial relations. It will be shown that the policies of the UK Government changed after 1979 and that there developed an attitude of antipathy towards collective bargaining and any involvement of the social partners³ with government. This will be analysed as the 'ideological' approach.

Secondly (chapter 3), the same issues will be considered with regard to selected Member States of the European Community. The selected states are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Portugal and Spain. The Member States excluded are Luxembourg, because of its similarity to France, and the newer Member States of Austria, Finland and Sweden, because there is not sufficient English language information available. It will be shown that, despite the many differences between the Member States, there are sufficient similarities which show a common approach to consultation and the social partners, which is different to that of the United Kingdom. This approach will be termed the 'corporatist' approach.

Thirdly, there is an examination of the Community (chapter 4) and the derivations of its institutions and approach to law making. The intention is to consider the influences on the Community of the two opposing approaches mentioned above. Finally (in

chapter 5) there is a consideration of the Community's social policy and the increasingly important role of the social partners.

Part 2

This part commences with chapter 6, where the implementation of the ARD is considered. The objective is to show the limitations of the Directive and its implementation which resulted in confusion over its purpose. Secondly (chapter 7) the issues arising from cases before the European Court of Justice are considered. Finally (chapter 8) problems resulting from the transposition of the directive into national law are examined. This, in the United Kingdom, was effected by the Transfer of Undertakings (Protection of Employment) Regulations 1981⁴ (hereafter referred to as the TUPE Regulations). These Regulations were introduced with great reluctance by the UK Government and were subsequently amended three times, in 1987⁵, 1993⁶ and 1995⁷. It is arguable that, even after these amendments, it is still not fully transposed⁸. The issues discussed in chapter 8 highlight the questions raised by the Directive's transposition into national law. This part of the thesis will show that, apart from the hostile environment within the United Kingdom, the ARD and the TUPE Regulations caused considerable confusion through lack of definition and inadequate implementation.

Part 3

This commences with chapter 9 and considers the proposed revision of the ARD which is likely to become Community law during 1997. It suggests that the revision will fail

to solve the confusion raised by the initial Directive and that there is so much discretion contained in the proposals that there will not be a harmonised approach amongst Member States of the Community. It is likely that employees in the United Kingdom, with its distinct approach, will have significantly less protection than employees in other Member States.

Chapter 10 then provides an alternative set of Regulations, which accept the approach of the UK Government to qualifying periods and consultation, but amend the definition of employee and alters the emphasis so that real protection is offered to employees in the event of a transfer of their undertaking.

Chapter 11 then offers conclusions.

Methodology

The work for this thesis has brought together a significant amount of information in order to consider the ARD and the TUPE Regulations in a way in which they may not have been considered before.

Extensive use of primary sources has been made. In particular the significant amount of UK Government and European Community material. There has also been extensive contact with interested parties (see pages 5 to 7) who have provided much useful and original material.

The placing of the study within a Community and legal context enables a consideration

to take place, not only of the flaws in the Directive and the TUPE Regulations, but also of the fact that there is a significant difference of approach between the Member States. It is this difference of approach which provides concern for the future harmonisation of Community social and labour policy.

Individuals that have assisted

For the purpose of this research the following people have been of significant assistance and whose help is gratefully acknowledged:

Mr Francisco de los Herras - European Commission official responsible for the proposed amendment to the ARD

Mr Robert Sheldon MP - Chair of the Public Accounts Committee of the House of Commons

Mr Stephen Hughes MEP - Chair of the European Parliament's Social Affairs and Employment Committee

Ms Pauline Green MEP - Leader of the European Parliament Socialist Group
Solicitor to the London Borough of Barnet

Mr Adam Tyson - First Secretary UK Representation to the EU

Mr Robert Niblett - Director, Rights on Redundancy and Transfer, Department of Trade and Industry

The research has included three visits to Brussels, one of which was to attend a meeting of the Social Affairs and Employment Committee of the European Parliament, when it discussed the issue of insolvency and the Directive.

Organisations that have assisted

The following organisations have provided information directly to the writer of this thesis. Most of this is unpublished material.

Employers

The Confederation of British Industry, the Post Office, the Chemical Industries Association, the Engineering Employers Federation, Planned Maintenance Engineering Ltd, the Heating and Ventilating Contractors Association, the Federation of Small Businesses, the Newspaper Society, the British Hospitality Association, the Food and Drink Federation, the Electricity Association, the Engineering Construction Industry Association, the Building Employers Confederation, the Institute of Directors.

Trade Unions

The Trades Union Congress, the Civil and Public Services Association, the Manufacturing Science and Finance Union and Unison and representatives of the European Trades Union Confederation.

Local Government

Association of District Councils, the Local Government Information Unit, Gateshead Metropolitan Borough Council, Oxford City Council, Cambridgeshire County Council, Derby City Council, Darlington Borough Council, Erewash Borough Council, London

Borough of Barnet, Vale of Glamorgan Council and the Royal Borough of Kensington and Chelsea.

Other Organisations

Law Society of Scotland, Law Society of England and Wales, the Equal Opportunities Commission, the Institute for Personnel and Development and the National Association of Pension Funds.

All of these organisations have provided information about their views on the existing and the proposed ARD.

Supervisors

The Director of Studies for this project has been Mr David Lewis. His contribution and that of the other Supervisors, Ms Penelope Kent and Professor Alan Cowling are gratefully acknowledged.

Effective date

The reported law in this thesis is stated as at December 31 1996.

1. OJ 1977 L61/26
2. The subject of corporatist and ideological approaches is considered in chapters 2 and 3
3. The social partners here means representatives of the trades unions and employers' organisations
4. 1981 SI 1794
5. The Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1987 SI 442
6. Trade Union Reform and Employment Rights Act 1993 S33 (hereafter known as TURER)
7. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 SI 2587 (hereafter referred to as the CRTUPE Regulations)
8. See the arguments in R v Secretary of State for Trade and Industry ex parte Unison and others (1996) IRLR 438. Although the Divisional Court did not accept this claim, the matter is the subject of appeal.

Chapter 2 A consideration of the attitude of governments of the United Kingdom towards industrial relations and consultation

Introduction

It is the objective of this chapter to consider the approach to the industrial relations policies of UK governments before and after 1979. It will be argued that the industrial relations policy approach changed considerably in the post 1979 period, under successive governments. It is intended to show the particular characteristics of the UK approach, so that these may be subsequently compared with the approach of other Member States and with that of the European Community. It will be shown that these differences are a cause of problems with the implementation of Community labour law in general and the ARD in particular.

It is not proposed here to attempt a history of labour law in the United Kingdom or elsewhere, but it is considered important to examine the approach of governments to the role of what have become known as the 'social partners', which means here the trades union and employers' organisations. Of most concern to this thesis is the development of government policies since the 1970s, when the ARD became Community law, and subsequently in the 1980s when it fell to be transposed into national law. This will lead to conclusions, later in this thesis, concerning the 1990s, when the revised ARD is due to be enacted.

Pre 1970

It has been suggested that the advent of the new government in 1970 represented the demise of collective laissez-faire in employment policy in the United Kingdom¹, although it is argued here that, perhaps, the real transition took place after the 1979 general election. Collective laissez-faire is an approach to labour law adopted by Sir Otto Kahn-Freund QC². A characteristic of this approach was the absence of the law in regulating the relationships between trade unions and management. It was Kahn-Freund's view that industrial relations in the United Kingdom had developed autonomously. This autonomy was fundamental as it meant that employers and employees had formulated their own 'codes of conduct' and created their own machinery for enforcing them³.

This approach suggests that the purpose of industrial relations is the coming together of the legitimate expectations of trade unions and management⁴. Management has the legitimate expectation that production will not be interrupted and trade unions have the expectation that wages and other conditions of work should be such as to be "compatible with the physical integrity and moral dignity of the individual"⁵. The reconciliation of these expectations takes place through collective bargaining.

There is a recognition in Kahn-Freund's writings of the realities of the employment relationship, ie. the subordination of the employee to management. The relationship of the trade union to management is, however, very different, because the power of management is weighed against that of the trade unions. The relationship is of equal parties rather than that of master and servant. The "principal purpose of labour law is

to regulate, to support, and to restrain the power of management and the power of organised labour"⁶.

Part of the justification for collective bargaining is the need to deal with the imbalance created by the common law approach to the contract of employment. It overcomes the inequality of power between the employer and the employee, and the assumption that a contract of employment is an equal relationship between two consenting adults. Kahn-Freund describes contracts of employment as concealing the realities of subordination behind the conceptual screen of contracts considered as concluded between equals. The reality is that such contracts tend to be between institutions and individuals. Freedom of contract is seen as a voluntary act of submission by the individual⁷.

Clearly in certain specialist fields of employment, where an individual's skill is in short supply, the individual may have an impact upon the negotiations for a contract of employment. It is true to say, however, that most contracts of employment are written by employers and the individual is invited to accept them. The penalty for non acceptance is that the individual is not employed. The weakness of the individual in such arrangements has long been recognised. In 1897 the Webbs wrote

"Individual bargaining between the owner of the means of subsistence and the seller of so perishable a commodity as a day's labour must be, once and for all, abandoned. In its place, if there is to be any genuine freedom of contract, we shall see the conditions of employment adjusted between equally expert negotiators acting for corporations reasonably comparable in strength"⁸.

The purpose of labour law is, therefore, to regulate and support this relationship. It is not in itself the source of power. Essential to this approach is that there is an inherent conflict of interests between employees and management:

"The conflict between capital and labour is inherent in an industrial society and therefore in the labour relationship. Conflicts of interest are inevitable in all societies."⁹

The two parties do have mutual obligations and conflicts, according to Kahn-Freund, which can only be settled unilaterally by the employer or bilaterally by collective bargaining or by the law itself¹⁰.

In this approach to labour relations and employment law, management and trade unions negotiate with each other. It is assumed that there are different, but mutual, interests which can be settled by the two parties negotiating on an equal basis of strength. Traditionally these collective agreements have not been legally binding contracts. It was argued that there could not be a legal contract because the parties did not intend to enter into one and that this lack of intent was crucial¹¹.

The significant features are, therefore, the need for collective bargaining to counter-balance the effect of the common law approach to contracts of employment; that there are two parties who negotiate, rather than consult, in fulfilling their legitimate expectations and who arrive at non binding agreements; and a role for labour law to regulate this process. It implies a certain relationship between the 'collective forces'¹².

This, as will be shown later, is different from the approach adopted in most other

Member States of the European Community, where there has been a much greater role for statute.

Positive rights and negative immunities

The nineteenth century was a period during which the repeal of laws that were oppressive to trade unions and workers' rights took place (in France 1884, Germany 1869, Italy 1889 and the United Kingdom 1875¹³). Most other European countries have developed this approach and established positive rights for workers to organise collectively, sometimes with a specific right to bargain (Sweden¹⁴) or to strike (France and Italy¹⁵). The United Kingdom did not take this step and, in the 1906 Trade Disputes Act, immunities were given to protect trade unions from legal actions in respect of inducing a breach of contract in the pursuance of an industrial dispute. It is these 'negative immunities', rather than positive rights, which distinguish the approach of the United Kingdom from that of most other Member States.

The Donovan Commission

In 1968 the Donovan Commission¹⁶ held that

"Properly conducted, collective bargaining is the most effective means of giving workers the right to representation in decisions affecting their working lives..".

It might be said that the Commission's report signalled the end of the collective laissez-faire approach and the commencement of greater involvement by the state in the

process of negotiation and consultation. It has been suggested that perhaps the collective laissez-faire approach was aided by the fact that it existed during a period of compulsory state sponsored arbitration, which encouraged employers to negotiate agreements with trade unions. This system of arbitration, which was a relic of the second world war period of regulation, was eventually abolished by the Terms and Conditions of Employment Act 1959¹⁷. It was as a result of industrial action during the 1960s and the 1970s that successive governments began a process of more active intervention¹⁸.

In Place of Strife

The report of the Donovan Commission was followed in 1969 by a government White Paper named 'In Place of Strife'¹⁹. The Secretary of State²⁰ proposed the establishment of a permanent Industrial Relations Commission to advise both sides of industry on ways to improve industrial relations and bargaining machinery, and that a register of collective agreements reached by firms of more than five thousand employees should be kept centrally. Significantly the Secretary of State initially proposed that she should have discretionary powers to compel trade unions to hold a ballot before an official strike and to impose a 28 day 'conciliation pause'. An Industrial Board would have the power to impose penalties for failure to abide by these rules. Initially the penalties were to be on individual trade unionists and, in a later proposal, on the trade unions themselves²¹.

The White Paper put forward the government's view of the doctrine of collective laissez-faire:

"Trade unions should be accepted as lawful and given the right to organise. The State should recognise the right to strike and the right to bargain collectively to improve wages and conditions, but, as long as the 'rules of the game' were roughly fair to both sides, the State should not be concerned with its consequences. In effect the Government should provide facilities to help the parties agree, but should not interfere to impose a settlement upon them".

The White Paper then described how, at various times, management and trade unions have welcomed the intervention of the state. State intervention was now "admitted by everyone". The question was not whether the state should intervene, but "what form should it take at the present time".

Kahn-Freund did not object to state intervention. His view was that the trade unions had legitimate expectations (in seeing their standards of living rise), management had legitimate expectations (in ensuring continuity of production) and that the consumer, as represented by the government, also had legitimate expectations (a continuous supply of goods). This meant that the state could, and did, intervene in industrial relations, eg. in the implementation of an incomes policy²². Of over-riding importance was the ability of the trade unions to organise collectively and to be able to use strike action if necessary. The ability to strike was essential. If the workers could not, in the last resort, collectively refuse to work, they could not bargain effectively²³.

Although the proposals contained in the White Paper were not implemented by the government at the time, they are a significant move away from providing the framework of the collective bargaining system towards attempting to be actively involved in the process.

1970 to 1979

The Industrial Relations Act 1971

The move away from a voluntarist role for labour law to a regulatory one was continued with the Industrial Relations Act 1971. It included measures to regulate the process of collective bargaining and for the state to become actively involved through legislation. S1(1), provided that

"The provisions of this Act shall have effect for the purpose of promoting good industrial relations in accordance with the following principles, that is to say-

(a) the principle of collective bargaining freely conducted on behalf of workers and employers and with due regard to the general interests of the community.."

The principle of free collective bargaining is apparently confirmed, but it is made conditional. The general interests of the community must also be taken into account. It is the 'legitimate expectations' of the community that can justify government intervention in the collective bargaining process.

The reasons for the Government's actions and motives for the Industrial Relations Act

1971 are not the subject of this study, but it is clear that the changes did not come from a desire for reform based upon substantive research. The Act, it has been suggested, reflected an inadequate knowledge and understanding of the nature of the abstentionist framework of industrial relations in the United Kingdom and the extent to which changes in the system can be affected by changes in the law²⁴.

One of the reasons given, which may have been linked to the Government's desire to join the European Economic Community, was that the United Kingdom was out of step with other industrial countries. Mr Robert Carr MP, Secretary of State for Employment, stated:

"The type of systems vary considerably from one country to another, but every other industrialised country but Britain has already found both in theory and practice that a comprehensive system of industrial relations laws is useful and, indeed, necessary"²⁵.

The problems resulting from this Act may have been partly due to the lack of consultation that preceded it. It resulted in confrontation between the law and the trade union movement, with sanctions being taken against individual trade unionists and trade unions by the National Industrial Relations Court. The government failed to appreciate that the reform of labour law, and its attempt to regulate industrial relations, was then more than a procedural matter²⁶ and that there would be resistance to the abandonment of a long tradition of non-interference by the law in the collective bargaining process.

The Social Contract

During the Labour Governments of 1974 to 1979 the contradictions between the professed belief in the freedom of the collective bargaining process and the regulatory role of labour law became more apparent. The Trade Union and Labour Relations Act of 1974 repealed the 1971 Industrial Relations Act.

The 1974 Act failed, as has every other piece of United Kingdom labour law before or since, to produce a positive legal right to strike. The legislation was still influenced by the collective laissez-faire approach and provided the protective framework for the bargaining process, e.g. with respect to the dismissal of workers for not wishing to join a trade union in a work place with a closed shop. The Trade Union and Labour Relations (Amendment) Act 1976 extended protection only to employees who had religious grounds for not joining a trade union. Other employees were to be part of the 'free' collective bargaining system.

At the same time, however, there were considerable extensions to the protection of individual employees contained in the Employment Protection Act 1975, the Sex Discrimination Act 1975 and the Race Relations Act 1976. Schedule 11 of the Employment Protection Act 1975 enabled the results of collective bargaining to be extended to other employees not represented by the parties to an agreement.

The close relationship between the Labour Party and the trade union movement, at this time, manifested itself in the form of the 'Social Contract'. The period, prior to the collapse of the Social Contract before the 1979 general election, was a time of close

relationship between the Trades Union Congress (TUC) and the Government. The TUC's annual report in 1974 stated that

"...the General Council of the TUC consider that statute law can only play a subordinate part in the conduct of industrial relations. the main method is voluntary negotiations between employers and unions .. legislation should ensure that all workers have minimum rights and should encourage the development of voluntary collective bargaining and supplement it where necessary".

The contradiction is that on the one hand the role of voluntary collective bargaining is paramount but, on the other hand, the TUC would be actively involved in policy making²⁷ and would invite the Government to legislate on minimum rights for workers. This was to be the role of legislation and the social partners were to be fully involved in the process.

In the Government White Paper, *The Attack on Inflation*²⁸, it was stated

"The Government seeks the support of the nation in breaking the inflation which threatens our economy. The measures which the Government, the TUC and the CBI are taking are designed to last right through the next pay round.."

The period 1974 to 1979 was perhaps the peak of the involvement of the social partners in the decision making process in the United Kingdom. Mr Roy Jenkins MP, Home Secretary from 1974 to 1976, said that the climate of the time was that of Ministers finding out what the TUC wanted and giving it to them. Mr Michael Foot MP, as

Secretary of State for Employment, was, apparently, totally of this disposition²⁹.

In 1997 it is, perhaps, difficult to imagine a statement similar to that in the TUC annual report of 1979³⁰, which contained a joint statement by the Government and the TUC headed 'The Economy, the Government and Trade Union Responsibilities: Joint Statement by the TUC and the Government'. This statement referred to the partnership between the TUC and the Government which was essential

"...to deal with the inter-related problems of international competitiveness, of the effective use of capital, of incomes, profits, prices, productivity, output, growth, social equality, public expenditure and employment..."³¹

Post 1979

The post 1979 Conservative governments have, it has been suggested, brought about the most radical package of changes to employment law ever seen in the history of English law³².

Sir Otto Kahn-Freund's death in 1979 also appears to have coincided with the conclusion of the collective laissez-faire approach to industrial relations.

The philosophy which was to become influential upon the Thatcher governments was that of Friedrich Hayek³³. In 1981 the Prime Minister stated

"..I am a great admirer of Professor Hayek. Some of his books are absolutely supreme-

'The Constitution of Liberty' and the three volumes on 'Law, Legislation and Liberty' -and would be well read by every hon. Member"³⁴.

In 'The Constitution of Liberty'³⁵ Professor Hayek was concerned with the reduction of coercion in order that individuals may achieve a state of liberty and freedom. For him freedom meant the minimisation of coercion and its harmful effects. Coercion occurs when 'one man's actions are made to serve another man's will'. This was especially true in the case of trade unions.

"It cannot be stressed enough that the coercion which unions have been permitted to exercise contrary to all principles of freedom under the law is primarily the coercion of fellow workers...the coercion of employers would lose most of its objectionable character if unions were deprived of this power to exact unwilling support"³⁶.

Hayek was also concerned with the amount of protection that the law gave to trade unions in the exercise of this coercive power. In his view the Trade Disputes Act of 1906 gave the unions a "spectacular" acquisition of privilege. The result of this is that British trade unions were the biggest obstacle to raising living standards. They were the prime cause of unemployment and the main reason for the general decline in the British economy.³⁷

He believed that this coercive power was exercised by the trade unions as a consequence of their privileged position. One of the duties of the state is seen as "the protection of individuals in society from coercion, whether it comes from outside or from their fellow citizens"³⁸. The instruments of coercion included the closed shop,

secondary action and intimidatory picketing. These are some of the issues which became the subject of government legislation (see below). This thesis is not the place to argue the correctness or otherwise of Hayek's views³⁹. The issue here is that the author of these views was admired by the British Prime Minister and a publication in which these views were put forward was commended, by that same Prime Minister, to other Members of Parliament.

The contrast in approach which is the result of the Conservative Governments' policies can be seen by comparing the White Paper, 'The Attack on Inflation', of 1975⁴⁰ and the White Paper, 'People, Jobs and Opportunity', of 1992⁴¹. The 1975 document states

"The Government intends to undertake jointly with the TUC and CBI a regular review of developments in the economic situation in order to determine progress towards the objectives of this policy".

The 1992 document states that the Government

"..will continue to encourage employers to move away from traditional, centralised collective bargaining towards methods of pay determination which reward individual skills and performance..".

In 1975 the Government was working with the two principal social partners to implement a collective pay policy. In 1992 the Conservative Government was concerned with employers dealing directly with individuals and by-passing the trade

unions. This is one objective of post 1979 Government policy, i.e. the move away from collective bargaining to individual bargaining. The implementation of the Hayek approach and the disappearance of that of Kahn-Freund was achieved through a reduction of trade union industrial power and of their political authority.

It might be suggested that Conservative Government of 1979 came to power with a programme for the destruction of trade unions and therefore a programme of destruction of the consultation process. It is more likely to have been an ad hoc approach in order to avoid the confrontation which took place when the previous Conservative Government introduced the 1971 Industrial Relations Act⁴².

Reducing industrial power

One of the purposes of the Government White Paper, 'Removing the Barriers to Employment', 1989⁴³, was a step by step reform of trade union authority in order to remove unnecessary barriers to jobs. The White Paper "sets out the major rights, freedoms and protections now provided..". The list is divided into those rights given to individuals and those rights given to employers. They all consist of rights taken away from trade unions. Some of these are

"Employment Act 1980

Individuals given protection against dismissal for non-union membership in a closed shop in the case of strongly held personal convictions.

Employers given freedom to decide for themselves whether or not to recognise trade

unions....

Employment Act 1982

Individuals given increased protection and compensation if dismissed because of the closed shop.

Employers given freedom to take legal action for injunctions and damages against trade unions themselves....

Trade Union Act 1984

Individuals given right to regular ballots to decide whether their union should undertake political activities.

Employers given right to restrain industrial action unless there has been a properly conducted secret ballot....

Employment Act 1988

Individuals given right to restrain their union from calling on them to take any industrial action not supported by a properly conducted ballot.

Employers given right to restrain industrial action intended to establish or maintain any union closed shop practice."

This White paper was the precursor of the Employment Act 1990 which made all secondary action unlawful and also made it unlawful to refuse employment on grounds

related to trade union membership. This latter measure being aimed at abolishing the pre-entry closed shop. Three of Hayek's criticisms with regard to trade union powers were the closed shop, secondary action and intimidatory picketing. All these areas have been the subject of reform.

Reducing political power

Of perhaps more significance for this thesis is the exclusion of the trade union movement from national decision-making or any semblance of partnership with the Government.

Examples of this are the restrictions on trade union political funds and the decline and eventual abolition of some of those national bodies in which the trade unions and employers participated with government. The significant ones being the decline of the National Economic Development Council and its abolition in 1992 and the disbanding of the Manpower Services Commission and its replacement by employer led Training and Enterprise Councils.

The period since 1979 has been marked by a move from 'collectivism' in industrial relations to one of 'individualism'. In 1973 it was estimated that some 72% of employees were covered by some form of collective agreement⁴⁴. In 1979 this figure was still 70%, but by 1990 it had declined to some 47%⁴⁵. This period has also marked a significant decline in trade union membership. From a peak in 1979 of 13.3 million members, total trade union membership has fallen every year to reach a figure of 8.3 million in 1994⁴⁶. In 1995 the number of members of TUC affiliated unions

had dropped to approximately 6.89 million from a peak of 12.17 million in 1980⁴⁷. This was a 2% drop on 1994 which had, in turn, experienced a 5.5% reduction over the previous year⁴⁸. There are perhaps a number of reasons for this decline. Partly the reasons are likely to be the decline of those industries in which traditionally there was a strong membership, such as shipbuilding or manufacturing, e.g. the membership of the Transport and General Workers Union fell from 1.271 million in 1989 to 914 thousand in 1994⁴⁹. Partly the reasons will be non economic, such as the ending of the closed shop and the ability of employers to de-recognise trade unions within the law⁵⁰.

The Government as an employer

The Government's policy of moving away from national bargaining to local and individual bargaining is also illustrated by its policies towards those employees working in the public sector.

In 1987 the Government received a report⁵¹ which initiated a programme designed to break up the unified civil service into agencies known as Next Step Agencies. The aim being to decentralise the 'operational' functions of the civil service and leave a core of policy making and advisory Departments. By November 1995 there were 109 such Agencies employing 302,075 staff. There were also another 55 notified candidates for Agency status, employing a further 81,060 staff⁵². It has been accepted that all transfers of staff from central departments to agencies are subject to the TUPE Regulations.

As at April 1 1996 all the established Agencies were given delegated powers to negotiate their own pay structures. They also have delegated personnel responsibilities for such matters as training and recruitment. The same process has happened at departmental level for those staff not transferred to agencies. Pay and personnel matters have been delegated to departments.

The result is that, instead of national negotiations, there are now many individual sets of negotiations that will occur between departments and trade unions and agencies and trade unions. This has caused significant problems for the trade unions who have changed their organisations to cope with this⁵³. Their emphasis is now on training and supporting employee negotiators rather than all negotiations being carried out by professional trade union representatives.

There has also been an important change in the senior civil service⁵⁴ where, from April 1 1996, all staff have been given, for the first time, individual contracts of employment setting out their individual terms and conditions and salaries.

A similar process has happened within the National Health Service. After the passing of the National Health Service and Community Care Act 1990, much of the National Health Service (NHS) was devolved to NHS Trusts, to which responsibility for pay bargaining and personnel policies have also been delegated. By September 1994, 65% of NHS Trusts had local pay action plans and 78% of Trusts had introduced local terms for some staff⁵⁵. It is the effect of the ARD that has stopped local pay arrangements happening more quickly in the NHS. Transfers of staff from the old NHS to the Trusts were recognised as being protected by the TUPE Regulations.

In local government there has traditionally been a process of national bargaining. The government encouraged local authorities to opt out of this structure⁵⁶ and negotiate individually. There have been a very limited number of authorities that have done so. By 1993 only 36 authorities, mostly in the South East, had taken this step⁵⁷. They employed just under 7.5% of the total APT&C⁵⁸ work force in England and Wales.

Conclusions

UK governments since 1979 have changed the approach of the state towards industrial relations. The undermining of trade unions, the attempts to end national bargaining and the ending of any national partnership arrangements with the trade unions or employer organisations are examples of an 'ideological' approach which makes the United Kingdom different to all other Member States of the Community studied here (see chapter 3)⁵⁹. The characteristics of this ideological approach are

1. Opposition to the consultation of employers' organisations and, especially, trade unions at a national level on any issues. This includes consultation on labour law.
2. A preference for individual bargaining and a weakening of trade union bargaining at sectoral level together with opposition to collective bargaining at any level.
3. Not accepting that employers' organisations and trade unions have a role to play in the process of decision making at any level.
4. Opposition to positive collective rights of workers, which results in a reluctance to

legislate in favour of the protection of employee rights.

It will be argued below that this approach leads to problems with the implementation of Community law, and especially Community labour law such as the ARD.

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reply to a question from Mr Nicholas Winterton MP
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Chapter 3 A consideration of the attitude of selected Member States of the European Union towards industrial relations and consultation

Introduction

It is the intention in this chapter to examine the position of the social partners in Member States of the Community. For the reasons explained in chapter 1, this will exclude Luxembourg, Sweden, Finland and Austria. The aim is to show that the approach in all the Member States considered is different to the ideological approach adopted by the United Kingdom.

There are many differences between Member States. Their approaches to collective bargaining and consultation derive from their own historical traditions and laws. This is also true of the United Kingdom. The lack of a defeat in the Second World War or of a revolution in this century has perhaps denied the United Kingdom the opportunity for radical or institutional change. This lack of an enforced opportunity to rationalise the institutions may have contributed to the present day fragmented structure¹.

Spain, Portugal and Greece have all suffered from fascist/military regimes in the post war period which led to the subsequent development of new constitutions. All other Member States suffered defeats in the Second World War in contrast to the United Kingdom. Some Member States have had subsequent periods of labour unrest which have led to important new labour legislation, e.g. France and Italy. It is also possible that the regional problems which affect Italy, Spain and Belgium will have greater effects in the future. It is suggested, however, for the purposes of this thesis, that it is

possible to identify common trends. These trends will be identified as being the result of a 'corporatist' approach to the social partners and consultation (see below), which will be shown to contrast with the 'ideological' approach in the United Kingdom (see page 28 above).

It is planned firstly to consider each state in turn in order to analyse this common approach.

Belgium²

Despite the post war constitutional changes that have devolved power to the different language regions, labour law continues to be a centralised function and there exists a highly developed national collective bargaining system.

Trade unions

Trade union membership is held by some 55% of the work force. There are clear distinctions between blue collar and white collar employees with little apparent trend towards harmonisation (as, for example, with local government employees in the United Kingdom³). Around 80% of blue collar workers are unionised and approximately 60% of white collar workers. The public sector has a very high degree of unionisation with some 90% of the work force belonging to a trade union, compared to approximately 60% in the private sector⁴.

There are three main trade union confederations: the Confederation of Christian Trade

Unions of Belgium with approximately 1.4 million members; the General Federation of Belgium Workers with approximately 1.1 million members; the General Confederation of Liberal Trade Unions of Belgium with approximately 210 000 members.

Trade unions have no legal personality and have resisted all attempts to change this. They cannot therefore be sued, nor can an employer take out an injunction against them to prevent, for example, strike action.

Employers' organisations

The main employers' organisation is the Federation of Belgian Enterprises, which represents some 85% of all private sector employers. There is no obligation upon employers to join an organisation. As with the trade unions the employers' organisations have tended to resist being treated as a legal entity.

Consultation and bargaining

There are two national organisations in which representatives of the trade unions and employers participate. The National Labour Council is the main national body for consultation and negotiation. The Council is consulted by the Government on social legislation and also has the power to enter into binding national collective agreements which can cover the whole of the private sector. These 'accord interprofessionnels', when reached, are given the force of law by Royal Decree. There are, approximately, fifty such agreements at present.

The second national body is the Central Economic Council which advises on economic matters and on issues of competitiveness. This is in contrast to the United Kingdom where such institutionalised discussion has not taken place since the abolition of the National Economic Development Council.

There are, in addition, a number of other consultation and bargaining channels

- a network of sectoral committees which exist for almost all sectors of the economy.

There are some 150 such committees covering approximately 90% of employees in the private sector.

- works councils for all organisations employing 100 or more people

- health and safety committees for all organisations employing more than fifty people.

There is also provision for the extension of collective agreements to other areas, by Royal Decree.

There are pressures which may weaken this centralised collective bargaining process.

Firstly, the government has been much more interventionist in recent years, as shown by the introduction of the 'Global' plan in 1994, which banned increases in real pay over a three year period and encouraged company level initiatives instead of industry ones. Secondly, the continuing regional pressures such as the attempt to divide the social security system between Flanders and Wallonia⁵. Despite this there remains a high level of collective bargaining and institutionalised consultation with the social partners.

Denmark⁶

The Danish approach to industrial relations is said to have four characteristics⁷:

1. a comprehensively organised labour market with strong employers and trades union organisations
2. a high degree of commitment to collective bargaining
3. a consensus based relationship between the opposing organisations
4. regulation of the vast bulk of terms and conditions of employment by collective bargaining rather than statute.

During the 1980s the system has come under strain as there has been a trend towards sector level bargaining. These sector level agreements have tended to become framework documents leaving detailed negotiations to be carried out at company level.

Trade unions

There is a very high degree of trade union membership with about 85% of the work force belonging to one of the three trade union confederations. The most significant is the LO (Landsorganisationen i Danmark), with approximately 1.4 million members.

The high levels of membership are traditional, but it may be helped by the involvement of the trade unions in the administration and payment of unemployment benefit.

Employers' organisations

The largest private sector employer organisation is the DA (Dansk Arbejdgiverforening) which represents approximately 30 000 members. In the past the LO and the DA would negotiate on pay and set a pattern for the rest of the negotiations. This role has declined with the decentralisation of bargaining.

The conciliation system, however, remains highly centralised with Government appointed conciliators becoming involved when there is a possibility of industrial conflict. The conciliators have the authority to impose delays in industrial action and to suggest compromise arrangements⁸. This is in contrast to the system within the United Kingdom, where the Advisory, Conciliation and Arbitration Service (ACAS) was placed upon a statutory basis by the Employment Protection Act of 1975. The Service provides facilities for, and participates in, conciliation in collective and individual disputes. The process, however, is entirely voluntary and requires the consent of both parties to the dispute.

Consultation and bargaining

There are a number of national economic institutions of which both the LO and the DA are members. These are the Economic Council which considers economic issues and the Co-operation Board which promotes co-operation between management and employees. There is also the Council of Nordic Trade Unions which advises and lobbies the Nordic Council of Ministers. The suggestion that there is a 'Nordic' approach to industrial relations is considered below, where Denmark, for the purposes

of this thesis, is the example of this approach.

There are also a number of locally based committees: the co-operation committees which can be set up on the employers' or the employees' initiative in companies of thirty five or more employees; in companies with twenty or more employees a safety committee must also be established. In companies of more than thirty five people the employees also have the right to vote on whether they should have representatives on the supervisory board.

There are, therefore, a significant number of institutionalised means of consultation and bargaining. Although there is no provision for extending the scope of agreements, as in Belgium, to employees not covered, many employers choose to sign adherence agreements through which they accept a specified collective agreement. Approximately one third of all Danish employers agree to collective procedures by this method.

France⁹

The most authoritative source of French employment law is the Constitution. The following is an extract from the 1946 version incorporated by reference into the 1958 Constitution:

"Every person has a duty to work and the right to obtain employment. No person can suffer loss in his or her work by reason of his or her origins, opinions or beliefs. Every person can defend his or her rights and interests through trade union activities and can belong to the union of his or her own choice. The right to strike can be

exercised within the framework of the statutes regulating it. Every worker participates, through delegates, in the determination of working conditions as well as the management of the firm".

This contrasts with the United Kingdom where there is a much more negative approach with protection being afforded to trade unions by the right not to be sued for taking part in industrial disputes (provided certain rules are followed). Nor, of course, are there the constitutional safeguards that exist in France and other Member States.

In practice the most important source of rights in France is statute law. Much of this statute has been incorporated into the nine books of the Code du Travail.

Trade unions

French trade unions are general unions divided along political and religious lines. Their membership is amongst the lowest in the Community, with less than 10% of the work force as members. There are five trade union federations. The largest of which is the Confederation Generale du Travail (CGT) with a claimed membership of 650 000 and the Confederation Francaise Democratique du Travail (CFDT) with a similar number¹⁰.

Despite the relatively low levels of membership, the unions appear to enjoy a significant amount of support from the work force. This is shown in elections to industrial tribunals and works councils. In 1993 some 70% of all delegates to works councils were trade union representatives and some 90% of all employee

representatives on industrial tribunals were from trade unions. Their strength in the workplace has been varied, however, and, with the devolution of bargaining to company and plant level, their influence has been declining¹¹.

Employers' organisations

The main employers' organisation is the Conseil National du Patronat Français (CNPF) which represents approximately 75% of all employers. The CNPF does not bargain directly, but is involved in establishing national framework agreements and offering broad guidelines on pay.

Consultation and bargaining

There is a national tripartite forum known as the National Collective Bargaining Board, which consists of trade unions, employer organisations and government. It has the task of monitoring legislation on collective agreements and deciding upon increases in the minimum wage. There also exists the Economic and Social Council, whose membership consists of employee and employer organisations and other bodies interested in the field, which publishes reports on economic and social policy.

At the local level, firms with eleven or more employees must elect staff representatives and undertakings with fifty or more employees must elect works committees. In small businesses (up to 150 employees) these two roles can be amalgamated. Additionally, in firms of fifty or more employees, health and safety committees must be elected.

Collective bargaining is enshrined in law. The 'Auroux' law of 14 November 1982 ensures that employers and trade unions at industry level must meet at least once a year to negotiate. Approximately 85% of all private sector employees are covered by around 400 such industry agreements¹².

Pay in the public sector is negotiated annually between the government and the civil service unions.

After consultation with the National Pay Bargaining Board collective agreements may be extended to all companies in the same sector or geographical area.

Germany¹³

German labour law has been highly interventionist because the State is very concerned with the protection of the employee and recognises that the employer and employee do not stand in equal relationship to each other¹⁴.

Fundamental rights in employment are guaranteed by the Basic Law (Grundgesetz) of 1949, e.g. Article 9 guarantees both individual and collective rights to freedom of association. The courts have also interpreted this to mean a guarantee of the right not to associate.

Trade unions

There is a dual employee representation system; through trade unions and through

works councils.

There are four trade union confederations of which the Deutsche Gewerkschaftsbund (DGB) is by far the most important. In 1994 the DGB had a membership of 9.77 million out of a total union membership of 11.685 million. This is equivalent to some 37% of the total workforce: Figures tend to be distorted by the results of unification. Union density is estimated to be some 50% in the old East Germany and 28% in the West¹⁵.

Trade unions tend to be involved in industry level agreements which are extensive. There are estimated to be approximately (in 1991) 24700 at sector level and 8750 at company level. These agreements, concluded with the trade unions, cover some 80 to 90% of all employees¹⁶.

There is also the possibility of extending collective agreements. Under the 1969 Collective Agreements Act the Federal Minister of Labour can declare an agreement generally binding. Some 5.4 million employees are covered by these extended agreements.

Employers' organisations

Employers' organisations tend to be fragmented and organised along industrial and geographical lines. There is also a distinction between employers' associations and industrial associations; the first dealing with social issues and the second being concerned with economic matters. The main employers group is the Bundesvereinigung

der Deutschen Arbeitgeberverbände (BDA), which includes some 700 employers' organisations.

Consultation and bargaining

There is no formal tripartite system of consultation at national level. There is, however, an active informal exchange and consultation process and an official ideology on both sides of 'social partnership' which commands broad support¹⁷.

Although there is a dual system of employee representation there is a considerable overlap, e.g. the chairs of the works councils in large firms usually sits on the union negotiating committees and trade unions may attend works council meetings. DGB candidates won two thirds of all seats in the 1994 works council elections and supplied three quarters of all chairpersons.

The works councils operate at plant level and are consulted extensively, e.g. any decision to employ extra workers must be notified and agreement obtained. The aim of the works council will be the protection of existing employees, although it has no right to strike. There is a resort to a conciliation committee, although this is a rare occurrence.

There is also a system of supervisory boards for firms of over 500 employees which will have shareholder and employee representation.

Greece¹⁸

Greece has had a political history in the twentieth century that has proved difficult for the establishment and building up of an independent trade union movement. There have been periods of dictatorship, from 1936 to 1941, and military government, from 1967 to 1974, and also the banning of the Communist Party of Greece from 1945 to 1974. In 1992 agriculture employed approximately 22% of the work force, compared to an EU average of 6%. Employees accounted for only 53% of the workforce, with 35%¹⁹ consisting of employers or the self employed.

Trade unions

From 1955 to 1990 industrial relations were dominated by Law 3329 which created and defined formal collective bargaining. This tight control over the structure and form of collective bargaining influenced the development of trade unions. Law 1876 in 1990, however, resulted in less detailed interference in industrial relations.

There are a large number of trade unions with the main organisation being the General Confederation of Greek Labour (GSEE). The rate of union membership in the private sector is 31% and approximately 78% in the public sector²⁰.

Employers' organisations

There are four main employers' organisations. The largest is the Federation of Greek Industries (SEB). The employers' organisations negotiate with the GSEE on the

National General Collective Bargaining Agreement, which sets minimum pay and conditions for the private sector, including the national minimum wage.

Law 1876 of 1990, fully implemented in 1992, has changed the relationship and has put in place a system of dispute resolution with the creation of a new body for conciliation and mediation.

Consultation and bargaining

This has been influenced by post war Greek political history and in recent years there has been increased consultation. In 1994 The Economic Commission was established as an independent body for social dialogue at a national level. It is made up of representatives of employers, trade unions, government and others and taking its opinion on a wide range of matters is obligatory for the Government.

The Civil Code of 1975 lays the foundation for collective agreements which play an important part in regulating labour relations. There are over 100 collective agreements concluded annually which are legally enforceable.

Legislation on works councils was introduced in 1988. Businesses with at least fifty employees (between twenty and fifty if there is no trade union) have the right to elect works councils. One of the functions of the councils is to be consulted on changes in the legal status of employers and the transfer of functions.

Ireland²¹

There has, traditionally, been a close relationship between the Irish and the British systems of industrial relations, partly as a result of the close history of the two nations. This close relationship has weakened and diverged since 1979. Until this time both countries were governed by similar legislation, such as the Trade Disputes Act of 1906. This was eventually superseded in Ireland by the 1990 Industrial Relations Act.

Trade unions

The Irish Congress of Trade Unions (ICTU) has sixty nine trade unions affiliated. Trade union membership, in 1993, was approximately 485 000, equivalent to some 47% of all employees in work. Membership levels are 36% in the private sector and 76% in the public sector²². The close links with the United Kingdom continue as twenty nine of the sixty nine affiliated unions have their headquarters in the United Kingdom or Northern Ireland.

The Constitution of 1937 guarantees the right to form unions or associations. This is supplemented by the Trades Union Acts of 1941 and 1971 and the Industrial Relations Act 1990. This latter introduced ballots for unions prior to industrial action.

Employers' organisations

In 1993 the Federation of Irish Employers merged with the Confederation of Irish Industry to form the Irish Business and Employers' Confederation to become the largest

of such organisations, representing some 3700 employers with approximately 300 000 employees.

Consultation and bargaining

There has been a history of national bargaining. In 1987, for example, there started a series of three yearly national agreements which covered pay and achieved consensus upon a wide range of social and economic topics. This process is voluntarist and the agreements are not legally binding, but levels of adherence are high. There is a Central Review Committee, with representatives of all three parties, which reviews the agreement monthly. The current three year agreement is called the 'Programme for Competitiveness and Work' and is due to be renewed at the end of 1996²³. This tripartite approach is extended to a number of state bodies such as the National Economic and Social Council.

Collective agreements are not legally binding unless otherwise agreed. Legally binding agreements can be registered at the Labour Court, but this, apparently, seldom happens²⁴. Despite the national agreements there is still an extensive system of company level agreements.

Italy²⁵

There is a considerable amount of legal protection for employees in Italy. The constitution guarantees all employees certain basic rights, which include the right to work; the right to be paid for that work; the right to a weekly rest day and annual

holidays; the right to receive welfare benefits and the right to freedom of association.

One of the most important pieces of labour law is Law No 300 of 20 May 1970, known as the Workers' Statute. This was concluded after a period of considerable industrial unrest in the late 1960s and can be seen as a bill of rights for workers. It lays down principles relating to workers' basic rights such as belonging to a trade union and the freedom to engage in union activities at the work place. This was amended and extended in 1990.

Much practical labour law is via collective agreements which have recently been influenced by the national agreements of 1993, which set a new pattern for industry and company level bargaining.

Trade unions

There are three main trade union confederations. These are the Confederazione Generale Italiana del Lavoro (CGIL), which claimed 5 million members in 1993; the Confederazione Italiana Sindacati Lavatori (CISL), which claimed 3.5 million members in 1993, and the Unione Italiana del Lavoro, which claimed 1.8 million members in the same period. These Federations have traditionally been aligned with particular political parties, but the situation is now more flexible with the political changes that have occurred in Italy in recent years. Newer political organisations such as the Northern League and the MSI/National Alliance have also developed their own union organisations. Total membership is approximately 40% of the work force.

Trade unions are not regulated by law. They are given the freedom to organise themselves as they wish, e.g. there is no requirement for ballots prior to strike action as in the United Kingdom.

Employers' organisations

The largest employers' organisation is the Confederazione Generale dell'Industria Italiana (Confindustria) which represents some 100 000 companies with approximately 3 million employees. It represents private sector industry in national talks with government and trade unions.

Consultation and bargaining

There are no formal structures for tripartite negotiations, but in practice there is continuous tripartite discussion on economic and social issues. Recent examples have been the agreements concluded in July 1992 and July 1993 which abolished pay indexation, reformed the industrial relations system and agreed terms for future collective bargaining.

There is also a well established process of national bargaining between employers, such as Confindustria, and the trade union confederations. Agreements reached often replace legislation, and can eventually become law, e.g. procedures on collective dismissal were governed by national agreement until legislation was finally passed in 1991. National agreements are binding upon all employers in a sector, regardless of whether they are a signatory to them or not. In the public sector there are negotiations with the

government which need to be ratified by parliament.

Employee representative bodies can be established in any work place with at least 16 employees. These consist of a mixture of elected employee representatives and trade union nominations.

Netherlands²⁶

Labour law in the Netherlands has historically been centralised and institutionalised. There is a strong tradition of consultation and an extensive use of collective agreements. In recent years there has been a weakening of this process with a reduction of trade union membership and the attempted simplification of the decision making and consultation process.

Trade unions

There are three recognised trade union confederations which have traditionally been divided along religious lines. The largest is the Federatie Nederlandse Vakbeweging (FNV) with a total membership of 1.1 million at the end of 1994. This represents some 80% of all trade unionists²⁷. Trade union membership has dropped from some 40% of the workforce in the mid 1970s to approximately 25% in the mid 1990s.

There is little statutory regulation of trade unions. They draw up their own rules for elections and voting procedures. If they wish, however, to enter into collective agreements they must have a legal personality. Only a trade union can negotiate formal

collective agreements.

Employers' organisations

The two main organisations, the *Verbond van Nederlandse Ondernemingen* (VNO) and the *Nederlandse Christelijk Werkgeversverbond* (NCW), amalgamated in 1994 to form the VNO-NCW. The old VNO, which was the biggest, represented about 10 000 employers.

Consultation and bargaining

The Government is under an obligation to consult the *Social and Economic Council* (SER), which is a national tripartite body, on major economic and social issues. One of the issues to commonly come before the SER is the implementation and interpretation of European law.

There is also a national bi-partite consultation body known as the *Labour Foundation*. It is a body of trade union and employer representatives that is consulted on industrial relations issues, but its role is now questioned as it is no longer concerned with the establishment of formal agreements.

Employers with at least thirty five employees are required to establish a works council. In practice about 70% of all works council members are trade union representatives.

Legislation on collective agreements consists of the 1927 Act on Collective

Agreements, which defined them, and the 1937 Act on the Generally Binding and Non Binding Declaration of Collective Agreements, which empowers the Minister for Social Affairs and Employment to issue a declaration that a collective agreement is generally binding.

This is a power that is used extensively. Over 70% of Dutch employees have their conditions of employment regulated by collective agreements. In 1995 there are approximately 900 such agreements in force for 3.4 million employees. Of these about 75% are declared generally binding, affecting approximately 400 000 employees not covered by collective agreements. This is compared to the fact that only 25% of the work force belong to the trade unions who negotiate these agreements with the employers.

Portugal²⁸

Portugal is still going through the process of reforming its industrial relations structures after the revolutions that overthrew the fascist regimes of Salazar and Caetano.

Trade unions

There are two main trade union confederations. They are the Confederação Geral dos Trabalhadores Portugueses (CGTP-IN) and the União Geral de Trabalhadores (UGT). In 1993 there were 396 unions, over 200 of which were affiliated to the CGTP-IN and sixty to the UGT. A union density figure of approximately 30% of the work force has been estimated by the OECD²⁹.

The principle of freedom of association for workers and trade unions and the right to strike is enshrined in the 1974 post revolutionary constitution. Trade unions acquire a legal personality upon registration with the Ministry of Employment.

Employers may not refuse to recognise trade unions and must respond to a proposal for negotiation within 30 days. After this the union can apply for official conciliation by the Ministry of Employment.

Under Article 56 of the Constitution trade unions must be consulted on legislative employment proposals.

Employers' organisations

There are three employers' organisations: the Confederação da Indústria Portuguesa (CIP); the Confederação do Comercio e Servicos Portuguesa (CCSP) and the Confederação da Agricultura Portuguesa (CAP). The CIP is the biggest and represents approximately seventy employers' associations of 60 000 companies employing about 750 000 people. The three organisations co-operate in an umbrella body called the Conselho Nacional de Empresas Portugueses (CNEP).

As with trade unions, employers must be consulted on legislative matters concerning labour law.

Consultation and bargaining

There is a national Economic and Social Council set up by amendment to the constitution in 1991 which concerns itself with, amongst other subjects, the promotion of social dialogue. As part of this organisation there is the tripartite Permanent Council for Social Consultation which has responsibility for labour matters (CPCS). The CPCS is consulted annually on the national minimum wage.

Workplace representation is of a dual nature between enterprise workers' committees and trade union workplace committees, both given the right to existence by the Constitution.

Most collective agreements are made at industry level and are legally binding upon the signatories and their affiliated organisations. They can also be extended by Government extension orders to unregulated parts of the industry. The result is that approximately 80% of all wage and salary earners are covered by some kind of agreement or employment regulation.

Spain³⁰

Traditionally labour law has been an exclusive function of the centralised state. The Ministry of Labour is now gradually transferring some employment processes to the regional governments.

Reforms introduced in 1994 were intended to remove the remaining parts of the old

fascist regime from labour law, where many rules were established by issuing labour ordinances. At the end of 1994 almost half the ordinances in existence had been approved during the 1970s. Part of the purpose of the reforms is to replace these ordinances by collectively agreed provisions, together with a trend towards decentralisation. These reforms have, however, proceeded slowly because of opposition from trade unions and employers³¹.

Trade unions

Spanish trade unions have been in the vanguard of the democratic opposition to twentieth century Spanish dictatorships and, as a result, are highly politicised. Trade unions were legalised again in 1977 with the Law on Freedom of Association. Article 28 of the 1978 Constitution guaranteed basic democratic union rights. Subsequent legislation continued this process with the Workers' Statutes of 1980 and 1994 and the 1985 Law on Trade Union Freedoms.

The two main trade union federations are the Union General de Trabajadores (UGT) and the Comisiones Obreras (CC.OO). Membership peaked in the late 1980s with a total of 2.6 million members. It subsequently fell and, according to some estimates, it fell to 15% of the total workforce in the 1980s³². Their influence may be stronger than their membership, however, as almost 70% of seats on works councils are held by trade union nominees.

Employers' organisations

Since 1977 employers also have the right to freedom of association. The largest employers' organisation, representing about 700 employers' associations, employing approximately 10 million people, is the Confederacion Espanola de Organizaciones Empresar (CEOE).

Consultation and bargaining

In 1992 the Social and Economic Council was formed. This is a tripartite body with a commitment to discussing policy but has no statutory power to examine legislation. There are also other regional forums which bring employers and trade unions together for consultation. The 1994 Workers Statute has led to further co-operation in order to replace the labour ordinances with collective agreements.

The Workers' Statutes of 1980 and 1994 also introduced and developed the system of works councils. Companies of 50 or more employees must establish works councils. These works councils have a statutory right to receive information and express an opinion.

Formal coverage of collective agreements is about 70% of the work force. In 1994 there were 2890 agreements at undertaking level, covering 842,500 employees, whilst 1191 agreements existed at other levels, including national and sectoral level, covering 5,584,000 employees³³. Collective agreements can be extended to other groups not covered by agreements.

The corporatist approach

All the Member States examined above display some common approaches which are here called the 'corporatist' approach. The characteristics of this system are

1. A willingness of the government to consult with representatives of workers and representatives of employers at a national level on a variety of economic and social issues. This is likely to include consultation on the introduction of labour law.
2. The encouragement, by statute or otherwise, of collective bargaining at all levels, but especially at work place level with the encouragement of work place or trade union consultation.
3. An acceptance that both employers' organisations and trade unions have a positive role to play in the process of decision making at both a national and a local level.
4. An acceptance of the collective rights of employees to organise and be recognised for consultation purposes.

This is in contrast to the ideological style adopted by the United Kingdom (see chapter 2). It is suggested that the United Kingdom has an approach which is different from the approach of all other Member States. This is further shown by a study carried out, for the European Commission, of labour law in Member States³⁴. This report is considered below.

European Comparisons

There are perhaps three broad levels at which collective bargaining can take place.

These are

- the national economy level
- the national sectoral level
- the enterprise/plant level

Most Member States have agreements at all these levels, but it is possible to say that the national economy level is most closely identified with those countries that have the most corporatist tradition, such as Denmark where there is a highly organised labour market with a strong commitment to collective bargaining. The majority of countries have sector wide bargaining as the norm in both the public and private sectors.

Levels of basic pay determination in the private sector for manual workers (1991)

(% of organisations)³⁵

| | Denmark | France | Italy | Netherlands | UK |
|----------------------|---------|--------|-------|-------------|----|
| National/Sector wide | 53 | 24 | 59 | 75 | 22 |
| Company | 6 | 50 | 45 | 24 | 37 |
| Plant | 8 | 27 | 12 | 8 | 40 |

The decentralisation of bargaining in the United Kingdom is very noticeable in the figures for negotiation at plant level. It may be significant that France should be similar, as France has the lowest trade union membership, as a proportion of the work force, of any Member State.

It is possible to identify three main sources of regulation of the rules governing the relationships of the state, employers and trade unions within the Community³⁶. These are the Romanic-Germanic system, the Anglo Irish system and the Nordic system.

Romanic German system

This includes the legal systems of Greece, Portugal, Spain, France, Belgium, Luxembourg, the Netherlands, Germany (the Federal Republic was the example used in this study) and Italy. The essential features of this system are

1. The existence of a written constitution enshrining fundamental social rights and freedoms.

The constitutions of Spain, Portugal, Greece, France, Germany, the Netherlands, Italy and Luxembourg incorporate, in some form or another, fundamental freedoms, such as the right to work; the right to join a trade union; the right to collective bargaining and the right to take collective action. The constitution of Belgium is less specific, but does contain certain political and civil rights³⁷.

2. The role of statute law in regulating individual and collective relations.

With the exception of Italy, there is much positive legislation fixing the basic institutional structure and much intervention in collective employment relations. Statute sets the legal framework for the employment contract; minimum levels of protection; working conditions; legal framework for collective bargaining and workplace

representation. State legislation on industrial relations is preceded by a process of consultation with the two sides of industry.

3. Collective agreements as a source of regulation.

To varying degrees collective agreements constitute the most important source of the regulation of working conditions in these Member States, although it is statute (with the possible exception of Italy) that regulates the form of the agreement and the bodies authorised to conclude these agreements.

Anglo Irish system

These systems are linked by their common law traditions. They have, according to the study, 'essential features and peculiarities unknown in the Nordic and Continental systems³⁸'. These features are

1. The absence of fundamental rights enshrined in a constitution.

Ireland does have a written constitution with equal treatment and freedom of association enshrined, but in neither country are there positive rights concerning industrial action ("constitutional judgments [in Ireland] are frequently ignored by both employers and trade unions"³⁹).

2. The abstentionist role of the state in regulating industrial relations.

3. The decisive role of the courts which play a key part in the role of industrial relations.

Ireland is linked to the United Kingdom, but there are umbrella national agreements that provide a general framework. In this respect one can say that there is a difference and that Ireland has many similarities with other Member States of the Community.

Nordic system

Denmark is the only example of this in the countries studied here. Its constitution contains few provisions on economic and social rights. Traditionally collective agreements have been the cornerstone of the system of regulation and include such rules as those on industrial action, the right to unionise and limits on the management prerogative. The high levels of trade union membership mean that these agreements have wide effect. The essential characteristic of this system is the economy wide agreement with the state acting as a third partner.

Conclusions

The differences between the ideological and the corporatist states manifest themselves in the approaches to collective bargaining and consultation.

Collective bargaining

In a number of countries the trade unions need to satisfy certain requirements to be

able to conclude collective agreements. In Germany a trade union must be represented at more than one level to qualify; in France, Greece, Luxembourg and Spain the unions have to be representative of the work forces for which they wish to negotiate; in the Netherlands and Portugal every trade union is entitled to conclude a collective agreement.

In the United Kingdom there is the requirement to be a recognised independent trade union⁴⁰, although there is no requirement that collective agreements must be reached with trade unions. Collective agreements have no legally binding effect unless the parties express that wish in writing⁴¹. It is possible for the terms of collective agreements to be expressed or implied into individual contracts of employment, but this process is far from automatic and limited to those employees affected by collective agreements.

In all other Member States the collective agreement is considered to be legally binding. In Belgium, France, Luxembourg and Spain the agreement is usually binding on all employees, whether or not the employee is a member of the trade union. In Denmark an agreement is binding upon the employer whether or not the employees are organised. In Germany, Greece, Italy and the Netherlands collective agreements are only legally binding when the employee is a member of the contracting trade union, although, in practice, it appears that non union employees receive the same terms and conditions.

In Belgium, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Portugal and Spain it is possible to extend, under certain circumstances, which differ

as between countries, agreements to other employees in the same sector.

Consultation

In eight Member States (Belgium, France, Greece, Germany, Luxembourg, the Netherlands, Portugal and Spain) there are mandatory works councils. In Denmark there are works councils based upon collective agreements. In Italy and Ireland there has been no tradition of such institutions, although this has changed since the introduction of the European Works Council Directive⁴².

In the United Kingdom there is only a very limited institutionalised system of employee participation. Many of those statutory rights that do exist are as a result of Community legislation⁴³, eg. a number of UK companies, with subsidiaries elsewhere in the Community, are establishing European Works Councils and including the UK employees as members⁴⁴.

It is important not to describe industrial relations in Member States in a static way. Changes are taking place in the level of bargaining with a move away from national and sectoral agreements to company level, e.g. in the Netherlands. There are also pressures to deregulate as in the United Kingdom, but there is a contrast between other Member States and the United Kingdom:

"What is notable in most of western Europe is the extent to which governments have embraced deregulation not, as in Britain, as part of a free market anti-union crusade, but as a tactical adaptation to changed economic circumstances to be accomplished as

far as possible by consent"⁴⁵.

1. See Lane, Christel (1994) 'Industrial Order and the Transformation of Industrial Relations: Britain, Germany and France compared' - contained in New Frontiers in European Industrial Relations Richard Hyman and Anthony Ferner (eds) Blackwell

2. The information in this section derives primarily from the following sources:

2.1 Burgess, Peter (ed) (1995) Contracts and Terms of Conditions of Employment European Management Guides London: Institute of Personnel and Development

2.2 Burgess, Peter (ed) (1996) Industrial Relations and Collective Bargaining European Management Guides London: Institute of Personnel and Development

2.3 Commission Report to the Council (1992) SEC(92) 857

2.4 Van Bael and Bellis (1993) Business Law Guide to Belgium Business Law Guide to Belgium CCH Editions Ltd

2.5 Vilroxx, Jaques and Van Leempt, Jim (1992) 'Belgium: A New Stability' contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell

2.6 Birk, Professor Rolf (1994) Contracting Out of Services Report for the European Commission

3. Harmonisation of terms and conditions of employment is one of the issues under negotiation between employers and trade unions within local government in the United Kingdom - source the Local Government Management Board.

4. These figures (taken from Burgess op.cit. note 2.2) include retired and unemployed members and so seem out of line with the 55% total membership figure quoted. This latter figure does not include these people

5. The 1995-1996 central agreement - EIRR 255 April 1995

6. The information in this section derives primarily from the following sources:

6.1 Burgess, Peter (ed) (1995) Contracts and Terms and Conditions of Employment European Management Guides London: Institute of Personnel and Development

6.2 Burgess, Peter (ed) (1996) Industrial Relations and Collective Bargaining European Management Guides London: Institute of Personnel and Development

6.3 Commission Report to the Council (1992) SEC(92) 857 Final

6.4 Davies, Paul (1994) Contracting Out of Services - Report for the European Commission

6.5 Eberling, Morgans and Gomard, Bernhard (1993) Corporations and Partnerships in Denmark Kluwer

6.6 Scheur, Steen (1992) 'Denmark: Return to Decentralisation' contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell

7. Burgess op.cit. note 6.2

8. Recovery may jeopardise wage moderation - IDS Employment Europe Issue 408 December 1995 p9

9. The information in this section derives primarily from the following sources:

9.1 Burgess, Peter (ed) (1995) Contracts and Terms and Conditions of Employment European Management Guides London: Institute of Personnel and Development

9.2 Burgess, Peter (ed) (1996) Industrial Relations and Collective Bargaining European Management Guides London: Institute of Personnel and Development

- 9.3 Commission Report to the Council SEC(92) 857 Final
- 9.4 Goetschy, Janine and Rozenblatt, Patrick (1992) - France: The Industrial Relations System at a Turning Point contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell
- 9.5 Dickson, Professor Brice (1994) Introduction to French Law London: Pitman Publishing 1994
- 9.6 Birk, Professor Rolf (1994) Contracting Out of Services Report for the European Commission
10. Burgess op.cit note 9.2
11. France - Country profile IDS Employment Europe Issue 405 September 1995
12. Burgess op.cit. note 9.2
13. The information in this section derives primarily from the following sources:
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- 13.2 Burgess, Peter (ed) (1996) Industrial Relations and Collective Bargaining European Management Guides London: Institute of Personnel and Development
- 13.3 Commission Report to the Council SEC(92) 857 Final
- 13.4 Foster, Nigel (1993) German Law and Legal System Blackstone
- 13.5 Stengel, Dr Arnd (1995) Company and Labour Law Aspects of the new German Business Transfer Act ICCLR 135
- 13.6 Weiss, Manfred (1987) Labour Law and Industrial Relations in the Federal Republic of Germany Kluwer
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- 13.8 Droste (Dr Michael Witzel) (1995) Mergers and Acquisitions in Germany CCH Editions Ltd
- 13.9 Birk, Professor Rolf (1994) Contracting Out of Services Report to the European Commission
14. Foster op.cit. note 13.4
15. Burgess op.cit. note 13.2
16. Burgess op.cit. note 13.1
17. Burgess op.cit. note 13.2
18. The information for this section derives primarily from the following sources:
- 18.1 Burgess, Peter (ed) (1995) Contracts and Terms and Conditions of Employment European Management Guides London: Institute of Personnel and Development
- 18.2 Burgess, Peter (ed) (1996) Industrial Relations and Collective Bargaining European Management Guides London: Institute of Personnel and Development
- 18.3 Commission Report to the Council SEC(92) 857 Final
- 18.4 Rokas, Professor Ionnis (1991) Greece Practical Commercial Law Longman
- 18.5 Kritsantonis, Nicos D (1992) 'Greece: From State Authoritarianism to Modernisation' contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell
- 18.6 Iliopoulous, Constantin (1994) Contracting Out of Services Report to the European Commission.

19. Rokas op.cit. note 18.4

20. Burgess op.cit. note 18.2

21. The information in this section derives primarily from the following sources:

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21.2 Burgess, Peter (ed) (1996) Industrial Relations and Collective Bargaining European Management Guides London: Institute of Personnel and Development

21.3 Commission Report to the Council SEC(92) 857 Final

21.4 von Prondzynski, Ferdinand (1992) 'Ireland: Between Centralism and the Market' contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell

21.5 Davies, Paul (1994) Contracting Out of Services Report for the Commission

21.6 Ireland - Industrial Relations Background EIRR 256, May 1995

22. Burgess op.cit. note 21.2

23. 'Financial Times' newspaper September 25 1996 p3

24. Burgess op.cit. note 21.2

25. The information in this section derives primarily from the following sources:

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25.3 Barbalich, Roberto (1991) Italy Practical Commercial Law Longman

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25.5 Biedma, Eduardo Gonzalez (1994) Contracting Out of Services Report to the European Commission

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25.7 Wedderburn of Charlton, Baron (1990) The Italian Workers' Statute - Some British Reflections ILJ vol 19 1990 p154

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26.5 Debate on Generally Binding Agreements EIRR 253 February 1995 27

26.6 Visser, Jelle (1992) 'The Netherlands: The End of an Era and the End of a System' contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell

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27. Burgess op. cit. note 26.2

28. The information in this section derives primarily from the following sources:

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28.3 Commission Report to the Council SEC(92) 857 Final

28.4 Portugal - Industrial Relations Background EIRR 253 February 1995 27

28.5 Biedma, Eduardo Gonzalez (1994) Contracting Out of Services Report for the European Commission

28.6 Barreto, Jose (1992) 'Industrial Relations Under Democracy' contained in Industrial Relations in the New Europe Anthony Ferner and Richard Hyman (eds) Blackwell

29. Burgess op.cit. 28.2

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30.5 Biedma, Eduardo Gonzalez (1994) Contracting Out of Services Report for the European Commission

30.6 Spain: Impoverishment or Enrichment? Bargaining after the Reforms EIRR 255 April 1995 25

30.7 The Deregulation of the Spanish Labour Market EIRR 262 November 1995 28

30.8 Hyman, Richard (1994) Industrial Relations in Western Europe: An Era of Ambiguity? Industrial Relations vol 33 no 1 January 1994 1

31. Burgess op.cit. note 30.2

32. Ibid

33. Ibid

34. Comparative Study on Rules Governing Working Conditions in the Member States SEC(89) 1137 - this is a study carried out at the request of the Council of Ministers meeting in Hanover on June 28/29 1988

35. Bridgford, Jeff and Stirling, John (1994) Employee Relations in Europe Blackwell

36. Comparative Study on Rules Governing Working Conditions in the Member States op.cit

37. Ibid

38. Ibid

39. Ibid

40. See Chapter 1 Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992

41. S179 TULRCA

42. Council Directive 94/45 EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees OJ L254/64 of 30.9.94

43. As in the Acquired Rights Directive and the Collective Redundancies Directive and consultation on matters of health and safety

44. See IDS Study European Works Councils No 600 April 1996

45. Hyman, Richard (1994) op.cit. note 30.8

Chapter 4 An examination of the implementation of law by the European Community and its consequences for the Community's social policy and labour law

Introduction

It is the intention in this chapter to consider the means by which Community law and Community social policy are implemented and to place the ARD in its legal and social context. The purpose is to analyse how the approach of the European Community differs from that of the United Kingdom and to draw conclusions about the relevance of the ideological and corporate approaches. This will provide the basis for the examination, in subsequent chapters, of the ARD and the TUPE Regulations.

It is not intended to examine all the institutions or all the sources of Community law¹. It is only intended to look at those areas that are of direct relevance to this thesis. It is important to establish, however, that to compare certain behavioural aspects of a state to behavioural aspects of the European Community is not a process of comparing like with like. All the Member States of the Community are 'state centred' in a way that the Community is not. An essential feature of the state is the ability to coerce. The very feature that Hayek found so distasteful in trade union organisations is an important aspect that distinguishes the state and the Community. The state is entitled to use coercion to enforce its laws. This coercion can include physical force². Furthermore the state has a monopoly of the use of force and it can decide what is lawful and what is not.

In contrast the Community has few coercive powers. It can, of course, impose financial

penalties for the failure of Member States to transpose Community law correctly (see below), but it is unable to physically enforce its decisions. It is the Member States that retain the monopoly of such power at present.

Additionally the state through the government, in democratic societies, has a relationship with the electorate. It is the collection of individuals that make up the electorate who give the government the authority to make laws and ensure that they are obeyed. An entity such as the European Community does not have this relationship. Although the European Parliament is directly elected, it has a very restricted role in the legislative process. The law making institutions of the Community are the Council of Ministers, the Commission and, arguably, the European Court of Justice. The relationship of these bodies is with the Member States, not with their electorates.

The European Community is not a 'super state'. The debate about whether the Treaties establishing the Community and its institutions create a constitution may not help an understanding of the Community. The European Court of Justice appears at times to have regarded the Treaties as the basis for a constitution:

"It must first be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty"³.

Perhaps the important part of this quotation is the emphasis on the rule of law. The Community exists because it makes laws based upon the consent of Member States. It

cannot coerce those Member States, but relies on their consent and acquiescence. Where a Member State decides to withhold consent, problems arise. An example of this is the policy adopted by the United Kingdom in its reaction to the 'beef crisis' in 1996. The United Kingdom Government adopted a policy of non co-operation which meant "Britain will first use its veto to block the passage of all EU directives requiring unanimity"⁴. If such an attitude were anything more than temporary the Community could not function. It could not do so because it would not have the consent of its members to function.

This difference is important when a consideration is given to the operation of the Community. It is an organisation that consists of Member States that allow and encourage it to function⁵. This means that an examination of the Community must accept that its derivations lie in the traditions and laws of the Member States. The Community and its activities are complementary to the Member States rather than being a superior state with superior laws and superior policies. This study will consider the influences that derive from the Member States and whether the ideological and corporatist approaches have influenced the working and structure of the Community.

The twin foundations of Community law are the concepts of supremacy and direct effect. In both of these areas it is possible to identify a conflict based upon the two different approaches outlined. It is proposed firstly to examine the apparent conflict between the ideas of the supremacy of Community law and that of subsidiarity.

Supremacy of Community law

The European Court of Justice explained the nature of the new Community order in Costa v ENEL⁶:

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves".

Thus Member States have limited their sovereignty by transferring powers to the Community. When a state joins the Community it agrees to the institutions of the Community having certain powers to initiate legislation and policy as well as to enforce that legislation and policy within the Member State. This might be seen as a delegation of authority to the Community, except, as shown in Costa above, the Community is not a subservient authority but a Community with its own "legal capacity". Those legal powers have grown partly as a result of decisions of the European Court of Justice.

Community powers have tended to grow with time. At first, they were usually

concurrent with Member State powers. Over time, in some areas, they have developed to the point of being exclusive⁷.

Mancini⁸ quotes some legal writers as saying that Costa v ENEL is an example of judicial activism gone wild. He points out that the decision is the logical development of creating the Community and of the powers contained in Article 189 EC⁹. In a reference to Garland v BREL¹⁰, he stated

"Lord Diplock, and many other national judges before him, obviously realised that the alternative to the supremacy clause would have been a rapid erosion of the Community"¹¹.

Other cases have emphasised the ruling in Costa. In Internationale Handelsgesellschaft¹² the European Court of Justice ruled on an apparent conflict between a Regulation and the German Constitution:

"..the law born from the Treaty (cannot) have the Courts opposing to it rules of national law of any nature whatsoever..the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principle of a national constitutional structure".

Community law should, therefore, have preference over national law and the national courts have an obligation to enforce this:

"...a national court which is called upon...to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing...to apply any conflicting provision of national legislation.."13.

Two examples of the effect of this obligation in the UK courts are Litster¹⁴ and Factortame¹⁵. Litster involved a consideration of the TUPE Regulations. All the employees of the company were dismissed as redundant one hour before the business was transferred to a new owner. The question that needed a decision was whether the employees were employed immediately before the transfer and thus protected by the TUPE Regulations. The Court held that in order for the Regulations to implement the aims of the Directive an extra sentence¹⁶ needed to be added to the Regulations. In order to transpose Community law, the House of Lords was able to give a purposive interpretation to UK law. Lord Templeman stated

"Thus the courts of the United Kingdom are under a duty to follow the practice of the European Court by giving a purposive construction to directives and to regulations issued for the purpose of complying with directives".

In Factortame the House of Lords, in an Article 177 reference to the European Court of Justice, asked whether Community law obliged the Court to give interim protection to the applicants even where the Court had no apparent power to do so. The European Court replied:

"It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed

by Community law from granting relief...It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule".

In order to enforce Community law, the national law of the United Kingdom was set aside by the UK court. It will be argued later that the UK courts have adapted to Community law effectively, but only by changing their traditional approach and adopting that of the European Court of Justice and the approach used by other Member States of the Community.

Subsidiarity

Article 3B EC states

"The Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein".

The European Commission explained the principle thus:

"In the Community context subsidiarity means the functions handed over to the Community are those which Member States, at the various levels of decision making, can no longer discharge satisfactorily".¹⁷

It is said that "the most visible source" of subsidiarity lies in the canon law of the Catholic Church¹⁸ and that Pope Pius XI included the concept in a 1931 Encyclical

Letter¹⁹. It is also an important underlying principle within post Second World War Germany and seeks to define the relationship between political institutions²⁰. Its first appearance in Community law was in 1975²¹. Here it is seen as a way of determining competencies between Community and Member State before the coming into existence of the institutions²². It was not, therefore, a concept that dealt with day to day problems. This approach has changed significantly and, for example, every directive now approved is examined firstly according to the principle of subsidiarity.

The problem with the concept in practice is that there is no independent body making decisions as to who has the competence in a certain area. The decision is taken by the institutions that have an interest in the decision.

It is important, however, to be aware of the derivations of the principle. These lie in the German Constitution and the wider Catholic Community, amongst others. It is a political concept that belongs to a federal structure rather than a unitary structure as that in the United Kingdom, where the concept of the supremacy of parliament leaves little room for concepts of the decentralisation of authority.

A simple model would be to assume that all Member States agree to hand over certain powers and functions to the Community and, in those remaining, exercise their own national jurisdiction. A concern with the concept of subsidiarity is, however, that it can have a number of definitions.

"...subsidiarity does not mean the rolling back of the frontiers of European legislation, nor is it a new, politically correct euphemism for Euro-federalism. It is a search for

the best level of government at which to take decisions".²³

It is being suggested here that it is possible to interpret subsidiarity as both a term for reducing the powers of the Community and a term for increasing those powers. One apparent consequence of adopting the concept at Maastricht is the reduction in legislative proposals from the Commission. In 1989 there were 92 major legislative proposals reducing, in 1994, to about half that number. Many of the latter were concerned with amending existing legislation²⁴.

Simplistically, legislation can be looked at in three ways. Firstly there is that which is the exclusive competence of the Community. Secondly there is that which is the exclusive competence of the Member States. Thirdly there are those legislative areas which are shared by the Community and the state. Subsidiarity seems to require that the Community not only has to justify its ability to act, but also justify why it and not the Member State should act.²⁵

The UK Government has held the view that applying the test of subsidiarity meant withdrawing the ARD and not amending it. The Directive has appeared on at least two lists suggesting that it might be withdrawn²⁶. This is a view that has clearly not been accepted by the Community as a whole. It might be argued that the quantity of discretion that appears in the proposed revision of the ARD might be the result of the Community attempting to balance the needs of the state as against the needs of the Community.

Supremacy and subsidiarity

The potential conflict between the concepts of the supremacy of Community law and the idea of subsidiarity is a real one. Supremacy is a problem for the European Court of Justice if there is a conflict between national law and Community law. Subsidiarity requires a political decision by the Community institutions and Member States²⁷. Some of these bodies might well take the view that legislation is required at the national level on the grounds of subsidiarity, which may conflict with the idea of the supremacy of Community law.

Whilst, for some Member States, there will be a concern that discussions about subsidiarity are about the real balance between the Community and national state; for the United Kingdom, the discussion is about reducing Community competence and increasing national competence.

One of the problems in the field of employee protection is that there is no consensus as to where the competence lies. There is a lack of clarity as to whether it lies with the Member State or with the Community. It is the view of the United Kingdom, with its distinctive ideological approach, that the competence lies with the Member State. The corporate view might, however, be that it is a shared competence as both the national state and the Community are involved in consultation and dialogue with representatives of employees and employers. A reduction in the role of the Community would be seen as incompatible with making progress with employee consultation and participation.

Direct Effect

It can be argued that the need for direct effect is created by the failure of Member States to implement directives on time and adequately²⁸. It can also, however, be argued that the need for direct effect would have been deemed necessary, regardless of the performance of Member States. The principle is an essential instrument by which the European Court of Justice ensures that Community law is implemented uniformly throughout the Community. Article 164 EEC empowered the Court to "ensure that in the interpretation and application of this Treaty the law is observed". As one observer has noted²⁹:

"It is worth adding that the Court of Justice's awareness of the particularly important Article 164 mandate has notably influenced the exercise of its jurisdiction. This awareness has prompted the Court to make a concerted effort to identify the fundamental principles of Community law, and to use them to assure respect for the rule of law by all parties involved in the European integration process, as well as to guarantee the uniform application of Community law throughout the Community",

An early case which made an important contribution to the principle of direct effect was Van Gend en Loos³⁰. The European Court considered whether Article 12 EEC conferred rights directly upon individuals. Their conclusion was

"It follows from the foregoing considerations that, according to the spirit, the general scheme and wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect".

In Van Duyn³¹ the Court considered the matter further and, in particular, whether directives (in this case Directive 64/221) could have direct effects. The UK Government argued that since Article 189 distinguished between regulations, directives and decisions, it followed that, because a directive had been issued instead of a regulation, different effects were intended. Therefore Directive 64/221 should not have direct effect.

The Court responded by saying that because regulations were different from directives it does not follow that they can never have similar effects:

"It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned".

The Court also set out the criteria for determining when a directive is directly effective. It concluded that they should be clear, precise and unconditional.

In the year after Van Duyn the Court held in Defrenne³² that an air hostess with Sabena could rely upon the Treaty directly before her national court when taking action under Article 119. The Court qualified its judgment by stating that it did not apply to new claims relating to the period before the judgment on the grounds of the need for legal certainty.

Pierre Pescatore³³, who was a judge at the European Court, put the matter in a practical way. He says that the judges had "une certaine idee de l'Europe" of their

own, and that it is this idea which has been decisive and not "arguments based on the legal technicalities of the matter". He also said that "direct effect must be considered as being the normal condition of any rule of law...In other words 'direct effect' must be presumed, it has not to be established a priori".

The test for whether an act has direct effect is a wide one. Pescatore defines it as "a rule can have direct effect whenever its characteristics are such that it is capable of judicial adjudication.."

There is, however, a distinction between vertical and horizontal direct effect. In Marshall³⁴ the question was asked as to whether Article 5(1) of Directive 76/207 may be relied upon before national courts and tribunals. The European Court of Justice held

"It follows that a directive may not impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person".

The Court held that the Area Health Authority was a public body. The definition was widened in Foster³⁵ to organisations "whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals..".

This also applied to a privatised water company in Griffin v South West Water³⁶ where the High Court held that the provision of water services was held to be a public service under the control of the State.

Vertical direct effect gives the individual rights against the state or an emanation of the state. Horizontal direct effect, which would impose similar obligations and rights upon individuals, is ruled out by Marshall. This has been confirmed by other cases including Kolpinghuis³⁷. In this case the reasons for not having horizontal direct effect were explained the European Court of Justice:

"However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of community law and in particular the principle of legal certainty and non retroactivity".

In Marleasing³⁸ the Court accepted the principle of no horizontal direct effect but held that the over-riding duty in applying national law was to interpret those laws in order to achieve the result of the directive, as far as this is possible, whether the national law was adopted before or after the directive.

As one authority has said³⁹

"In certain circumstances, the obligation imposed on national courts to interpret national law so as to conform with a directive may lead to the same result as that which would be achieved if the directive were capable of producing horizontal effect".

The effect of Marleasing seems limited by Wagner Miret⁴⁰ by the need to have regard to the principles of legal certainty and retroactivity. Thus it is not seen as fair to impose a rule which might turn someone who was abiding by national law into an

offender because the state had not implemented a Community rule.

According to de Burca⁴¹ the European Court risks creating a "convoluted legal situation" by not recognising horizontal effect.

Mengozi⁴² suggests that the Court's attitude may have been political and was a manifestation of a willingness to preserve the delicate balance between Community powers, on the one hand, and Member State legislative sovereignty, traditionally exercised in regulating private relations, on the other.

There does need to be such an explanation because the logic of denying horizontal effect on the grounds of legal certainty does seem difficult to maintain. National legislatures put into effect national laws which they expect their citizens to respect, whether they are aware of them or not.

The view that the Court needs to revise its views was supported by Advocate General Van Gerven in Marshall 2⁴³, Advocate General Jacobs in Nicole Vaneetveld⁴⁴ and Advocate General Lenz in Faccini Dori⁴⁵, when giving their opinions, all argued in favour of horizontal direct effect.

Advocate General Jacobs stated

"There are sound reasons of principle for assigning direct effect to directives without any distinction based on the status of the defendant. It would be consistent with the need to ensure the effectiveness of Community law and its application in all the

Member States".

These arguments are important when one considers the inadequate implementation of the ARD by the UK Government. The lack of horizontal direct effect has inhibited employees from taking action against private employers to protect their rights under the ARD. There may be an opportunity of action against the State, but firstly it will need to be established as to whether the ARD has direct effect. In Griffin, the High Court held that Article 2 of the Collective Redundancies Directive⁴⁶ was did not have direct effective because it was not sufficiently precise and unconditional. It was not clear who were the workers' representatives with whom the employer must consult. This same argument may apply to the ARD. It is arguable that it is still not clear who these representatives are, despite the passing of the 1995 amendments⁴⁷. In the United Kingdom now, employers have a possible choice of 'appropriate representatives'. They may be a recognised trade union or they may be employee representatives elected by some ill defined method of voting. A large element of discretion exists.

It is proposed to briefly examine the relevant Community institutions before considering the implementation of directives by Member States.

The European Court of Justice

Derivations

The European Court of Justice first appeared under the Treaty establishing the European Coal and Steel Community (the ECSC) in 1951. Its foundations were in the

French legal system (see below). The common law jurisdictions of the United Kingdom and Ireland did not join the Community until 1973, some 22 years later. It is, therefore, inevitable that many of the traditions and general principles of law (such as those of proportionality and legal certainty) affecting decisions of the European Court of Justice are derived from Member States other than the United Kingdom and Ireland⁴⁸. It is the principles derived from French and German jurisdictions that appear to have had the most influence. It is possible to say that it is the judicial traditions of the corporatist states that have had the most influence upon the European Court of Justice, rather than those traditions of the ideological state.

Articles 164 to 188 EC deal with the establishment and powers of the Court. Article 177 EC enables the Court to make judgments concerning the validity and interpretation of acts of the institutions of the Community.

Judges are appointed for a period of six years, with appointments taking place every three years in order to ensure continuity. The last appointment changes took place on October 7 1994 and, it has been suggested, may have produced a significantly changed Court. Unlike in 1991, when only two changes took place, the 1994 appointments resulted in seven new appointees⁴⁹. Additionally there have been new judges from the beginning of 1995 from the three new Member States, Austria, Finland and Sweden. The Belgian nominee was also newly appointed as a result of the death of his predecessor. This means that eleven of the fifteen judges were new appointments and had only limited employment law experience. Judge Mancini, from Italy, is an expert in employment law, whilst Judge Puissochet, from France, was Director General of the French Labour Agency and the Ministry of Industry. There are indications that the

Court may be more conservative in its judgments than previously.⁵⁰ These changes may have an effect on future decisions regarding the ARD.

This increased conservatism may have shown itself in a ruling concerning local government reorganisation⁵¹. This will be considered further in chapter 7.

The European Court of Justice has played an important role in the interpretation of the ARD. Its decisions have defined and expanded the meaning of a transfer of an undertaking to areas not foreseen by the original authors of the Directive⁵².

The Council of Ministers

This is composed of political representatives of the Member States. The Presidency of the Council rotates, with each Member State taking the role for six months at a time. One of the ironies of the transposition of the ARD into UK law was that, at the time of its approval by the Council, the United Kingdom held the Presidency of the Council.

The Council is supported by the Committee of Permanent Representatives which consists of the permanent delegations of the Member States to the Community. This committee in turn is supported by others. The relevant one for the purposes of this study is the Social Affairs Working Group which normally meets twice a week. This Group consists of representatives from all the permanent representations. The UK delegate to this Group is the First Secretary (Social Affairs) at the UK Representation, based in the Rond-Point Robert Schuman, Brussels. The Group is chaired by whichever Member State holds the Presidency at that time. This Group considers proposals and

issues relating to social questions and has considered the proposed revision of the ARD on a number of occasions.

The Commission

Article 155 EC sets out the tasks of the Commission :

"..to ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied; formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;

- have its power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty
- exercise the powers conferred on it by the Council for the implementation of rules laid down by the latter".

The Commission initiates legislation as well as the administering the bureaucracy. It is the Commission, for example, that has provided the drafts of the amended ARD to be discussed by the various political institutions. This provides the Commission with considerable scope for initiative in the process of the development of the Community and legislation.

Jean Monnet⁵³ is quoted as describing the Commission as a sort of "Platonic embodiment of Communitarian spirit, with Gallic elan, self confidence and expertise"⁵⁴. A more pertinent description in the context of this study is to describe

it as the "watchdog of the Treaty"⁵⁵.

Article 169 EC empowers the Commission to take action against a Member State if it fails to "fulfil an obligation under this Treaty". Those actions consist of delivering a reasoned opinion and, if there is then still no compliance thereafter, to take the matter to the European Court of Justice. The Court is given power to enforce compliance under Article 171 EC including the imposition of 'penalty payments'.

The Commission took three Member States to the European Court of Justice, under their powers in Article 169 EC, in order to compel them to transpose the ARD correctly⁵⁶.

The Social Partners

To be considered alongside the role of the Commission is the role of the social dialogue. Consultation with the Social Partners (ETUC, CEEP and UNICE⁵⁷) in the field of social legislative proposals is now the norm for the Commission (see chapter 5). This process cannot, perhaps, be regarded as a source of law, but it is an integral part of the process of making law on these issues. It will be argued later that this process is not compatible with the present approach of the UK Government and will, therefore, lead to problems with the implementation of Community law in the United Kingdom. For the purposes of this part of the thesis it is important to recognise its growing influence.

The implementation of directives

The significant characteristic of directives (Article 189 EC) is that the 'choice of form or methods' is left to the Member State. These can be important because it does allow substantial discretion. The result, in the case of the ARD, is a variation in its effects within different Member States⁵⁸.

One of the objectives of the European Court of Justice is the uniform and equal application of directives throughout the Community.

"The combination of the States' frequent non-implementation of directives with the fact that directives cannot in themselves be directly enforced against individuals, means that their effectiveness as a legislative form is seriously undermined"⁵⁹

Non implementation has been a serious problem for the effectiveness of Community law. It is clear, for example, that the TUPE Regulations failed to implement the ARD in a number of respects and it is arguable that they still fail to do so. Non implementation is not only a breach of Article 189, it is also a breach of Article 5 which states:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".

This, of course, is the logical outcome of the supremacy of Community law.

In Sabine von Colson⁶⁰ the European Court of Justice stated

"However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts".

There are perhaps two significant ways in which Member States have failed to carry out their obligations to implement directives. These are, firstly, the failure to implement them within the required time and, secondly, the failure to implement them adequately and in full.

In 1989 deadlines were not respected in 45% of directives⁶¹, but in 1994 the Commission was able to report that "the situation regarding the observance of Community law and the implementation of directives is relatively satisfactory"⁶².

The table below shows progress in implementing directives applicable to employment and social policy. The figures come from the 1996 report on implementation in 1995⁶³:

| Member State | Directives applicable on 31-12-94 | Measures notified | % |
|----------------|--------------------------------------|-------------------|-----|
| Belgium | 45 | 34 | 76 |
| Denmark | 45 | 43 | 96 |
| Germany | 45 | 39 | 87 |
| Greece | 44 | 36 | 82 |
| Spain | 45 | 30 | 67 |
| France | 45 | 39 | 87 |
| Ireland | 45 | 40 | 89 |
| Italy | 45 | 35 | 78 |
| Luxembourg | 45 | 42 | 94 |
| Austria | 45 | 41 | 91 |
| Netherlands | 45 | 43 | 96 |
| Portugal | 45 | 36 | 80 |
| Finland | 45 | 45 | 100 |
| Sweden | 45 | 45 | 100 |
| United Kingdom | 45 | 41 | 91 |

It would be incorrect to take one year's figures in isolation, but the United Kingdom has, overall, a good record in the implementation of directives on time.

The figures below show referrals to the European Court of Justice for infringement proceedings⁶⁴:

| Member State | 1991 | 1992 | 1993 | 1994 | 1995 |
|----------------|------|------|------|------|------|
| Belgium | 8 | 6 | 7 | 10 | 6 |
| Denmark | 1 | 0 | 0 | 0 | 0 |
| Germany | 1 | 5 | 4 | 5 | 10 |
| Greece | 9 | 4 | 4 | 17 | 12 |
| Spain | 2 | 5 | 5 | 9 | 6 |
| France | 4 | 1 | 2 | 8 | 6 |
| Ireland | 3 | 9 | 0 | 12 | 6 |
| Italy | 24 | 11 | 6 | 12 | 17 |
| Luxembourg | 4 | 14 | 11 | 6 | 3 |
| Netherlands | 7 | 5 | 5 | 4 | 0 |
| Portugal | 2 | 1 | 0 | 5 | 4 |
| United Kingdom | 0 | 3 | 0 | 1 | 2 |

The ARD was due to be implemented in February 1979. In the United Kingdom it was transposed in 1981; in Greece in 1988 and in Italy in 1990⁶⁵. Both Greece and Italy have a poor record, in comparison with other Member States, of implementing Community legislation.

The Commission took three Member States to the European Court over inadequate implementation of the ARD. These were Belgium, Italy and the United Kingdom.

The national authorities who have the responsibility for implementing Community legislation are the legislatures and the judiciaries.

Legislatures

Legislatures can, and do, fail to implement directives in sufficient time. Governments may be reluctant to implement, as was the United Kingdom with the ARD, or they may take the view that they need do little as their national law already implements a directive;

"There can be no doubt that the UK Government has caused much unnecessary litigation and the expenditure of much unnecessary cost by taking the position that implementation of the Equal Pay and Equal Treatment Directives required only the continuation of, or minor amendments to, the Equal Pay Act 1970 and the Sex Discrimination Act 1975, rather than new laws based specifically on the Directives"⁶⁶.

The liability of the Member State to implement directives is absolute. It is no defence to say that another agency was at fault. The European Court refers to states, rather than governments or institutions. The Court held

"...the liability of a Member State under Article 169 arises whatever the agency of the state whose action or inaction is the cause of a failure to fulfil its obligations, even in the case of a constitutionally independent institution"⁶⁷.

The state can be liable for all the emanations of the state, such as the actions of a

limited liability company, the Irish Goods Council⁶⁸ set up by the Irish Government, or a privatised utility such as South West Water in the United Kingdom⁶⁹.

Member States are deemed to have adequate time for the implementation of directives. In Commission v Italy⁷⁰ the Government of Italy had not implemented Directive 78/546 for the provision of statistics relating to road transport. They were due to start in 1979, but in 1984 this had still not happened. In its judgment the Court held

"In the Commission's view, those facts reveal conduct by a public administration which, after the occurrence of an event which was indeed unforeseen and unforeseeable, has not shown the normal degree of diligence to be expected of any administration...Although it is true that the bomb attack, which took place before January 18 1979, may have constituted a force majeure and created insurmountable difficulties, its effect could only have lasted a certain time..The Italian Government cannot therefore rely on that event to justify its continuing failure to comply with its obligations years later..."

Italy has "the dubious distinction of being the Member State most often cited and condemned before the Court of Justice pursuant to Articles 169 and 170 for infraction of Community obligations...Italy has violated Community law more often than all the other Member States put together. Italy has implemented fewer directives than any of its partners"⁷¹.

Part of this problem has been the constitutional divide between central and regional government. The Government's response to the problem has been to introduce an

annual law, since 1990, to literally transpose Community legislation into national law.

Judiciaries

Section 3 of the European Communities Act 1972 concerned the British courts:

"(1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

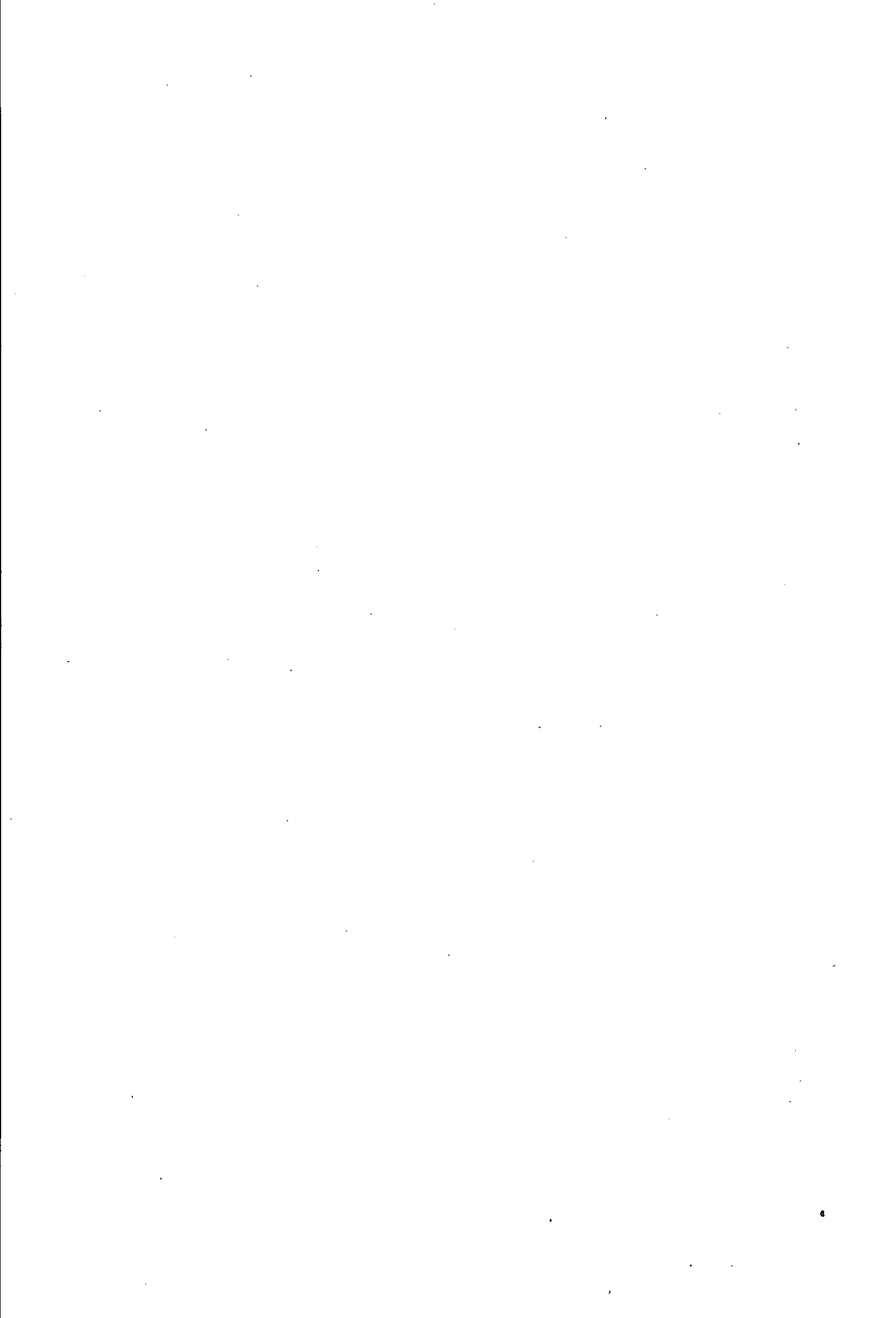
(2) Judicial notice shall be taken of the Treaties, of the official Journal of the Communities and of any decision of, or expression of opinion by, the European Court on any such questions as aforesaid..."

and also Section 2(4)

"The provision that...might be made by Act of Parliament, and any enactment passed or to be passed,...shall be construed and have effect subject to the foregoing provisions of this section".

The effectiveness of Community law in advancing the Community's aims and policies will depend upon the national courts' readiness to give effect to Community law:

"...the role of the national judge is profoundly qualified. The national judge must now



ascertain the sphere from which the state legal system has withdrawn and in which state legal norms no longer serve as the basis for deciding controversies before the national judge. In other words, the national judge must simultaneously apply the state legal system, define the bounds of its application and act altogether beyond them"⁷².

As the discussion on subsidiarity, above, has shown, there is no unanimity on the sphere from which the state legal system has withdrawn. The British courts have not adopted a consistent approach to the application of EC law, although they did adopt a supportive approach in Garland v BREL⁷³ where Lord Diplock stated

"It is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty had been signed and dealing with the subject matter of the international obligation, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it".

The UK courts have not attempted to apply Community law directly, but rather to construe UK law 'as intending to carry out the legislation'. This may be as a result of a still lingering belief in the sovereignty of Parliament and the belief that the UK Parliament could decide not to implement Community legislation or repeal the European Communities Act if it so chose.

The Court of Appeal was not prepared to interpret contrary to prior domestic legislation. In Duke v Reliance Systems⁷⁴ Sir John Donaldson stated

"For my part I think that what section 2(4) means is a matter of great interest. but I do not believe it has the effect of abrogating the doctrine of stare decisis in this court, even when European law is involved".

On the other hand in Litster the House of Lords held

"Thus the courts of the United Kingdom are under a duty to follow the practice of the European Court by giving a purposive construction to directives and to regulations issued for the purpose of complying with directives".

This involves, of course, looking at the aims and objectives of the directive in order to interpret national statutes in a way that will implement the aims and objectives of the directive. National courts within the Community, however, have not always accepted the supremacy of Community law. In Re Value Added Tax Directives⁷⁵ the German Federal Fiscal Court held that

"EEC law affects national law only to the extent that the federal Government has assigned sovereign rights to the EEC by the law pursuant to Article 24 of the Constitution".

The German Court concluded that VAT was payable upon a transaction even though an EC Directive had declared it exempt. The Directive had not been implemented in West Germany. The problem for the Federal Republic which first occurred in the Internationale Handelsgesellschaft case was that if there was to be a transfer of powers to a body (the Community) that did not afford the same protection as the constitution,

then the German courts must retain the ability to test the legislation emanating from that source.

The problem was eased over subsequent years as the European Court developed its own case law on fundamental rights, together with a recognition of the role of the European Convention of Human Rights and the 1977 declaration by the European Institutions respecting fundamental rights.

Articles 169-171

These Articles define the EC's duties and responsibilities with regard to Member States who do not satisfactorily implement directives. Article 169 requires the Commission to deliver a reasoned opinion if it believes that a Member State has failed in its obligations. The Member State is then given the opportunity to deliver its own observations and come to an agreement with the Commission. Further failure to comply may result in a referral to the European Court of Justice by the Commission. Article 170 concerns the ability of one Member State to complain about the failure of another Member State to fulfil its obligations. Article 171 provides that the Member State must comply with the decision of the European Court of Justice.

Article 171 was revised under the Treaty of European Union in order to strengthen the Commission's hand in monitoring Community law. Under the revised Treaty a Member State who fails to comply with a judgment of the Court relating to infringement proceedings can face financial penalties. This is not an action that is readily undertaken:

"However, the Commission's tougher legal powers must not undermine its pursuit of co-operation and dialogue with national government departments, as this method very often leads to cases being settled at an early stage of proceedings."⁷⁶

This first phase can be called the 'administrative phase'⁷⁷. Formal action is normally preceded by informal contacts to settle the matter; usually between the relevant Director General and the Permanent Representative of the Member State. The 'formal' stage begins with a letter from the Commission to the Member State requesting its observations on the alleged infringement. If no agreement is possible then the Commission is required to give a reasoned opinion. This will be a statement of the reasons that led the Commission to conclude that the Member State had failed in an obligation. Failure to reach an agreement in the 'administrative phase' will lead to the 'judicial phase', where proceedings may be taken against the Member State.

"However the ultimate guarantee of the effectiveness of infringement proceedings is Member States' recognition that respect for a rule of law in the Community is a condition for its survival. A Member State that adopted a policy of ignoring adverse judgments of the European Court would not be able to remain a member of the Community for very long."⁷⁸

Thus the power to impose financial penalties is clearly a power of last resort as, for the Community to operate effectively, the expectation is that Member States will abide by judgments of the Court. By the time that the European Court of Justice gave judgment in the case of the Commission v United Kingdom⁷⁹ the United Kingdom had complied with all the Commission's requests for changes except that which required

action on consultation of employees where there was no recognised trade union with which to consult. The UK Government took action to comply with this by approving the Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations 1995⁸⁰ (CRTUPE Regulations).

If a state fails to comply with Community legislation, the individual has no recourse against non state organisations (see above). Action will need to be taken against the State or an emanation of the State.

In Francovich⁸¹ the Court held that a principle of state liability was inherent in the system and that, subject to certain conditions, the individual could claim compensation.

The three conditions are

1. The result prescribed by the provision must involve the conferring of rights on individuals
2. The content of the rights must be capable of definition on the basis of the directive
3. There must be a causal link between the violation of the Treaty obligation and the loss suffered by the individual.

It is clear that these three conditions can be said to apply in the situation of the UK Government's failure to implement the ARD adequately. Public service employees who lost their jobs through redundancy as a result of the contracting out of their work are, for example, likely to meet this criteria.

This matter has been further qualified by the joined cases of Brasserie du Pêcheur and Factortame⁸² which made it quite clear that harm caused by breaches of Community

law caused by legislatures makes the state potentially liable for payment of damages. The European Court of Justice provided the conditions under which the state would be required to make good the consequences of the loss of damages. These are

1. the Community law breached was intended to confer rights upon the individual
2. the breach is sufficiently serious
3. there is a direct causal link between the breach and the damage sustained by the individuals.

Whether these conditions apply will depend upon the amount of discretion enjoyed by the state. Whether there is wide discretion or a narrow one will depend upon a number of issues, such as whether there has been a harmonisation of Member State policies or not; whether the subject matter falls within the jurisdiction of the Member State and where Community policy leaves a margin of discretion. There is no simple answer in the field of employment law. There has been harmonisation, as in the ARD, the Collective Redundancies Directive and the Insolvency Directives. The European Court of Justice has held, however, that the ARD is only intended to achieve partial harmonisation (see chapter 7). The issue might, therefore, be seen as one of shared competence, which would leave the United Kingdom with wide discretion⁸³. This is in contrast to Hedley Lomas⁸⁴, where harmonisation had virtually removed all discretion and a mere breach of Community law might be sufficient to establish a sufficiently serious breach.

The clarity and precision of the ARD is, however, further confused by the apparent change in the direction of the European Court of Justice as it may be argued that there

is a contradiction in decisions between, on the one hand, Sophie Redmond and, on the other, Annette Henke and Suzen (see chapter 7).

It is not known why the UK trade unions concerned have not progressed their initial 'Francovich claims' further⁸⁵, although there was a delay whilst waiting for the outcome of the Brasserie du Pecheur case and the subsequent British Telecom case⁸⁶. Even with the additional condition that the breach is sufficiently serious, the UK workers who lost their jobs as a result of inadequate implementation would seem to have an arguable case. The British Telecom case allows these conditions to apply in a situation where a directive has been inadequately transposed. There are, however, circumstances where a Member State has not adequately transposed Community law but has not committed a 'sufficiently serious breach'. In the British Telecom case the Court held that Article 8(1) of the Directive concerned⁸⁷ was "imprecisely worded" and that the United Kingdom gave an interpretation "in good faith and on the basis of arguments which are not entirely devoid of substance". Additionally there was no guidance from the case law of the European Court of Justice. In those circumstances, the Court held, the breach

"...cannot be regarded as a sufficiently serious breach of Community law of the kind intended by the Court in its judgment in Brasserie du Pecheur and Factortame".

This judgment, given the limitations of the ARD, may have some implications for future litigation against the UK Government.

Conclusions

The United Kingdom played no part in the initial establishment and development of the institutions of the European Community. The European Court of Justice and the other institutions had their seeds in the 1951 European Coal and Steel Community and the 1956 Treaty of Rome, which established the EEC.

The result of this is that these institutions have their roots in the legal and political systems of the founding Member States and, especially, of Germany and France. The European Court of Justice has its foundations in the French Conseil d'Etat. Some of the major principles of Community law, such as the ideas of proportionality, legal certainty and subsidiarity, have their roots in German law.

An example of this is to compare the methods of workings of the common law courts and the European Court of Justice. The common law approach will encourage the expression of individual opinions, including dissenting judgments. The European Court works on a collegiate system which will "simply cloak an inability to reach a clear decision"⁸⁸. This is a small example, but the whole process of decision making is different to the UK courts. Additionally the working language of the court is French. This is not intended to state that one system is better than the other, but only to say that they are different.

The institutions are, however, concerned with advancing the idea of the European Community. It is to this Community that they owe their existence. Although, as has been shown, they have few coercive powers, their decisions will reflect the 'European'

approach. Indeed, it might be said that the Community itself will inevitably adopt the approach of the corporatist Member States as it is to their legal systems that it owes its derivations.

1. There are many publications covering the operation of the Community and its institutions, such as Lasok and Bridge (1994) Law and Institutions of the European Union London: Butterworths
2. Although I do not think that I follow the same approach, I have been stimulated by the ideas in Bengoetxea, Joxerramon (1993) The Legal Reasoning of the European Court of Justice Oxford: Clarendon Press
3. Partie Ecologiste 'Les Verts' v European Parliament (Case 294/83) (1986) ECR 1339
4. 'The Guardian' newspaper May 22 1996 p1 - the headline of the article was "Major goes to war with Europe"
5. Article 5 EC imposes a positive obligation upon Member States to "facilitate the achievement of the Community's tasks"
6. Costa v ENEL (Case 6/64) (1964) ECR 585
7. Mengozzi, Paolo (1992) European Community Law translated Patrick del Duca Graham and Trotman
8. Mancini (1989) The Making of a Constitution for Europe 26 CMLRev 595
9. See below for a further discussion of Article 189
10. Garland v British Rail Engineering Ltd (Case 12/81) (1982) ECR 359 (1982) 2 All ER 402
11. Mancini - op.cit.
12. Internationale Handelsgesellschaft GmbH v Einfuhr-und-Vorratsstelle fur Getreide und Futtermittel (Case 11/70) (1970) ECR 1125
13. Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) (1978) ECR 629 (1978) 3 CMLR 263
14. Litster v Forth Dry Dock Engineering Co Ltd (1989) IRLR 161
15. R v Secretary of State for Transport ex parte Factortame Ltd (Case C-213/89) (1990) ECR I-2433
16. The TUPE Regulations apply not only to those employed immediately before the transfer, but also to those "who would have been so employed if he had not been unfairly dismissed before the transfer for a reason connected with the transfer"
17. The Principle of Subsidiarity: Communication of the Commission to the Council and the European Parliament SEC(92) 1990 Final
18. Emiliou, Nicholas (1992) Subsidiarity: An Effective Barrier Against the Enterprises of Ambition? ELRev 383
19. Ibid
20. Ibid

21. Report on the European Union - report by the Commission for the Council Supplement 5/75 Bull. EC
22. Toth, A.G. (1992) The Principle of Subsidiarity in the Maastricht Treaty CMLRev 29 1079
23. Brittan, Leon (1994) Europe: The Europe We Need p17 London: Hamish Hamilton 1994
24. Ibid
25. Beale, Andrew and Geary, Dr Roger (1994) Subsidiarity Comes of Age? - NLJ January 7 p12
26. There have been an Anglo French list and an Anglo German list on which the ARD has appeared as a candidate for withdrawal - information from the UK permanent representation to the Community
27. Cass, Deborah Z. (1992) The Word that saves Maastricht? The Principle of Subsidiarity and the division of powers within the European Community CMLRev 29 1107
28. Beaumont, Paul (1994) Scottish Law Gazette vol 62 no 4 p319
29. Mengozzi op.cit.
30. NV Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62) (1963) ECR 1
31. Van Duyn v Home Office (Case 41/74) (1974) ECR 1337 (1975) 1 CMLR 1
32. Oefrenne v Sabena (Case 43/75) (1976) ECR 455
33. Pescatore, Pierre (1983) The Doctrine of Direct Effect: An Infant Disease of Community Law 8 ELRev 155
34. Marshall v Southampton and South-West Area Health Authority (Case 152/84) (1986) ECR 723
35. Foster and others v British Gas plc (Case C-188/90) (1990) ECR 1-3313
36. Griffin v South West Water Services Ltd (1995) IRLR 15
37. Officier van Justitie v Kolpinghuis Nijmegen BV (Case 80/86) (1987) ECR 3689 (1989) 2 CMLR 18
38. Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89) (1992) ECR 1-4135 (1992) 1 CMLR 305
39. Tridimas, Takis (1994) Horizontal Effect of Directives ELRev vol 19 no 6 p621
40. Wagner Miret (Case C-334/92) (1993) ECR 1-691:1
41. de Burca, Grainne (1992) Giving Effect to European Community Directives 55 MLR 215
42. Mengozzi op.cit.

43. Marshall v Southampton Area Health Authority (No 2) (Case C-271/91) (1993) ECR I-4367
44. Nicole Vaneetveld v Le Foyer and Le Foyer v Federation de Mutualities Socialistes et Syndicales de la Province de Liege (Case C-316/93) (1994) ECR 3-763
45. Paolo Faccini Dori v Recreb Srl (Case C-91/92) (1994) ECR 7-3325
46. Directive 75/129 as amended by Directive 92/56
47. The Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations 1995 SI 2587
48. For an idea of the derivation of the Community's general principles of law, see Brown, L. Neville and Kennedy, Tom (1994) The Court of Justice of the European Communities London: Sweet and Maxwell
49. Backup (1995) Labour Research October 1995
50. Ibid
51. Annette Henke v Gemeinde Schierke and Verwaltungsgemeinschaft 'Brocken' (1996) IRLR 701
52. Statement by Francisco de los Herras to the writer. Mr de los Herras is the Community civil servant responsible for the introduction of the revised ARD
53. Jean Monnet was a French businessman and administrator who played, with Robert Schumann the French Foreign Minister, a pivotal role in establishing the early institutions of the Community
54. Mancini op.cit.
55. Ibid
56. Commission v Kingdom of Belgium (Case 237/84) (1986) ECR 1247
Commission v The Italian Republic (Case 235/84) (1986) ECR 2291
Commission v United Kingdom (Case C-382/92) (1994) ECR 2435
57. UNICE is the Union des confederations de l'industrie et des employeurs d'Europe (European employers federation); CEEP is Centre europeen des enterprises a participation publique (the European public employers representation); and ETUC is the European Trade Union Confederation
58. See Chapter 7 for a discussion on the variations in the definition of employed and self employed in each Member State
59. de Burca op.cit.
60. Sabine von Colson and Elisabeth Kamman v Land Nordrhein-Westfalen (Case 14/83) (1984) ECR 1891
61. Curtin, Deidre (1990) Directives: The Effectiveness of Judicial Protection of Individual Rights CMLRev 27 p709

62. Eleventh Annual Report on monitoring the application of Community law 1993 COM (94/C 154/6)
63. Thirteenth Annual report on Monitoring the Application of Community Law COM(96) 600 Final
64. Ibid
65. Commission Report to the Council SEC(92) 2/6/92
66. Collins op.cit.
67. Commission v Kingdom of Belgium (Case 77/69) (1970) ECR 237
68. Commission v Ireland (Case 249/81) (1982) ECR 4005
69. Griffin v South West Water Services Ltd (1995) IRLR 15
70. Commission v Italy (Case C-382/92) (1985) ECR 2629
71. Mengozzi op.cit.
72. Ibid
73. Garland v BREL (Case 12/81) (1982) ECR 359 (1982) 2 All ER 402
74. Duke v GEC Reliance (1988) 1 All ER 626
75. (Case 51/80) (1982) 1 CMLR 527
76. Eleventh Annual report on monitoring the application of Community law op.cit.
77. Dashwood and White (1989) Enforcement Action Under Articles 169 and 170 EEC ELRev 388
78. Ibid
79. Case C-382/92 (1994) ECR 2435
80. SI 2587/1995
81. Francovich and Boniface v The Italian Republic (Cases C-6 and 9/90) (1991) ECR 1-5357
82. Joined cases Brasserie du Pecheur v Germany and R v Secretary of State for Transport ex parte Factortame and others (Joined cases C-46/93 and C-48/93) (1996) ECR 1029 (1996) CMLR 889
83. Hervey, Tamara K and Rostant, Philip (1996) After Francovich: State Liability and British Employment Law ILJ vol 25 no 4 December p259
84. R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd (Case C-5/94) (1996) ECR 2553 (1996) 2 CMLR 391
85. Information that initial proceedings had commenced obtained from Unison in 1994

86. R v HM Treasury ex parte British Telecommunications plc (Case C-392/93)
(1996) ECR 1631

87. Council Directive 90/351/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications services

88. Edwards, David (1995) How the Court of Justice Works ELRev vol 20 no 6
p539

Chapter 5 An examination of European Community social policy, the origins of the ARD and a consideration of the approach of the Community towards the social partners.

Introduction

In this chapter there will be an examination of the background and derivation of the ARD in order to put it into its social policy context. There will then be a specific examination of the Community's approach towards the social dialogue and labour law. The intention is to contrast this with the approach of the UK Government to demonstrate further the different approaches to labour law and social policy.

Community social policy

The Treaty of Rome 1957 established the European **Economic** Community (emphasis added). It was, and perhaps still is, primarily an economic community. Social aspects have traditionally been based upon the desire to fulfil the needs of this economic community, i.e. to create 'a level playing field' or create minimum standards between nations in order to remove unfair competitive advantages¹.

Article 2 EEC stated

"The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community an harmonious development of economic activities, a

continued and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it".

Article 3(1) EEC provided for

"...the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standards of living".

The Treaty was essentially minimalist when it dealt with social policy. The range of social issues subsequently dealt with by the Community has been varied and has included worker mobility, youth training, industrial training, education, equal treatment, health and safety at work and employment rights².

The European Court held, in Defrenne³, that Article 119, and by implication the Community's social policy, had a double aim;

"First in the light of the different stages of development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.

Secondly, this provision 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 emphasised by the preamble to the Treaties.."

The two aims were the 'level playing field' and the improvement of living and working conditions. Both can be said to be essentially economic objectives.

The Treaty of European Union (TEU), 1992, has broadened the objectives of the Community. Article 2 EC provides for

"...a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life...."

Although subsidiarity has emerged as an issue in recent years, social policy has always been a field in which both the Member States and the Community have competence.

Development of social policy

It has been suggested⁴ that there have been a number of distinct stages in the development of the Community's social policy:

1957-1972 - a period of economic neo-liberalism and a relative economic boom. Community activity concerned the free movement of labour, social security, youth exchange schemes, wages information, health and safety at work and the European Social Fund.

1972-1980 - a period of social action. This began with the communique issued by the

heads of government at the Paris summit of October 1972. The Member States "attached as much importance to vigorous action in the social field as to the achievement of economic union...it is essential to ensure the increased involvement of labour and management in the economic and social decisions of the Community".⁵

This led to the preparation of the Social Action Programme in 1974⁶. In this document the Community outlined its objectives and attitudes.

The Commission..."considers that vigorous action must be undertaken in successive stages with a view to realising the social aims of European union, in order to attain the following broad objectives: full and better employment at Community, national and regional levels, which is an essential condition for an effective social policy; improvement of living and working conditions so as to make possible their harmonisation while the improvement is being maintained; increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings..."

A policy of "full and better employment" is perhaps a policy that no longer has the support of all governments in the Community. The statement that this is a pre-requisite of "an effective social policy" is also something that no longer has universal support. It is, however, an indication of the objectives of social policy at the time.

One of the items of action in the Programme under the heading "Improvement of living and working conditions so as to make possible their harmonisation while the improvement is being maintained" has the following paragraph:

"(viii) to protect workers' interests, in particular with regard to the retention of rights and advantages in the case of mergers, concentrations or rationalisation operations".

The result of this was the Acquired Rights Directive.

According to Nielsen and Szyszczak⁷ only three concrete measures were to emerge from the Social Action Programme. These were

- a directive on collective redundancies
- a directive protecting workers' rights in insolvency situations
- a directive protecting workers' rights during the transfers of undertakings

although they were subsequently followed by directives on equal pay, equal treatment and health and safety at work.

1980-1986 - a period of crisis. This was a period of structural change and purely regulatory matters with real progress being made by the European Court rather than by the Commission. In 1984 a second action programme led to directives on health and safety. Some twenty directives in this area were proposed⁸.

Action Programme

In December 1986 an Action Programme for Employment Growth was adopted during a British Presidency and the second Thatcher Government. It proposed four areas of action:

1. the promotion of flexible employment patterns and conditions of work

2. recognition of the needs (particularly in the field of training) of the long term unemployed
3. the promotion of training in management and entrepreneurial skills
4. a realignment of the priorities of the Social Fund to promote small and medium sized businesses.

At the Strasbourg summit of December 1989 eleven of the twelve Member States adopted the Community Charter of Fundamental Rights⁹, also called the Social Charter. The Commission then published an action plan to implement this.

All the 'Fundamental Rights' are social aspects of the economic community. They do not deal with social issues such as the rights to education and health care. Even the section, for example, on the protection of children and young persons deals with the minimum age for work, rates of pay for young people, duration and hours of work and entitlement to vocational training. There is no mention of the many other social issues affecting children and young people.

The UK Government was unhappy about the proposals. The Secretary of State for Employment¹⁰ stated that

"...the effect of accepting the Charter as it stands would be to concede that the Community has competence to deal with these subjects and that it should take action in any event. That runs entirely contrary to the principle of subsidiarity...subjects such as holidays and hours should not be regulated from Brussels".

The Commission's view was expressed in the introduction to the Social Charter:

"3. In accordance with the principle of subsidiarity, whereby the Community acts when the set objectives can be reached more effectively at its level...the Commission takes the view that responsibility for the initiatives to be taken as regards the implementation of social rights lies with the Member States".

The question of the relationship between the Community's social policy and subsidiarity is a theme that will be returned to in this study, especially when considering the revision of the ARD.

As a result of the Charter and the availability of qualified majority voting under Article 118a EC¹¹, legislative activity has increased in the early nineties¹². The emphasis has moved from harmonisation to the agreeing of minimum standards. The Action Programme contained 21 proposals for directives.

Future social policy

Future social policy proposals are contained in a white paper, produced by the Commission, entitled European Social Policy - A Way Forward for the Union¹³. It has been described as an uneasy compromise between those who argue that excessively high labour standards result in costs which blunt the competitive edge of companies and those who argue that high labour standards are an integral part of a competitive labour market¹⁴.

This resulted in the adoption of the Medium Term Social Action Programme 1995-1997¹⁵. In its introduction it stated that

"Community action in the social field cannot be restricted to the world of work. There is already a wide degree of public support for a strong European social policy across the Union."

The document covers the issues of job creation, education and training, improved working conditions, gender equality, social protection including the combatting of racism, xenophobia and anti semitism and public health.

The proposal to 'amend and update' the ARD is contained in Section 4 on encouraging high labour standards as part of a competitive Europe. The introduction to this section states

"Meanwhile, the priority for the coming period will be the further development of a common framework of minimum social standards, completing where necessary the 1989 social action programme while at the same time taking account of the increasingly rapid changes in the working environment and the diversity between Member States".

Setting common minimum standards remains the objective of Community social policy. It may be that this will become more difficult with a greater emphasis on subsidiarity, a potential increase in membership to include Eastern Europe and possibly a much more conservative European Court of Justice. The document notes:

"The Commission fully recognises that the main responsibility for policy in these areas rests at national, regional or even local level. However the Commission firmly believes that the Union can play a valuable role in promoting co-operation or even common action".

It is intended to launch a debate on the question of fundamental social rights in the EU and this will be a subject for discussion at the 1996 Inter Governmental Conference. Thus there is the possibility of a more active role in the future but, in the meantime, action is likely to be based upon the Social Protocol.

The compromise at Maastricht which resulted in the Social Protocol and Agreement annexed to the Treaty will offer a new dynamic, but it is difficult to imagine how progress can be made if one Member State is not going to accept a common approach to harmonisation and the achievement of minimum standards.

It is suggested here that the European Community has adopted the corporatist system and the problem of using this approach in an ideological system leads to significant problems.

Between 1980 and 1989 no new labour law directives were adopted by the Community, with limited exceptions in the fields of health and safety and equal treatment¹⁶. The proposals put forward, such as proposals on working time and atypical workers, were opposed by the UK Government because they were based on premises unacceptable to it. These were that the participation of workers, through information and consultation, were essential features of change and that the Community definition of flexibility was

not the same as that of the United Kingdom Government. Flexibility did not mean deregulation.

It is, perhaps, ironic that the progress in the European social dialogue resulted from the United Kingdom's threat to use its veto. The proposed directives, based upon Article 100 EEC, required unanimity in the Council of Ministers.

The then President of the European Commission, Mr Jacques Delors, invited the chairs and secretaries of all the national organisations affiliated to the employers' groups UNICE and CEEP and the trade union organisation, ETUC to a meeting at Val Duchesse on January 31 1985. These social partners began a process of dialogue, setting up working parties and reaching their first 'joint opinion' on November 6 1986.

This process was given formal recognition in the Single European Act of 1986. Article 118b stated

"The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides considered it desirable, lead to relations based on agreement".

This process was taken further forward at a meeting at the Palais d'Egmont on January 12 1989, when a steering group was set up consisting of the social partners and the Commission. One of their subsequent actions was to set up an ad hoc committee to examine their role. The proposals formed the basis of parts of the Protocol on Social Policy attached to the Treaty of European Union¹⁷. Article 2 of the Protocol begins

"1. The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measures to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action".

This consultation at the Community level is an institutionalised part of the decision making process in the Community. The encouragement of collective representation has been an active part of Community policy. It is "a principle manifested in numerous policy initiatives of the Commission"¹⁸. Examples of such policy initiatives are the establishment of works councils¹⁹ and the consultation requirements in the Collective Redundancies Directive and the ARD. This was reinforced by the European Court of Justice²⁰ who held that the voluntary system of union recognition in the United Kingdom negated the consultation requirements of these directives and that consultation with employee representatives was therefore mandatory. Other examples are in the field of health and safety such as Directive 89/391/EC²¹. Article 11 of this Directive is headed 'Consultation and Participation of Workers' and provides that

"1. Employers shall consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work".

Implementation of this Directive perhaps exemplifies the different approach of the United Kingdom to the Community. The United Kingdom had a system of appointing safety representatives via recognised trade unions²². The problem with this approach

is that recognition of trade unions is entirely voluntary. The consequence was that those employees with no recognised trade union were not affected by these Regulations. After the European Court of Justice decision²³ concerning inadequate implementation of the ARD (discussed elsewhere in this thesis) the Government introduced new Regulations²⁴, which came into effect on October 1 1996. These provided for representation of workers in health and safety matters when there was no recognised trade union. These Regulations are unclear as to how employee representatives are to be elected or consulted when there is no recognised trade union. They show, however, the Government's reluctance to implement legislation which provides a general right to consultation by employees, albeit in very limited circumstances.

This contrasts with the approach of the Community which can be seen in the development of the social dialogue.

The social dialogue

The development of the dialogue with the social partners has become an increasingly important part of the Community's development of social policy. It takes place through a variety of institutions. Mr Pdraig Flynn²⁵ stated, in 1996,

"The Commission's policy is one of openness to the social partners, in the interests of pursuing a social policy based on positive contributions from all those involved in the social dialogue".²⁶

Within the Commission's Directorate General for Employment, Industrial Relations and

Social Affairs (DG5), there exists a directorate initially known as 'Social dialogue and industrial relations', but renamed as 'Social dialogue and freedom of movement for workers' in 1993. This is concerned with the development of the social dialogue and has, for example, established, with the social partners, a European Centre for Industrial Relations based on the University of Florence with the aim of increasing the study of comparative industrial relations systems.

The social partners

It is clear that the role of the social partners²⁷ at Community level has developed significantly. It can now be said that the representatives of trade unions and employers' organisations have a important role to play in the development of the Community's social policy. There is, however, a question as to whom the Community social partners actually represent and whether they have the authority to negotiate on behalf of workers and employers throughout the Community. At the beginning of their involvement they had not received authority from their national affiliates to agree or sign any type of collective agreement. This has now changed as, for example, the May 1991 Congress of the ETUC gave its executive committee authority to negotiate²⁸. There are still disagreements upon the employers' side with organisations such as UEAPME²⁹ claiming that they are not represented by UNICE or CEEP. They have started proceedings under Article 173 claiming that they should have been involved in the discussions leading to the Parental Leave Directive³⁰.

Consultative committees

The Economic and Social Committee is a consultative assembly of the European Communities which has representatives of employers, workers and various other interested groups³¹. There are 222 members in total.

There are also a number of other cross industry advisory committees which are used for consultative purposes. These are the European Social Fund; the Advisory Committee on Social Security for Migrant Workers; the Advisory Committee on Freedom of Movement for Workers; the Advisory Committee on Vocational Training; the Advisory Committee on Safety, Hygiene and Health protection at Work and the Advisory Committee on Equal Opportunities for Women and Men³².

In addition there are sector committees covering agriculture, transport, inland navigation, railways, maritime transport, civil aviation, sea fishing, telecommunications and postal services, all of which have representatives of employers and employees.

Concertation

There appears to be a wish to go beyond the level of consultation which is concerned with receiving opinions and taking them into account when developing policies. This stronger approach is referred to as concertation:

"The special element in concertation is that all sides enter into a stronger commitment, the basic idea being that the social partners could rank as equals with the Council - i.e.

with government representatives, in policy sectors such as employment"³³.

It is this development of the social dialogue that is important for this thesis. It is built upon a tradition of consultation but developed out of the successive meetings referred to as the Val Duchesse social dialogue (see above). It is a process that has reached the stage of deliberations over social policy initiatives, such as the production of a framework document on parental leave³⁴ which states in the preamble

"ETUC, UNICE and CEEP request the Commission to submit this framework agreement to the Council for a Council decision making these requirements binding in the Member States..."

It is a process perhaps more reflective of the approach of those Member States with a corporatist outlook, rather than the United Kingdom's ideological approach.

It is proposed here to examine two directives more closely in order to illustrate the Community's approach further.

The European Works Councils Directive³⁵

This Directive was approved by the Council of Ministers on 22 September 1994. The European Works Councils Directive (hereafter called the EWC Directive) sets out its objectives in Article I. The first of these is

"I. The purpose of this Directive is to improve the right to information and to

consultation of employees in Community-scale undertakings and Community-scale groups of undertakings".

Consultation is defined in Article 2 as meaning

"..the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management".

Article 12 provides that the Directive is without prejudice to measures in the Collective Redundancies Directive and the ARD.

The EWC Directive applies to undertakings employing at least 1000 people within the Member States with at least 150 employees in two Member States. The requirement is to set up an EWC or equivalent procedure. As it was the first measure to be approved under the Protocol and Agreement on Social Policy of the Treaty of European Union, the United Kingdom's opt out applies. UK based multi national companies who meet the criteria, excluding their UK staff, are affected, however. Approximately 1200 Companies are affected in all³⁶, including about 150 UK based companies. One example is British Steel who employed 52,700 people³⁷, 85% of whom are in the United Kingdom. They planned to set up a works council which included its British workforce.

It is estimated that the number of such companies will increase to approximately 300 should a future UK government end the opt out³⁸.

Two of the features of the EWC Directive are firstly the active participation of the social partners in the formulation of the Directive and, secondly, that it "has the potential to make a decisive step towards a transnational industrial relations system"³⁹.

Professor Bercusson estimates that this could result in 36000 works council representatives throughout the Community involved in transnational information and consultation procedures⁴⁰. The result is unpredictable, perhaps, but it is likely to have an impact on both transnational and national industrial relations. This approach appears to be incompatible with the ideological approach of the UK Government. In these circumstances opting out of the Social Agreement seems to be entirely logical.

There is, perhaps, a contradiction within the economy, however. Many of the larger companies, that are likely to be affected by the EWC Directive, adopt a more corporatist approach themselves. A survey⁴¹ in 1992 of 176 companies employing 1000 or more people in the United Kingdom showed that 69% recognised trade unions for the largest employee group in their work force. This is in comparison to the economy as a whole where 40% of employers recognised trade unions.

The Working Time Directive⁴²

The Working Time Directive is concerned with laying "down minimum safety and health requirements for the organisation of working time" (Article 1(1)). The policies of the various Member States with regard to these issues are perhaps symptomatic of their wider attitudes to questions of employee rights and industrial relations. All Member States, with the exception of the United Kingdom, have some statutory or

agreed (by collective agreement in Denmark) maximum working hours per week.

These limits are

| | |
|-------------|------------------|
| Belgium | 40 hours |
| Denmark | 37 |
| France | 39 |
| Germany | 48 |
| Greece | 48 |
| Ireland | 48 |
| Italy | 48 |
| Luxembourg | 40 |
| Netherlands | 48 |
| Portugal | 44 |
| Spain | 40 ⁴³ |

The United Kingdom has the largest percentage, in the Community, of employees working over 48 hours. The average for the Community was 10.4% of the work force whilst in the United Kingdom the figure was 27.8%⁴⁴. Only the United Kingdom and Italy do not have a statutory minimum holiday entitlement, but in Italy the right to time off is enshrined in the constitution. It is estimated that some 11% of the UK work force have no rights to paid holidays.⁴⁵

Professor Bercusson stated that

"The working time directive illustrates this process of europeanisation of labour law:

its roots are to be found in the experience of Member States, but in the process of formulating the directive, this experience has been moulded into a new shape. The working time patterns proposed by the directive are modelled on continental European experience, in contrast to the UK patterns of working time. On the other hand, the Directive offers considerable space for flexibility through collective agreements, which reflects the singularity of the United Kingdom's tradition of regulating working time through collective bargaining and collective agreements, in contrast with continental traditions of legislation on working time"⁴⁶.

It will be suggested below that this apparent flexibility in directives, in order to cope with the widely different approaches of the United Kingdom and other Member States, is the cause of many of the problems associated with the ARD and its proposed replacement.

One of the features of the Working Time Directive is the explicit nature of collective bargaining, at national level, to implement it. Article 18(1)(a) provides that

"Member States shall adopt laws..necessary..or shall ensure..that the two sides of industry establish the necessary measures by agreement..".

Both the Working Time Directive and the EWC Directive allow an important role for collective bargaining and the involvement of employees and employee representatives in their implementation. Many of the flexibilities inherent in both Directives can be settled by collective bargaining. This is in contrast to the flexibilities in the proposed ARD which leaves the decisions on their interpretation to the national governments.

This flexibility can lead to different levels of protection in different Member States.

A Council Resolution of 6 December 1994⁴⁷ asks the two sides of industry

"..to step up their dialogue and make full use of the new possibilities afforded them by the Treaty on European Union...to use the consultation procedure to provide the European Union with improved bases for the creation of a European social policy which is pragmatic and close to the citizen.."

This is an example of the corporatist approach adopted by the Community following the practice of most Member States.

In early 1994 the UK Government brought a legal challenge before the European Court of Justice, claiming that the Directive should not be classed as a health and safety issue, which requires a qualified majority vote in the Council of Ministers. It should have been brought under Article 100 or 235 EC, which require unanimity.

The Court announced its decision on November 12 1996, confirming that the legal basis for the Directive was correct. The date for transposition into national law was November 23 1996. Thus the United Kingdom has failed to implement this Directive and its only hope for exclusion rested with the negotiations at the Inter Governmental Conference, 1996/1997.

Flexibility

It is apparent that there is to be flexibility in both the means of implementing social policy and in the content of the policy itself. Collective agreements at the Community level and at the national level are to be a source of Community action. In the Medium-term Social Action Programme 1995-1997⁴⁸ the Commission proposed in paragraph 11.1.9

"Implementation of directives by collective agreement: in the light of the European Court of Justice case law and the Agreement on Social Policy, and taking into account diverse national practices, the Commission will present a communication addressing the entire area of implementation of Community directives by collective agreements. The Commission will also consider and reflect on ways and procedures to involve the social partners in the process of control and transposition and enforcement of Community law".

This involvement of the social partners in Community law is now established. On December 14 1995, ETUC, UNICE and CEEP signed the new framework agreement on parental leave, prior to the agreement going to the Council of Ministers to be turned into legislation⁴⁹.

The content of the law is to be flexible, as shown above. Other directives share this feature, e.g. the draft Takeovers Directive⁵⁰. This is a proposal for a 'framework' directive which "would establish the same general principles to govern the conduct of takeovers as were featured in the previous proposal, but no longer includes detailed

provisions to harmonise how these principles should be applied"⁵¹.

As a result Member States will be able to continue to operate their own takeover codes "and Alistair Defriez, director general of the powerful self regulatory body [City Takeover Panel] said..there was a distinct risk that the European Commission's draft takeover directive could result in bids being settled by protracted court cases rather than being dealt with quickly under City rules"⁵².

There is a problem with flexible directives. They may result in litigation and the application of different rules in different Member States.

Harmonisation

In Mikkelson⁵³ Advocate General Sir Gordon Slynn distinguished between the terms 'approximation' and 'harmonisation' of laws. The former enables Member States, for example, to apply the ARD to people that their own laws prescribe as having a contract of employment or an employment relationship. The European Court of Justice repeated this distinction in its judgment:

"It is clear...that Directive 77/187 is intended to achieve only partial harmonisation essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred".

The same approach was taken by the Court in Daddy's Dance Hall⁵⁴:

"The Directive does not aim at setting up a uniform level of protection for the whole of the Community based on common criteria...".

Thus the ARD is only intended to approximate or partially harmonise the laws of Member States. The European Court did not answer the question that if directives are intended to only partially harmonise the laws of Member States, why is it not made clear which part they intend to harmonise? One might also question what proportion was intended to be harmonised and whether this proportion is the same in every Member State. This distinction between approximation and harmonisation is not clear and, combined with flexible directives, can only add to the confusion surrounding some Community law, especially, the proposed ARD. It is clear, however, that once a Member State has decided upon the definition of employee, the Member state must consult with them or their representatives in certain circumstances⁵⁵.

UK Government Attitude

Of importance too is the attitude of the United Kingdom to Community law and to its perception that it regards itself as being different to the rest of the Community. Mr Eric Forth MP, Minister of State at the Department of Education and Employment, stated⁵⁶ in response to a question

"My hon. friend has hit on a truth that has been obvious to us for some time but which we have as yet been unable to persuade our partners to see. It is that if we arbitrarily interfere in the working of the labour market...the almost certain result will be the loss of jobs and competitiveness..".

The United Kingdom Government believes that it has the correct approach and that the other Member States remain to be convinced. The Government, however, goes further in its opposition to Community law. On May 22 1996 Mr Roger Freeman MP, Chancellor of the Duchy of Lancaster, announced that "we have published a new checklist for Departments dealing with gold plating⁵⁷".

'Gold plating' is a concept introduced by the Government which is akin to taking the 'gilt' off European Community legislation and decisions of the European Court of Justice. In a debate on the Opposition's attempt to annul the Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations⁵⁸ the Minister for Competition and Consumer Affairs, Mr John Taylor MP, had announced that "Conservative Members are pleased to take the gold plate off regulations and directives".

Gold plating is one of the items on the check list produced for Ministers to help deal with European legislation. The check-list is divided into four sections; double banking, gold plating, clarity and presentation, and monitoring. The objective of the list is clear. It aims to help Ministers do the minimum necessary to introduce Community law.

Double banking consists of three items. Firstly "are the requirements of the directive covered to any extent by existing domestic law, perhaps law for which another department is responsible", secondly "is the domestic provision sufficient, and no more than the directive requires" and thirdly "if not, can the existing law be dispensed with. Consider using the European Communities Act or a Deregulation Order".

The objective, clearly, is not to introduce unnecessary legislation. This is a laudable aim, perhaps, except that the motivations for the questions are revealed by the 22 questions under the next section which is headed 'gold plating'. The first sub section is titled 'timing' and reveals the motivations. The questions are "what use is being made of available transitional periods? are legal obligations being imposed with effect from the latest possible date? if not, do UK benefits of early implementation clearly outweigh costs". Unless there is seen to be a clear benefit to the United Kingdom from early implementation, then this should not take place until the latest opportunity. It is unlikely, for this Government, to mean early implementation of the Working Time Directive or the proposed new Acquired Rights Directive, both of which extend extra protection to employees.

The second sub heading under 'gold plating' is concerned with what is called "copy-out". This intention appears not to do more than the absolute minimum that is required by the directive, with such questions as "is there elaboration of any term used which may give a wider meaning in UK law than that in the directive and do the substantive requirements follow exactly the wording of the directive?".

This concern with doing no more than the minimum is continued with the next two sub sections on scope and exemptions; "are there precise definitions on coverage...are any potential exemptions or derogations being used to their maximum extent..".

There are further questions about sanctions, codes, clarity and monitoring. The objective is ostensibly to reduce the burden of legislation and regulation. As Mr Anthony Steen MP said in the same adjournment debate:

"The culture shockwaves must not stop at Dover: they must cross the channel to Brussels, from which directives, rules and regulations are spewed out at an alarming rate...and if the Brussels bureaucracy were not enough, our own officials compound the problem by hijacking European directives and adding burdens to them, going beyond the minimum requirements of the directives. The result is even more obligations imposed on those who live in Britain".

The problem with this 'we are hard done by' approach is that it may result in the minimum transposition of directives which may lead to inadequate implementation. It is, however, the Government's policy. Other cabinet ministers have also committed themselves to removing 'gold plating'⁵⁹.

Worker information and consultation: Community proposals and the UK response

In 1995 the European Commission issued a Communication on Worker Information and Consultation⁶⁰. The proposals and the response of the United Kingdom Government illustrate, perhaps, the different approaches between the two.

Following the successful introduction of the European Works Council Directive⁶¹ the Commission has turned its attention to a number of other proposals which contain provisions concerning the consultation of employees. Some of these are proposals for directives that have been in existence for a considerable time, e.g. the so called 'Vredeling proposal' for a Council Directive on informing and consulting the employees of undertakings with complex structures⁶² was first a proposal in 1980.

The Commission contrasts the achievement of directives concerning collective redundancies⁶³, transfers of undertakings⁶⁴ and European works councils with the failure of its proposals on a European company statute, a European association⁶⁵, a European co-operative society⁶⁶ and a European mutual society⁶⁷. The distinction, according to the Commission, is that the former establishes a model whereby employees are informed and consulted on a number of important issues, whilst the latter provide for forms of employee involvement, such as their incorporation into a supervisory board.

The adoption of the European Works Council Directive (EWC), after fourteen years of debate, is seen as a breakthrough in providing a model for future progress. One possible proposal is that there should be two general framework agreements; one for transnational aspects (based upon the EWC model of consultation) and one governing the national aspects, based, perhaps, on the pattern established by such directives as the collective redundancies directive and the ARD.

There are three possible options proposed. These are

Option 1 - maintain the status quo

This means continuing with the present fragmented approach with the likelihood that little progress will be made on the outstanding proposals.

Option 2 - the global approach

A proposal to have two legal frameworks, one for transnational and one for national aspects. The Commission accepts that this latter proposal raises questions of subsidiarity, proportionality and the question of what would be the legal basis⁶⁸ for action.

Option 3 - immediate action on the blocked directives

If the global approach is adopted then progress could be immediately made on the blocked directives.

The Commission would like progress to be made on its proposals and that one route is that of new legislation solely covering the rights of workers to information and consultation and the EWC model of employee involvement. The Commission recognised the difficulties ahead, but also stressed what it sees as its importance:

"The history of the attempts to establish Community-level rules on employee information, consultation and involvement is closely linked to the history of the European Community itself. For many years now, this subject has been at the heart of the discussions on European social policy, the European social model and the preferred type of economic and social development in Europe. These discussions have not only been long, but also lively, controversial and in some cases, even heated"⁶⁹.

This may well be an understatement as the issue is about the way progress is to be

made in moving forward Community social policy. It is also about a fundamentally different approach between the UK Government and the European Community towards collective relations and collective consultation with workers. Whereas the United Kingdom strongly favours an individualistic approach to bargaining and consultation, the Community favours a collective approach which includes consultation with employees' representatives.

The UK consultation exercise⁷⁰

The UK Government held a brief consultation exercise, issuing its document in January 1996 and producing its summary in May 1996. Twenty three organisations responded to the consultation. They were:

11 from industry federations and other organisations representing groups of businesses (including small firms).

5 from large UK-based employers

2 from management-related associations

2 from trade union organisations

2 from chambers of commerce

1 from a voluntary sector representative organisation

This cannot be called a significant response in terms of numbers, but one must speculate whether more numbers from the different organisations would have produced a different result. It can be further speculated whether, of course, any consultation exercise on this issue would actually have made any difference to the views of the UK

government.

Three questions were posed. The first two were

"(i) The Communication puts forward the option of a new Community instrument which would require organisations to establish information and consultation procedures at national level. What impact would legislation of this kind have on UK organisations?

(ii) How would legislation of this kind affect existing (formal and informal) employee involvement arrangements?"

The summary concluded that

"The large majority of respondents were strongly against the idea of Community legislation on national-level information and consultation"

The arguments ranged against the proposal were, firstly, that there would be additional costs without additional benefits; secondly, there is already a well established network of arrangements that would be jeopardised by legislation; thirdly, from the point of view of the concept of subsidiarity, this matter should be left to national governments.

There was also opposition to the idea that European Works Councils were a success. One 'major business federation' stated that European Works Councils "have been widely criticised by many throughout Europe. Even those UK companies who are setting up a European Forum have few illusions about their effectiveness, nor have they embraced them with great enthusiasm".

The one 'large trade union organisation' which expressed support for the proposals stated that "many UK companies already recognise the benefits of involving their staff and giving them a voice at the workplace...there should be guaranteed rights in this area".

The third question was

"(iii) The Communication suggests that the draft European Company Statute might be amended to bar UK businesses from forming European Companies, because of the UK's opt-out from the European Works Councils Directive. It suggests similar amendments to the draft Statutes on the European Association, European Mutual Society and European Co-operative Society. How might such exclusions affect UK organisations in relation to their counterparts in other member states?"

This is a highly colourful interpretation of the Commission's Communication. Only 16 organisations responded to this question, 14 of whom were opposed to being excluded from participating in new types of European entities. This is not surprising, but there was criticism of the linking of two apparently separate issues, namely employee involvement and issues of establishing a European company, which was "the main reason why discussions on these proposals have failed to make progress". In opposition 'one of the trade union organisations' argued

"that the compulsory link between the establishment of a European company and the requirement for procedures on employee involvement is a key element of the proposal which must not be lost".

It is difficult to see what the Government learnt from this exercise and one must be seriously concerned about its method of consultation, which is to issue questionnaires and analyse the results, no matter how inadequate. There is no attempt to enter into serious dialogue with any of the interested parties as this would, perhaps, be inappropriate given the Government's policy towards consultation with the social partners. Despite this the Government concludes its report by praising the exercise and promising to take into account the views of the participants.

The UK Government response

The Government was opposed to all the options put forward by the Commission:

"The Government strongly believes that genuine employee involvement in the UK cannot be imposed by legislation and it would be wrong to try to force businesses to inform and consult their employees".

The arguments against are, firstly, that it is wrong to use legislation to force action in this area; secondly, that such legislation would jeopardise the wide range of voluntary arrangements which already exist and, thirdly, that there is no requirement for it.. "a wide variety of flexible, voluntary arrangements exist very successfully in the UK" already.

The Government then considered each of the options (see above) put forward by the Commission:

Option 1 - maintain the status quo

The Government stated its fundamental opposition to the worker participation elements of the proposed directives. They were incompatible with "the UK's voluntary approach".

Option 2 - the global approach

Here, perhaps with some justification, the Government expressed "severe doubts as to whether such an approach would be in keeping with the principle of subsidiarity". They pointed out that all the proposed directives were concerned with establishing new kinds of transnational organisations and could not see the connection between these and the need for Community rules on information and consultation at national level.

Option 3 - immediate action on the proposals

The United Kingdom would support progress on these directives (although there would still be remaining issues to be agreed) if the worker participation sections were deleted. It was opposed to being excluded from these proposed directives, which were, according to the Commission, an essential part of the internal market. The employee participation sections could be introduced under the Agreement on Social Policy and they would then not apply to the United Kingdom.

The UK Government has an important argument concerning the subject of subsidiarity. There is a strong case for Community regulation of transnational organisations and

transnational arrangements for consultation and participation. The Community case for the regulation of national systems is not so clear.

The Commission, in its document, states that there are two issues; that of consultation and that of participation. It explains its success and failure on the difference between the two (see above). The United Kingdom, on the other hand, distinguishes between those actions that need to be taken at Community level and those that need to be taken at a national level.

Combining, perhaps necessarily, issues concerning the single market and issues concerning social and employment policy into one piece of legislation may lead to a situation where either the internal market measure is delayed, or the question of whether the United Kingdom should be excluded from a single market measure is raised. Either situation should be unacceptable. The gulf between the attitude of the UK Government and that of the Community on this issue seems large.

Conclusions

There is a very real difference between national trade union organisations and employers' organisations as compared with the Community ones. At the national level these organisations are likely to have sanctions as part of the negotiations. Employers can create jobs or take action against employees. Trade unions may take industrial action against an employer. Whatever form this action takes it is the possibility of these actions that makes the bargaining process effective.

In many Member States the representatives of employers and employees have become social partners. Their agreements are given the force of law and they have become part of the legal/social framework. They are able to be part of the negotiating process because their membership consists of employers and employees, not because of the potential sanctions that they might wield. The most important characteristic of the corporatist system is that the social partners are institutionalised and are an integral part of the national negotiating process.

It is suggested here that this is a process that has also taken place at Community level. Article 118B EC has institutionalised the process and this has been aided by the Protocol and Social Policy Agreement. The Social Partners, i.e. UNICE, CEEP and ETUC, are consulted and involved merely because they represent organisations of employers and employees, not because they have any sanctions available to them.

In contrast, as has been shown, the social partners in the United Kingdom have become de-institutionalised. In the 1960s and the 1970s the trade unions and employers were treated as genuine social partners by governments. This began to change in the 1970s and has changed in the 1980s and 1990s. The corporatist model has institutionalised the social partners at the same time as the ideological model has de-institutionalised them. There are problems associated with law resulting from institutionalised corporatism being applied to a de-institutionalised system. The ideological system does not operate on the same premises as the body which passes the laws at Community level.

The original ARD was approved by the Council of Ministers in 1977 when there was

a similarity of approach amongst Member States concerning the role of trade unions and employers' representatives. This collective approach no longer exists and the proposed ARD appears to be a compromise between the social partners and between the Member States. The result will be a 'flexible directive' which will lead to continued litigation and leaving the final decision to the European Court of Justice. This final decision will rest with a Court whose membership changes, sometimes dramatically, at regular intervals and whose decisions are not tied to the common law approach of precedent.

1. This approach is still developing. See later the discussions of the social dialogue
2. Nielsen and Szyszczak (1993) The Social Dimension of the European Community Copenhagen: Handelshojkskolens Forlag
3. Defrenne v Sabena (Case 43/75) (1976) ECR 455
4. Neilsen and Szyszczak op.cit.
5. Ibid
6. Bulletin of the European Communities - supplement 2/74
7. Op.cit.
8. James, Phil (1993) The European Community A positive force for UK health and safety law? London: Institute of Employment Rights
9. COM (89) Final 22/11/89
10. Norman Fowler MP Hansard HC vol 162 col 724
11. Article 188a is concerned with encouraging improvements in health and safety of workers and improving the working environment. It allows for the decision procedure set out in Article 189c which permits majority voting by the Council
12. Szyszczak, Erica (1995) Future directions in European Union social policy law ILJ vol 24 no 1 p19
13. COM(94) 333 Final
14. Szyszczak op.cit.
15. COM(95) 134
16. Hepple, Professor Bob (1993) European Social Dialogue - Alibi or Opportunity London: Institute of Employment Rights
17. See Cm 1934 May 1992
18. Bercusson, Professor Brian (1996) European Labour Law Butterworths
19. Op.cit.
20. European Commission v United Kingdom (Case C-382/92) (1994) ECR 1-2435
21. Council Directive 89/391/EC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L183/1 of 29 June 1989
22. The Safety Representatives and Safety Committees Regulations SI 1977/500 as amended by SI 1992/2051
23. European Commission v United Kingdom see note 20
24. Health and Safety (Consultation with Employees) Regulations SI 1996/1513

25. Member of the European Commission with responsibility for employment and social affairs
26. Preface to Social Europe 2/95 1996 Luxembourg: Office for Official Publications of the European Communities
27. Social partners are the employers' organisations UNICE (Union of Industrial and Employers' Confederations of the European Communities) and CEEP (European Centre for Public Enterprises), and ETUC which is the European Trades Union Confederation
28. Antonio Ojeda-Aviles (1993) European Collective Bargaining: A Triumph of the Will? International Journal of Comparative Law and Industrial Relations Winter p279
29. The European body representing small and medium sized employers
30. EIRR 274 November 1996 p3
31. For example the professions, farmers and education
32. Social Europe op.cit. p18
33. Ibid p15
34. Ibid p184
35. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees OJ L254/64 of 30.9.94
36. IDS Study 1996 European Works Councils No 600 April
37. At the time of their announcement that they would set up an EWC. Information from the Financial Times 1996 August 1 p7
38. Independent newspaper May 13 1996
39. Bercusson op.cit
40. Ibid
41. Workplace Industrial Relations Survey quoted in Bercusson ibid
42. Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time OJ L307/18 of 13 December 1993
43. IDS Employment Europe 1996 No 413 May
44. Ibid
45. Ibid
46. Bercusson, Professor Brian (1994) Working Time in Britain: Towards a European Model London: Institute of Employment Rights

47. Council resolution on certain aspects of a European Union social policy: a contribution to economic and social convergence in the Union OJ No C 368/6 23.12.94
48. COM(95) 134
49. EIRR 1996 p264 January
50. Proposal for a 13th Company Law Directive concerning takeover bids COM(95) 655 Final of February 2 1996
51. Single Market News 1996 - Newsletter of DG XV No 3 p16
52. Guardian May 13 1996 p15
53. Foreningen af Arbejdsledere i Danmark v Danmols Inventar (Case 105/84) (1985) ECR 2639
54. Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S (Case 324/86) (1988) ECR 739 (1988) IRLR 315
55. European Commission v United Kingdom see note 20
56. HC 278 Col 280 22 May 1996
57. HC 278 col 255 May 22 1996
58. HC 271 col 204 6 February 1996
59. HC 278 col 255 May 22 1996
60. COM(95) 547 Final
61. Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees OJ L254/64 of 30.9.94
62. OJ C297 of 15.11.80 and an amended proposal in OJ C217 of 12.12.83
63. Council Directive 75/129/EEC as amended by Council Directive 75/129/EEC
64. Council Directive 77/187/EEC
65. OJ C176 8.7.91
66. OJ C236 31.8.93
67. OJ C99 21.4.1992
68. Treaty or Social Agreement
69. Communication from the Commission op.cit. p3
70. Information provided by the DTI. dated May 1996 - no reference available

Chapter 6 The implementation of the ARD in the United Kingdom and selected Member States of the European Community

Introduction

In this chapter it is intended to consider the ARD and to examine its implementation in the United Kingdom in contrast to that of other Member States.

The ARD

Although the ARD arose out of the Community's social policy, foreshadowed in the communique resulting from the Paris heads of government meeting in October 1972 and the resulting Social Action Programme of 1974, the legal basis for the Directive was Article 100 EEC:

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

This Article concerns the harmonisation of rules governing the establishment of the internal market. The legal basis for the ARD had little to do with its derivations (see below).

The Directive itself was adopted by the Council of Ministers on February 14 1977

during a British Presidency of the EEC and a Labour Government in the United Kingdom. It was, however, ultimately left to a Conservative Government, led by Margaret Thatcher, to transpose it into national law. It was introduced when the United Kingdom had a government that was in sympathy with the corporatist approach of other Member States, but fell to be transposed by a government that was developing a different approach.

This is in contrast to the way that the Collective Redundancies Directive¹ was implemented. This was a Directive with similar origins to the ARD in that it arose out of the same Social Action Programme and had, as its justification, Article 100 EEC. It was transposed into UK law by S99 of the Employment Protection Act 1975. The same UK Government that supported the measure in the Council of Ministers was able to transpose it into UK law. The ARD, on the other hand, was incorrectly transposed by a Government with a different approach to employment protection measures to that which had been in power before 1979.

The purpose of the ARD is stated as

"The approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses".

As was said by the Advocate General in Spijkers²

"It is clear that the over-riding objective of the Directive is to protect workers in a

business that has been transferred".

The Preamble

This begins by citing Article 100 as the legal basis of the Directive. It is followed by the justification, which is that economic trends are changing the "structures of undertakings" and that employees need to be protected and "their rights are safeguarded" in the event of a transfer.

In an explanatory memorandum to the proposed 1994 revision³ it was stated

"The dismantling of internal frontiers is already resulting in major corporate reorganisations within the Community, including a significant increase in mergers, takeovers, transfers and joint ventures, leading to a growing concentration of company ownership".

The justification was, and still is, the need to protect workers during a period of increased merger activity resulting from the success of the internal market. The predictions of such merger activity seem to have been confirmed by subsequent events.

The value of acquisitions and mergers by UK industrial and commercial companies of UK companies increased from £5.5 billion in 1984 to £27.1 billion in 1989. Between 1986 and 1989 the number of overseas companies acquired by UK companies more than doubled to 680 with a value of £22.6 billion in 1989. Additionally "there has been a steady increase in the number and value of acquisitions of UK companies by EC companies"⁴.

The Directive is divided into four sections:

Section I gives the scope and definitions

Section II concerns the safeguarding of employees' rights

Section III concerns information and consultation

Section IV details various final provisions

Section I concerning scope and definitions

Article 1 provides that the Directive shall apply to the "transfer of an undertaking, business, or part of a business to another employer as a result of a legal transfer or merger" that takes place within the EEC and excludes sea going vessels.

Article 2 attempts to define some of the terms, i.e. 'transferor', 'transferee' and 'representatives of the employees'.

Significantly, two of the important terms concerning future litigation were not defined in any way. These terms are 'transfer' and 'undertaking'. Defining what was meant by these words was left to the European Court of Justice. It also gave the Court the opportunity to widen the scope of the Directive to definitions not foreseen by the original authors⁵. It was also to be a cause of considerable uncertainty in areas such as the contracting out of services in local government within the United Kingdom.

Section II concerns the safeguarding of employees' rights

Article 3 states that "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee".

The transferee is also obliged to respect any existing collective agreements entered into.

Article 4 is perhaps the most important article. A transfer does not constitute grounds for a dismissal, unless there are "economic, technical or organisational" reasons. A substantial deterioration in working conditions after a transfer can be treated as a dismissal.

Article 5 tries to preserve the position of employee representatives in the event of a transfer.

Section III concerns information and consultation

Article 6 provides for the informing and consultation of representatives of employees about the reasons for the transfer, the legal economic and social implications and the measures envisaged for the employees. The transferor and the transferee have an obligation to give such information "in good time before the transfer is carried out" and consultation is "with a view to seeking agreement". Where there are no representatives of employees, the employees must still be informed in advance when a transfer is to

take place.

It was this Article on consultation that was the last to be implemented by the UK Government in 1995, some 16 years after it was due to be transposed.

Section IV contains final provisions

Article 7 allows Member States to introduce more favourable laws.

Articles 8 and 9 provide that the changes in legislation necessary to implement the Directive should be made within two years and that details of the changes should be communicated to the Commission.

The Directive is then signed, perhaps ironically in the light of later developments, by a UK Government Minister, Mr John Silkin MP.

Implementation of the ARD in the United Kingdom

An essential argument in this thesis is that the approach to industrial relations in the United Kingdom is different to that of most other Member States of the European Community.

Lord Wedderburn wrote, in 1991,⁶

"Long ago, one member of the Donovan Commission wrote: A thing that worried me

all through the deliberations of the Commission...was this, supposing we made all the right recommendations, and supposing the Government gave effect to them all in legislation, how long would it be before the judges turned everything upside down".

The history of the British judiciary and the common law, which will be considered shortly, is one of suppressing trade union and workers' rights. It is the legislature that traditionally has intervened to remove the worst effects of the courts' decisions in order to protect workers and grant them and their representatives immunity from the results of judicial decision making. Some well known historical examples are the deportation of the Tolpuddle martyrs in 1834 for secretly forming an association and the invention of new torts in Quinn v Leatham⁷ 1901 and Rookes v Barnard⁸ in 1964.

Historically, much government legislation concerning employee rights has concerned the granting of immunity from legal action for actions seen as not permissible in common law. These are essentially negative rights; i.e. protection against the worst effects of the common law, rather than the more positive granting of new rights. This is in direct contrast to many other Member States of the Community where the right to strike, for example, is enshrined in statute or a constitution.

The period from 1979 has been dominated by successive Conservative Governments, initially led by Mrs Margaret Thatcher. These were Governments committed to reversing the policies of state intervention in the fields of employment protection and in removing much of the role of the state as a participant in industrial relations. These protections were seen as barriers to job creation (see chapter 2).

Community legislation during this period has been described as "the only hope of restraint" to "a continuation of the sustained attack on trade union and work peoples' rights"⁹ by successive Conservative governments.

The contrast between the Governments' domestic policies and the demands of this "incoming tide"¹⁰ of Community labour law is striking. No fewer than seven Directives underpin TURER 1993. These were

- Directive 92/85 on the protection of pregnant workers¹¹
- Directive 91/533 on informing employees about terms and conditions¹²
- Directive 89/391 on encouraging improvements in the safety and health of workers¹³
- Directive 76/207 on equal treatment for men and women¹⁴
- Directive 77/187 on the transfer of undertakings¹⁵
- Directives 75/129 and 92/56 on collective redundancies¹⁶

The common law and business transfers

At common law an employee is regarded as having a contract of personal service with an employer. The standard authority on the approach of the courts with regard to transferring that contract is perhaps Nokes v Doncaster Collieries¹⁷. In this case a miner working for Hickleton Main Colliery Ltd was apparently unaware that this Company had been dissolved by a court order and that he had been transferred to Doncaster Amalgamated Collieries Ltd.. Viscount Simon LC stated

"My Lords, the question to be decided in the appeal can be thus stated. When the Court makes an order under S15 of the Companies Act, 1929, transferring all the

properties and liabilities of the transferor company to the transferee company, is the result that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between the individual and the transferee company?"

Lord Atkin stated:

"My Lords, I should have thought that the principle that a man is not to be compelled to serve a master against his will is...deep seated in the common law of this country".

The rule, therefore, is that a change in the legal identity of the employer results in the termination of the contract of service. For a novation of the contract to take place the new employer and the employee must give consent and have knowledge of the event. As will be shown later in this study, the law is very similar after the implementation of the ARD. The significant difference is that an employer's freedom of choice is removed. Although the employee can choose not to be transferred, the employer cannot, except under certain circumstances, decide not to transfer the employee without the possibility of unfairly dismissing that employee.

Statutory intervention first took place with the Contracts of Employment Act 1972, subsequently amended by the Employment Protection Consolidation Act 1978 and now contained in the Employment Rights Act 1996, where section 218(2) deals with transfers of employment

"If a trade or business, or an undertaking...is transferred from one person to another-

- (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and
- (b) the transfer shall not break the continuity of the period of employment".

This protection, however, is only available if the transferee employer agrees to employ the person concerned. It also does not concern itself with the acquired rights of employment such as seniority or service based entitlements. The only acquired right that is transferred by this provision is the concept of continuity of employment¹⁸.

The TUPE Regulations

The Transfer of Undertakings (Protection of Employment) Regulations¹⁹ were the Government's chosen means for transposing the ARD. The Regulations were approved by the House of Commons on December 7 1981 and by the House of Lords on December 10 1981. This was approximately four and a half years after the Directive became Community law and some two and a half years late in being transposed into UK legislation. It was also the first time that a directive had been implemented in the form of regulations.

The power to make regulations, subject to the approval of Parliament, derives from Section 2(2) of the European Communities Act 1972.

The method of introducing the Regulations to Parliament did, perhaps, reflect the Government's attitude towards them. The Regulations were introduced into the House of Commons at 10.15 p.m. on December 7 1981 and the whole process was completed

in approximately one and a half hours.

The Minister introducing them to the House of Commons, Mr David Waddington (Joint Parliamentary Under Secretary of State at the Department of Employment), said²⁰

"I am recommending these with a remarkable lack of enthusiasm".

In the House of Lords the Government minimised the potential impact of the Regulations. The Government spokesperson, Lord Lyell, said²¹

"It is a major change in principle; but in practice it will not be anything like as far reaching as some have assumed. In reality, it will matter little where responsibility lies, since any shift in that responsibility will be reflected in the purchase price paid for the business".

One of the issues for this study is whether the Government really did not understand the impact of its own legislation or was deliberately misleading in its interpretation of that legislation. It would not be correct to say that such conclusions could only result from hindsight. There were critics at the time of the legislation who did pose some of the problems and criticise the Government's interpretation of the Directive. In the House of Lords debate the most vocal critics were Lords Wedderburn and McCarthy. It is clear from their speeches that some of the inadequacies of the Regulations were known at the time and that there was some idea of their potential impact.

Regulation 1

This is concerned with the dates upon which the Regulations come into force.

Regulation 2

This defines a number of terms.

Firstly it is notable for differing from the ARD in that it does not refer to the employment relationship. Article 3 of the ARD refers to "obligations arising from a contract of employment or from an employment relationship". The employment relationship is not mentioned at all in the Regulations. All references are to the contract of employment only and employees are defined as individuals "who work for another person...under a contract of service". Specifically excluded are any persons "who provide services under a contract for services". Thus the Regulations exclude a significant part of the working population who are self employed, despite the fact that it is arguable that many 'self employed' people are in an employment relationship.

The ARD does not define the meaning of an 'employment relationship', but it does refer to "contract of employment or employment relationship" on three different occasions and never to "contract of employment", on its own. It is arguable, therefore, that employment relationship means more than just a contract of employment, but this is an issue that is ignored both by the Directive and by the Regulations.

The second definition in the TUPE Regulations which had a limiting effect on their applicability was that of an 'undertaking'. In Regulation 2 it was defined as

"undertaking includes any trade or business but does not include any undertaking or part of an undertaking which is not in the nature of a commercial venture".

In the House of Lords debate on the introduction of the Regulations, Lord McCarthy had asked the Government to "spell out the meaning of non commercial". The response of the Government was merely to state²²

"We have been advised that all activities of a non commercial nature are outside the scope of this Directive".

There is no such exception mentioned in the ARD. As the Opposition spokesperson in the House of Commons pointed out²³, the result of this qualification in the Regulations might be to exclude a wide range of employment including government owned undertakings, such as British Telecommunications, the Property Services Agency and the Ordnance Survey.

Subsequently the European Court of Justice accepted²⁴ the European Commission's argument that this exclusion was not an adequate implementation of the Directive. It is not possible to conclude whether this was a deliberate attempt by the Government to reduce the impact of the Regulations or whether the Government genuinely believed that 'non-commercial' undertakings were excluded. The result of the restricted definition had the effect of removing large numbers of people from the protection of the Directive and the Regulations.

Regulation 3

This concerns the definition of a relevant transfer, which is "a transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or part of one which is so situated".

Younson²⁵ suggested that transfers could be classified into four groups. These were share transfers, business transfers, asset transfers and license transfers. It is suggested here that there might now be six useful categories. These are

1. **Share transfers** where the controlling interest in a business is acquired through the transfer of shares. This is said to be different from other transfers because the legal entity of the employer remains the same. It is the shares in the Company that have changed owners.

It is arguable that this is an anomaly in the ARD and the TUPE Regulations. The effect of a new owner of the equity of a company may have a significant effect upon the company and its employees. The Directive and the Regulations take no account of the need to protect employees in the case of the transfer of equity. There is no need for consultation "with a view to reaching agreement" and there is no necessity for an "economic, technical or organisational" reason for taking measures which have a significant effect upon employees. These employees still retain their length of service with the company and have some protection, but they are not provided with the protection offered to employees affected by a transfer of their undertaking.

2. **Going concern transfers** are defined as the transfer of a business which is then

continued as a business entity or part of a much larger business. This may involve the transfer of assets such as machinery and places of work as well as existing business contracts and good will. The essential test, which applies to all other types of relevant transfers, is that an entity is transferred which retains its identity. This definition will cover 'non-business' enterprises such as charities and the voluntary sector. It is to be distinguished from the mere sale or transfer of the assets of a business. A difficult question is at what stage a going concern stops being an undertaking capable of being transferred and becomes a collection of assets only.

3. **Insolvency transfers** are one of the commonest types of transfer and occur when an undertaking becomes insolvent and its business is disposed of by an administrator or receiver. A perceived problem, discussed by the European Court of Justice was that, in insolvency situations, the Directive could actually lessen the protection offered to employees. If all the employees were obliged to be transferred with the insolvent undertaking then this might considerably lessen the ability of the receiver/administrator to sell the undertaking, or part of it, and thereby preserve contracts of employment.

4. **License transfers** concern the transfer of a business via licenses or franchises and where one holder of a franchise or license transfers that franchise or license to another person.

5. **Public service transfers** concern the applicability of the Regulations to the public sector in the United Kingdom. There are two possible areas of applicability: firstly in the re-organisation of the public sector such as the transfer of much of the National Health Service to NHS Trusts and the transfer of many civil service functions to

executive agencies; secondly in the area of contracting out of services in both central and local government. The awarding of a contract to carry out services eventually came to be seen as a transfer of an undertaking. Regulation 3(4) was also influential in providing that a transfer may take place in two or more transactions.

6. **Part transfers** are worth mentioning as a separate category because they are an area which has caused much difficulty, especially when deciding whether an employee works for the part transferred or not.

The Regulations provide that there must be a transfer of the undertaking from "one person to another". This excludes share transfers where there is no change in the legal entity comprising the employer. Leaving out transfers as a result of a change in the ownership of shares was, according to Lord Wedderburn, like "leaving out the Prince of Denmark in the play"²⁶.

The omission of share transfers may not be the fault of the Regulations, but the responsibility of the authors of the Directive. In the preamble to the Directive, part of its rationale is

"Whereas economic trends are bringing in their wake, at both national and community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers..."

This perhaps suggests that the concern of the Community was to protect workers in

reorganisation situations as a result of their employer being taken over or merged with another undertaking.

Regulation 4

This is concerned with transfers by receivers and liquidators and the practice of 'hiving down'. The ARD does not concern itself with transfers as a result of insolvencies and it is the European Court of Justice that has attempted to define when and whether the Directive applies in insolvency situations.

The Regulation provided special rules for the practice of 'hiving down'. These concerned removing the assets, business and goodwill from an insolvent company and transferring them to a new wholly owned subsidiary company. This was summarised in Pambakian v Brentford Nylons²⁷:

"The purpose of these arrangements was to segregate the saleable assets...into a clean package, free of obligations whether to staff or creditors, which would be more readily saleable and if the transaction were correctly effected would bring to the purchaser certain fiscal advantages".

If the Directive were to apply, then the employees would automatically transfer to the newly created subsidiary. Hiving down and Regulation 4 acted to stop this happening. The employees' contracts did not transfer until the new subsidiary was transferred. Only the contracts of those employed by the subsidiary were transferred to the purchaser. This enabled the transferee to take on the insolvent business without any employees or historic contracts of employment.

This practice enabled the receiver to sell the assets or business of an insolvent company without the 'encumbrance' of existing employees, existing wage structures and contracts of employment. The creditors and shareholders of an insolvent company may be given preference over the claims of employees. In certain situations some jobs would have been protected by such a transfer. In others the employees' protection was taken away and there were job losses which could not be deemed to be as a result of a transfer, even though the business had transferred.

It may be considered strange that the practice could ever be construed as being in accord with the ARD and with the need to protect employees' rights during a transfer of an undertaking. The European Court of Justice, in Spano v Fiat Geotech²⁸ (see chapter 7), examined a 'technical' restructuring which appeared to be very similar to the hiving down approach in the TUPE Regulations. The Court concluded that employees within such transfers were protected by the Directive.

Regulation 5

This provides for the automatic transfer of contracts in the event of a relevant transfer of an undertaking. The Regulations mention only the transfer of the contract and not the transfer of the employment relationship. It is the contracts of "any person employed by the transferor in the undertaking or part transferred" that are safeguarded. The definition of persons employed is left to the national courts as in Mikkelsen²⁹. In the United Kingdom this means, of course, that 'self employed' people are excluded.

Further problems arise when only part of an undertaking is transferred or when only

part of the work of an undertaking is transferred. Employees working in a part that is transferred are protected by the Regulations, but there is a further problem arising from those who may work for other parts of the organisation but nevertheless provide a service to that part transferred, e.g. perhaps parts of personnel, finance and computer departments. This problem was considered in Botzen³⁰. The European Court of Justice held

"An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties".

This was also considered in Sunley Turriff v Thomson³¹ where a Company Secretary and Chief Accountant was deemed to have transferred despite the fact that his contract of employment was with a different company within the group. The absence of an agreement, between the employee and the transferor, to stay with the transferor was held to be important. If there is no new agreement then the transfer takes place. Thus an employee may not be directly employed by the part transferred, but may have a close enough link with the part transferred to be protected by the Regulations.

Regulation 5(3) confines the benefits of this protection to persons "employed immediately before the transfer". Regulation 5(5) protects the employee if there is a significant deterioration of their working conditions as a result of the transfer.

Regulation 6

This concerns the transfer of collective agreements. Those collective agreements existing at the transferor affecting those employees transferred are automatically transferred to the transferee. There is, however, no obligation upon the transferee to maintain a relationship with the trade union concerned.

As most collective agreements are deemed not to be legally enforceable, as per S179 Trade Union and Labour Relations (Consolidation) Act (hereafter known as TULRCA) 1992, employees are unlikely to have any remedies if the transferee decides not to recognise the trade union or the collective agreement concerned. The exception to this is when certain of the terms of the collective agreement had been incorporated into the individual contracts of employment. As was said in Robertson v British Gas:

"This is another way of saying that the terms of the individual contracts are in part to be found in the agreed collective agreements as they exist from time to time, and, if these cease to exist as collective agreements, then the terms, unless expressly varied between the individual and the employer, will remain as they were by reference to the last agreed collective agreement incorporated into the individual contracts".³²

Regulation 7

This excludes occupational pension schemes from Regulations 5 and 6. The subject of the transferring of pensions has been the subject of litigation, as in Adams v Lancashire County Council³³. Although this litigation confirmed that occupational pension

schemes are excluded, it is the case that in the contractualisation of parts of the civil service, that civil servants posts have moved to private management with the post holders retaining the same pensions entitlements that they had when still in the civil service³⁴. This is often done through the creation of mirror image pension schemes³⁵.

Regulation 8

Regulation 8(1) is concerned with making dismissals unfair if the reasons are connected with a relevant transfer.

Regulation 8(2) provides that if the dismissals were for an economic, technical or organisational reason (hereafter known as an ETO reason) before or after the transfer then these may be held as "a substantial reason of a kind to justify the dismissal".

Much of the litigation concerned with Regulation 8(1) has been concerned with whether dismissals were as a result of the transfer or for some other reason. Once, however, a relevant transfer has been established it is a question of fact, for the industrial tribunal to decide, whether the dismissal was for a reason connected with the transfer:

The ETO reason was referred to by Lord McCarthy, in the original House of Lords debate, as "gobbledegook". The phrase 'economic, technical or organisational' is a direct reproduction of the words used in the ARD (Article 4(I)) and might be seen as a reflection of the Government's attitude towards the Regulations. The United Kingdom, however, was not alone in reproducing, verbatim, parts of a Community directive into national law. It is a process that is common place in Italy and was

certainly repeated in Ireland when it transposed the ARD into Irish law. Unless there are overriding political or other reasons it might be regarded as unwise merely to reproduce the words of a non specific directive into national legislation. Directives do not contain the level of detail for direct implementation, but are intended to be used by the Member State to alter/introduce its own law or rules.

Regulation 9

This applies only where a transferred undertaking retains a distinct identity and is concerned with the transferee taking over recognition agreements. This may prove important because of the rights that may be conferred upon trade union representatives for time off etc for trade union activities. Regulation 9(2)(b), however, gives the right to vary or rescind an agreement. There is no clarification as to whether this needs to be done by agreement. This Regulation may be seen as redundant as recognition or de-recognition of trade unions in the United Kingdom is a matter of managerial prerogative.

Regulation 10

This concerns the requirements for information and consultation prior to a relevant transfer. In the 1981 TUPE Regulations the requirement was restricted to consultation with representatives of recognised trade unions. This meant that if there were no trade union membership or recognition there would be no requirement for consultation. This has been amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Amendment) Regulations 1995³⁶ (the CRTUPE

Regulations) so that, with effect from transfers which took place after March 1 1996, consultation will take place with the "appropriate representatives".

It is a two stage process. Firstly, "long enough before a relevant transfer" the employer of affected employees must inform the employees of the events and the "legal, economic and social implications". This is to enable consultation to take place as a second stage.

The consultation process, according to the original Regulations, consisted of the employer informing, followed by the unions making representations. If the employer rejected these representations, all that was needed was that they inform the representatives and give reasons.

Consultation needs to take place when there are 'measures' to be taken in connection with the transfer. Confidentiality of information is not a justification for failure to inform or consult. According to Elias and Bowers³⁷ this may have the effect that

"...many employers have preferred to take the risk of proceedings, and to pay the penalties involved, than to jeopardise a transfer by premature disclosure".

There is a defence for lack of consultation by employers in Regulation 10(7). This refers to any "special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him..". There is, however, a strict interpretation of 'special circumstances'. In Angus Jowett v NUTGW³⁸ Mr Justice Beldam approved a pre TUPE case³⁹ in which it was said

"In other words, to be something special the event must be something out of the ordinary, something uncommon..."

In this case insolvency was held not to be something special, although the reasons for the insolvency might be. As was said in the Jowett case

"...for there to be special reasons there must be reasons which are special to the facts of the particular case".

Regulation 11

This concerns the ability to complain about the lack of consultation. The original remedy was for a trade union to make a complaint to an industrial tribunal. Other workers had no rights of complaint about the lack of consultation.

It is not necessary to wait until after the transfer has taken place before making such a complaint, as in South Durham Health Authority v Unison⁴⁰. Here the trade union made the complaint two weeks before the transfer and this was permitted. Regulation 11 specifies an end date, not a beginning date, for complaints to be made to an industrial tribunal.

The original compensation was a maximum of two weeks pay. From this could be deducted any protective award given to compensate for lack of consultation about redundancies; any payment in lieu of notice and any other payments for breach of the employment contract. This meant that, in many cases, the potential extra compensation

for failure to consult on the transfer would be nil. As Lord Wedderburn said⁴¹

"But only the good employer will have to give two weeks pay. The bad employer.. will not have to pay anything at all. There is no extra obligation on him..."

Regulation 12

This concerns the inability to opt out of Regulations 5,8 or 10.

Regulation 13

This excludes employment abroad and registered dock workers.

The Inadequacies of the TUPE Regulations

On November 27 1989 the European Commission gave notice to the United Kingdom of its view that the United Kingdom had failed to meet its obligations concerning the implementation of the ARD. It listed seven points:

1. The UK legislation did not provide for the designation of employee representatives where this did not occur voluntarily in practice.
2. The scope of the provisions designed to implement the Directive was limited to situations in which the business transferred was owned by the transferor.

3. Certain undertakings were excluded from the scope of the provisions.
4. There was no requirement for a transferee to continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor.
5. The transferee was not obliged by legislation to recognise a trade union which had been recognised by the transferor.
6. The legislation did not require a transferor or a transferee who was envisaging measures in respect of his employees to hold consultations in good time with a view to seeking agreement.
7. There were no effective sanctions in a case where there was a failure to inform and consult employee representatives.

On March 9 1990 the UK Government replied, accepting only point 6.

On March 26 1991 the Commission delivered a reasoned opinion, under Article 169 EEC, stating that the UK Government had failed to fulfil its obligations. The Commission maintained its complaints except for point 5.

In reply the United Kingdom accepted points 2, 3 and 7, which left points 1 and 4 as outstanding issues.

All the issues, except one, were settled by the Trade Union Reform and Employment Rights Act 1993 (TURER). The one exception being the issue of employee representation for consultation purposes and who should be providing it. This has now, perhaps, been dealt with by the CRTUPE Regulations 1995, although they were the subject of an unsuccessful application⁴² for judicial review by a number of trade unions (see chapter 8).

TURER

The Minister of State at the Department of Employment, Mr Michael Forsyth, said during the committee stage of the Bill⁴³:

"The acquired rights directive was agreed by the previous Labour Government. It is perfectly clear from the exchanges that we have had and from reading Hansard that the Government had no idea what they were signing up to, and that, over the course of time, the interpretation of the regulations has been broadened in a way which, in my opinion, disadvantages the delivery of public services in this country".

Much of the debate in Committee was about the effects of the Regulations on compulsory competitive tendering and on the "delivery of public services". The amendments to the TUPE Regulations were made by S33 of TURER. There were five changes made:

- S33(2) removed the 'commercial nature' test
- S33(3) clarified matters by saying that transfers could be by a series of two or more

transfers and that property did not have to change hands in a transfer

- S33(4) gives the employee the right to object to being transferred but leaves them with no special rights with the transferor
- S33(5) narrows the definition of occupational pension schemes
- S33(6) concerns consultation with trade union representatives where the aim is now to consult "with a view to seeking agreement" and the remedy for failure to consult is increased from two to four weeks pay.

These amendments came into effect on August 30 1993, some 12 years after the original Regulations were approved by Parliament and some 14 years after the UK Government was obliged by the ARD to implement them.

The Attorney General, Sir Nicholas Lyell, described these amendments as⁴⁴

"...relatively limited technical changes required to ensure that the wording of the regulations more closely follow the directive".

In one sense he was correct in that many of the changes were the result of developments in the European Court of Justice which had clarified and perhaps widened the scope of the Directive. The amendments were bringing the Regulations nearer to the position that should have existed in 1981. It is possible to argue, however, that the Government had successfully neutralised the Directive during a period of great economic change and radical changes in the Government's approach to contracting out and privatisation. This was a period when they could have served their purpose in protecting the rights of workers much more successfully, if they had been

correctly implemented in 1981.

The Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations 1995⁴⁵

These Regulations came into force on October 26 1995 and affect transfers that took place on or after March 1 1996. Regulations 9-11 of the CRTUPE Regulations amend Regulations 10 and 11 of the TUPE Regulations concerning consultation on transfers.

The most important change is that consultations no longer take place with recognised trade union representatives, but now occur with 'appropriate representatives' of the employees. These can be the trade union representatives or elected representatives or, if there are both in existence the employer may decide which to consult.

The reason why the European Court of Justice⁴⁶ did not accept that the United Kingdom had adequately implemented the necessary consultation procedures was because the system of consultation was essentially voluntary. There was no compulsion to recognise trade unions for negotiating purposes, which meant that the employer could effectively decide whether to negotiate or not. An element of employers' choice still remains with the CRTUPE Regulations. If there is an appropriate elected committee of employees or their representatives in existence as well as a recognised trade union, the employer has the right to decide with whom to negotiate over the transfer. No criteria is suggested by the Regulations to aid the employers' decision. It remains to be seen whether the employers' freedom to make such a decision is absolute or whether this element of choice still weakens the consultation process as required by

the ARD.

CRTUPE Regulation 10 amends TUPE Regulation 11 so that it is no longer only trade union representatives who can complain to a tribunal about the failure of an employer to meet their obligations to consult. In the appropriate circumstances it can now be the elected representatives or the affected employees.

Despite the changes there must still be doubt as to whether the United Kingdom is meeting its obligations under the ARD. There is still a discretionary element and one must have serious doubts about the ability of newly elected and, perhaps, soon to be transferred, employees to negotiate effectively with employers.

Part of the problem is that the ARD assumes that where there are representatives of employees they are able to be consulted "with a view to reaching agreement". It is suggested here that newly elected representatives may not have the ability to do so without the help of professional advice.

It is surprising that the United Kingdom had put itself in the position of having to produce these new Regulations. Article 6(5) of the ARD provides for a situation where there are no employee representatives. It states that

"Member States may provide that where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed in advance when a transfer within the meaning of Article 1(1) is about to take place".

This section was not incorporated into the TUPE Regulations which only concerned themselves with consultation with trade unions. One can conjecture that if the original Regulations had concerned themselves with existing employee representatives, instead of just trade union representatives, as well as providing for situations where there are no employee representatives as in Article 6(5) ARD, then, perhaps, the CRTUPE Regulations would not have been required.

Thus some 15 years after the original Regulations it is still questionable as to whether the ARD has been satisfactorily implemented. The Regulations were an inadequate transposition and may still be so. It can be, perhaps, argued that the fault may not lie entirely with the UK Government because the ARD itself may be at fault in not taking into account the diverse nature of the consultation procedures, or the lack of them, within the various Member States.

Implementation of the ARD in selected Member States

There follows an examination of the implementation of the ARD in selected Member States. The intention is to aid the reaching of conclusions about the different attitudes towards the Directive and to help test the hypothesis that the difference in approach of the Government of the United Kingdom as compared to other member States is a significant reason for the problems experienced in the implementation of the ARD. It is intended to examine the same Member States as in Chapter 3.

Belgium

Individual contracts of employment are regulated by statute (in particular the 1978 Law on Contracts of Employment) and by collective agreements reached by the National Labour Council.

There are strict procedures for the termination of a contract of employment. Minimum periods of notice are provided by statute and there is no formal distinction between dismissal on the grounds of employee conduct and redundancy. Employees may be dismissed for economic and financial reasons or for reasons associated with their conduct, but there must be adherence to the procedures provided by the organisation's rules. These rules are a statutory requirement.

The ARD has been implemented by three collective bargaining agreements which have resulted in Royal Decrees. They are Agreement no 32 of 28 February 1978 (Decree of April 19 1978); Agreement no 32 of 2 December 1986 (Decree of 19 January 1987); Agreement no 32 of 19 December 1989 (Decree of 6 March 1990).

Article 1 states that the purpose of the Agreement is to "safeguard the rights of employees in all cases of a change of employer as a result of the transfer of an undertaking or part thereof by agreement".

Article 2 defines the terms transferor and transferee.

Article 3 gives a broad interpretation of the term 'contract of employment'. It includes

a person who has an 'employment relationship' other than a contract of employment. Such a person carries out work for another under their authority.

Article 5 provides for the principle of transferring rights and obligations from contracts of employment.

The Law of 5 December 1968 also states that

"Where a business has been partially or wholly transferred, the new employer shall observe the agreement binding by the former employer until such time as the agreement ceases to have effect".

The 1986 Collective Bargaining Agreement concerns transfers resulting from bankruptcy and states that the transferee is not obliged to take all the employees resulting from a transfer.

Article 6 states that a change of employer does not constitute grounds for dismissal.

Article 7 excluded certain groups from protection. These were

- employees on a trial period
- employees near retirement age
- persons with a student contract of employment

As a result of these exceptions the European Commission commenced proceedings against Belgium in the European Court of Justice⁴⁷. They argued, successfully, that

these exemptions were not permissible.

Article 21 deals with transfers of works councils

Article 11 of the Agreement of 9 March 1972, as amended by the Agreement of 24 July 1974, requires transferors and transferees to inform and consult the works council in good time.

Denmark

There are a number of general and important laws on terms and conditions, such as

- The Contracts Act which lays down basic principles concerning contracts of employment, the Sick Pay Act and the Health and Safety at Work Act.

Many arrangements are agreed through collective agreements, the most important of which is the general agreement between the LO and the DA. This agreement is familiarly known as the 'constitution of the labour market'⁴⁸. It is these agreements, supported by law, which govern many issues in the employer/employee relationship. All contracts must be in writing after one month's employment (and working more than 8 hours per week) by a law of 1993 implementing the EC Directive on obligations to provide information to employees about their contracts of employment⁴⁹, but much of the content is governed by collective agreement, e.g. grievance and disciplinary procedures.

The rights of employers to dismiss 'blue collar' employees is subject to this not being

done for 'arbitrary reasons'. For 'white collar' employees the Salaried Employees' Act provides that the right to dismiss is 'reasonable based upon the employee's or the company' circumstances'.

In Denmark the ARD was transposed by Law No 111 of 21 March 1979.

Article 1(1) of this law provides that it shall apply to

"transfers of undertakings or parts of undertakings within the territorial scope of the Treaty establishing the European Community".

The term 'business' is unknown in Danish law and the concept is incorporated in the word 'undertakings'. The concepts of transferor and transferee are not defined in Law No 111, because the Danish Government felt that they were concepts already well established in law.

Article 2(1) of the Law of 1979 incorporates the principle of an automatic transfer of the rights and obligations arising from the contract of employment. It also makes provision for the rights and obligations deriving from a collective agreement to be transferred.

This is an important safeguard in Denmark because of the crucial role played by collective agreements. This only applies to existing employees. The European Court of Justice held, in Ny Molle Kro⁵⁰, which was a reference from the Danish Court, that

"Article 3(2) of Directive 77/187 must be interpreted as meaning that it does not require the transferee to continue to observe the working conditions agreed under a collective agreement with respect to workers who were not employees of the undertaking at the time of transfer".

Article 3(1) of the 1979 Law provides that a dismissal in connection with the transfer is automatically unfair unless for ETO reasons. Paul Davies⁵¹ points out in his report that there was some debate about the effectiveness of the 1979 Law in certain circumstances:

"Providing the contractor acts with procedural propriety in selecting the employee to be dismissed, it seems to be the case that, in principle, dismissals are lawful where it is anticipated that the transferee will be able to discharge the duties of the contract with fewer employees than the transferor used".

Such dismissals are apparently permissible as they would be for ETO reasons.

Article 4(1) of the 1979 Law provides for the protection of workers' representatives and the retention of their status and functions. This does not only include trade union representatives, but also worker representatives on company boards.

Articles 5 and 6 cover all the necessary measures for informing and consulting the employees concerned. They also make provisions for directly informing employees where there are no representatives.

France

There are two major grounds for dismissal. One is for economic reasons, the other is due to the conduct or fault of the employee. In all cases the employer must give well founded reasons for the action. A dismissed employee needs two years service and be working for a firm with more than ten employees to claim unfair dismissal. Fair reasons can be connected with the employee's behaviour and conduct. It is also important for the employer to follow agreed procedures, including an interview with the employee prior to dismissal.

The concept of the transfer of contracts as a result of a transfer of employer is a long established one in French law, going back as far as 1928. The main provisions are contained in the Code du Travail (L 122-12 para 2). This provides that contracts of employment are automatically transferred in all cases of "changes in the legal status of the employer". Transfers as a reason for dismissal are prohibited. There is no mention of the terms undertaking, business or part of a business, merely the change in the legal status of the employer. As a result the High Court has interpreted the term in its widest sense.

Article L 132-7 of the Code du Travail provides that collective agreements are automatically transferred where they are affected by, amongst other situations, a transfer. Article L 132-8 provides that this should continue for one year or until replaced by a new agreement.

Articles L 412-16, on trade union representatives, L 423-16, on shop stewards, and

Article L 433-14, on members of works councils, safeguard the continuation in office of these people after the transfer.

Article L 432-1, on the functions of works councils, states that such works councils must be informed and consulted if the economic organisation or legal status of the undertaking is to be changed.

The High Court has accepted that transfers take place in such cases as: the transfer of a meat products store; the continuation of a joinery section when separated from other company activities; the takeover of an hotel; the takeover of a business selling cars of the same manufacture⁵².

Germany

The Civil Code (Bürgerliches Gesetzbuch - BGB) sets out underlying provisions on contracts of employment (S611), periods of notice (S622), equality (S611a) and transfers (S613a). Other important statutes are the Business Organisation Act of 1952, as amended in 1972, which provided for the establishment of works councils and the Protection Against Dismissals Act 1969.

S613a(1) BGB provides

"If a plant or portion of a plant is transferred to another owner, the transferee assumes the rights and duties of the employment relationship existing at the time of transfer. To the extent that these rights and duties are governed by the basic provisions of a

collective bargaining agreement or a shop agreement, they shall control the employment relationship between the transferee and the employee and may not be revised to the detriment of the employee prior to the expiry of one year after the transfer has become effective... Prior to the expiration of the deadline provided for in sentence 2, the rights and duties may be revised if the collective bargaining agreement is no longer in effect or if both parties are not bound by a collective bargaining agreement between the transferee and the employee".

S613a(2) provides for joint liability for claims up to one year after the transfer.

S613a(3) provides that no joint liability exists if a corporation is reorganised or merged.

S613a(4) provides that the dismissal of an employee because of a transfer is not permitted.

German jurisprudence has experienced considerable difficulty in overcoming the vagueness of S613a(1) BGB. German law differentiates between an enterprise or undertaking and a business or part of a business. The BGB mentions only the transfer of a business or part of a business. This is a differentiation not used by other judicial systems in this study. Each undertaking owns at least one business and no transfer of an undertaking can take place without the transfer of one or more businesses. A business could, however, be transferred without an undertaking being transferred, provided the transferor undertaking retained at least one business. The legislation has tried to circumvent this by defining the business as the subject of the transfer.

The labour courts have not always been consistent in their approach to the definition

of a transfer⁵³. There has been a distinction drawn between the criteria required for a transfer within the production sector and the service sector, with an emphasis on tangibles being transferred. There were also a number of contract changeovers, concerning security and cleaning contracts, which were held not to be transfers.

These cases took place before the case of Schmidt⁵⁴ which altered the whole approach of the German courts. This case was an Article 177 EEC reference from the Schleswig-Holstein labour court to the European Court of Justice and widened the interpretation of the meaning of a transfer of an undertaking.

Subsequently the Government has introduced new legislation, which became effective on January 1 1995. The Corporate Conversion Consolidation Act regulates mergers and augments the BGB rules on transfers of undertakings⁵⁵. The new rules are

1. Works councils must be informed of changes at least one month in advance of the shareholders' meeting at which the decision will be made and written proof of consultation is required before the new business can be registered.
2. Where two businesses merge, all employment relationships pass to the new entity. Employees of small businesses (less than five people), who do not normally have protection from unfair dismissal, are protected for three years.
3. If establishments are merged, the works council with the largest number of employees has a transitional mandate for up to six months until a new council is elected.
4. Special rules apply where the legal form of a company changes and the employees continue to be protected.

Greece

In Greece there are no legal restraints on the dismissal of employees, providing that the employer has followed proper procedures. This usually involves an oral and a written warning, deductions from pay and suspension without pay.

Articles 6(1) and 6(2) of Law 2112/20, on the termination of white collar workers provides that

"A change in the person of the employer, irrespective of how it comes about, shall not affect the safeguards for employees under this law".

Article 9(1) of the Presidential Decree of 16 July 1920 provides a similar statement for manual employees.

These are very broad concepts which were incorporated into the Presidential Decree No 572 of 6 December 1988 which incorporated the ARD into Greek law. Article 3(2) deals with the transfer of collective agreements, but allows for limiting the period for observing the terms and conditions of transferred employees to one year.

Representatives of the employees are defined in the Law on Works Councils of 1988. In the event of a transfer these workers' representatives continue in office if the business preserves its autonomy. If their term of office expires as a result of the transfer, they continue to receive this protection for as long as they would have done had not the transfer taken place.

Greek law is concerned with a change in the person of the employer. In Greek case law a change of employer is said to have occurred if certain conditions are satisfied:

- the undertaking continues to exist as an economic unit
- the change of employer may have occurred in any manner, e.g. a contract or by statutory provision
- a legal relationship between the old and new employers is not necessary
- there is no absolute requirement for consent or knowledge by the employees, unless contained in the contract of employment or if it leads to worse conditions of employment.

The essential condition is that the undertaking should retain its identity.

Ireland

Legislation concerning employment rights also reflects events within the United Kingdom. The Unfair Dismissal Act of 1977 has provisions for defining an unfair dismissal which were very similar to those contained in the Employment Protection (Consolidation) Act 1978 and now the Employment Rights Act 1996 in the United Kingdom. Underlying the statutory regulations is the same common law tradition as in the United Kingdom.

Transposition of the ARD is through the European Communities (Safeguarding of Employees' Rights on Transfers of Undertakings) Regulations 1980.

Regulation 2(2) has a wide scope:

"...a word or expression that is used in these Regulations and is also used in the Council Directive shall, unless the context otherwise requires, have the meaning in these Regulations that it has in the Council Directive".

There is no further attempt to define terms. Bankruptcy does, however, seem to be excluded. Under Irish law the employment relationship ceases when bankruptcy proceedings are opened.

Regulation 3 reproduces the wording of Article 3(1) of the Directive on the automatic transfer of contracts.

Regulation 4(1) reproduces Article 3(2) of the Directive on the transfer of collective agreements. The same is true of Regulation 4(3) which, with some addition, reproduces Article 3(3) of the Directive.

This reproductive process continues for the rest of the Regulations. In Regulation 7(3), however, there are provisions for dealing with a situation where there are no employee representatives, i.e. a statement in writing to each employee and notices of the statement to be displayed. The Irish Government have followed the practice of the Italian Government (see below) in transposing large parts of the Directive into national law verbatim. It is perhaps difficult to criticise the Irish Government for this as, compared to the United Kingdom, there has been little reported litigation on the subject. Conversely a purpose of using a directive, instead of a regulation, as the chosen means of implementing Community law is to give the opportunity for the Member State to integrate the new rules into their own national laws.

Italy

Individual termination is regulated by two main pieces of legislation, which are the Workers' Statute of 1970 and Law 604/66 as amended in May 1990. Employees cannot be dismissed except for 'just cause' or for 'justified motive'.

'Just cause' is a very serious misconduct or omission which is a fundamental breach of contract. 'Justified motive' concerns the situation where an employee has failed to fulfil their contractual obligations. This will cover subjective grounds concerning the conduct of an employee and other matters such as redundancy.

Italy was the last Member State to transpose the ARD into national law. This was done by Article 47 of the Law of December 29 1990 (the Legge Comunitaria).

Article 2112 of the Civil Code already incorporated the principle of continuity of employment in the event of a change of ownership. The first three paragraphs of Article 2112 were amended by Article 47 of the 1990 law to read:

"If an undertaking is transferred, the employment relationship shall continue with the transferee and the employee shall retain all rights deriving from this relationship.

The transferor and the transferee shall be jointly and severally liable for all employee entitlements outstanding at the time of transfer... collective agreements, including those at the level of the undertaking, which are in force at the time of transfer shall be binding on the transferee until they expire, unless they are replaced by other collective

contracts applicable to the transferee's undertaking".

Section 1 of the 1990 Law gives legal expression to the duty to inform and consult:

"Where an undertaking with over 15 employees is to be transferred within the meaning of Article 2112 of the Civil Code, the transferor and the transferee must notify this in writing, at least 25 days in advance, to the plant level union structures...If no such representative bodies exist within the undertaking, the industrial federations belonging to the most representative trade union confederations must be notified.. The information must include: a) the reasons for the proposed transfer; b) the legal, financial and social implications for the employees; c) any measures planned in relation to the employees".

The Law of May 26 1978 is part of the labour law for 'emergency situations'. If an undertaking's position has been declared critical and is going to be resolved by a specific takeover, then the trade unions can set aside their rights to employment protection.

Article 47 (of the 1990 Law) then provides that redundant employees have priority for employment for at least one year.

Article 47(3) provides for the continuity of collective agreements.

Article 47(4) provides that transfers of undertakings do not in themselves constitute grounds for dismissal.

Article 47(5) permits exceptions. These are all concerned with companies in crisis, e.g. liquidation and receivership.

Luxembourg

It is not intended to study Luxembourg here because of the similarity of its law to France. The ARD was introduced by the Law of 24 May 1984.

Netherlands

Apart from instant dismissal, permission to dismiss an employee needs to be obtained from the Regional Labour Office, which only refuses some 5-6%. Article 1639p of the Civil Code gives a list of reasons for summary dismissal. Dismissal can be for economic reasons or for matters related to the conduct of the employee, such as unsuitability for the work; conduct of the employee; breakdown of employee relations and long term illness.

The ARD is transposed into Dutch law by Articles 1639aa to 1639dd of the Dutch Civil Code concerning the rights and obligations arising from contracts of employment and the Law of May 5 1981 on Collective Agreements with provisions concerning the binding effect of collective agreements and their provisions concerning transfers.

These provide that all rights and obligations automatically transfer to the new employer. There is an additional safeguard in that the Director of the Regional Employment Office needs to give approval for dismissals. Approval will not be given if the dismissal is because of a transfer, unless there is an ETO reason.

The Works Council Act of 28 January 1971 covers provisions on information and

consultation and defines an undertaking as

"...any organised body functioning in society as an autonomous unit where employment is provided by virtue of a contract".

When an undertaking is transferred so is the works council and consultation obligations. Guidelines relating to mergers stipulate that unions must also be informed and asked for their opinions.

Portugal

Legislation on labour law is a mixture of pre-revolutionary decrees and post revolutionary legislation. In 1975 a decree was approved that prohibited individual dismissal for non disciplinary reasons. This was not finally changed until 1989 and 1991, when employers were allowed to dismiss for economic reasons and non disciplinary matters, such as unsuitability for a position. The dismissal laws remain very restrictive and all other possibilities need to be explored before dismissal can take place.

The principle of transferring contracts has been long established in Portuguese law. Article 20 of Law No 1952 of March 10 1937 provided for the continuance of contracts when an undertaking was transferred, subject to "transfer of the operation or conveyance of the business".

Basic legislation concerning individual contracts of employment, including transfers,

is in a pre revolutionary decree (subsequently amended). Article 37 of the decree-law 49/408 of November 24 1969 provides

"The position with respect to the employment contracts shall pass from the transferor, or old employing entity, to the transferee who acquires, on whatever basis, the business in which the employees work, unless the employment contract was lawfully terminated prior to the transfer or the transferor and the transferee had agreed that the workers should remain in the transferor's employment in another business..."

The term business, as in French law, has a wide connotation. There is no definition of transfer in Article 37, but there is a broad interpretation.

For the purposes of consultation the representatives of the employees are the works councils (Article 23 of Law 46/79). There are no special rules for consultation of workers or their representatives, on the subject of transfers, but the European Commission⁵⁶ was satisfied that the general rules under this law were adequate.

Spain

Individual termination can be for 'objective' reasons or disciplinary reasons. Objective reasons can be incapacity or restructuring of the enterprise. Disciplinary reasons can be for unpunctuality, indiscipline and disobedience.

The Constitution guarantees the right to strike. The strike decision can be taken by the works council or established trade unions or the workforce in general.

Both statute and collective agreements play a role in the implementation of the ARD, e.g. the security industry has traditionally been regulated by collective agreement.

Article 14 of the 1992 Agreement states

"So as to ensure security of employment for workers in the sector, but not security in a particular job...if an undertaking loses a service contract the transferee shall assume its predecessor's obligations in the employment contracts of the workers assigned to that contract, irrespective of their terms of engagement, provided that they have been employed...for at least seven months".

Article 44 of the 1980 Workers' Statute concerns transfers or undertakings;

"The change of ownership of an undertaking, business or independent production unit within an undertaking shall not in itself terminate the employment relationship and the new owner shall assume the rights and obligations of the previous owner".

There are no definitions similar to those contained in Article 2 ARD, but this definition does seem as wide as is necessary⁵⁷. This Article also provides for joint liability of the transferee and the transferor for three years, in respect of obligations arising from before the date of transfer.

This is expanded in Article 97(2) of the General Law on Social Security⁵⁸:

"In the event of succession to the ownership of an undertaking, industry or business, the new owner shares joint and several liability with the previous owner...in respect of

payment of benefits..".

Article 64 of the 1980 Workers' Statute states that it is one of the responsibilities of the works council to "issue an opinion when a merger, incorporation or change in the legal status of the undertaking is likely to have some effect on the size of the work force". This role, however, is one of consultation, not negotiation.

With the possible exception of not having provision for the protection of workers' representatives on transfer and concern about consultation procedures, the Commission's view was that Spain had implemented the Directive in full⁵⁹.

Conclusions

When one examines the arguments of the various parties as outlined in Commission v United Kingdom it is clear that there was a fundamental difference between the positions of the UK Government and the Commission. It is a Directive with essentially a social objective, but its justification is an economic one (Article 100 EEC). On the question of undertakings needing to be commercial in nature the United Kingdom used this argument:

"The United Kingdom also submits that, as it is based on Article 100 of the EEC Treaty, the Directive cannot, despite its social policy objective, apply to non profit making undertakings, which are not engaged in an 'economic activity' within the meaning of the Treaty".

There has also been a different approach, to workers' rights and workers' representation, between the United Kingdom and most other Member States. As was pointed out by the Commission in this same case;

"The specific bodies representing workers in an undertaking or establishment are provided for by law (or, in the case of Denmark, under the system of collective agreements) in all the Member States except the United Kingdom and Ireland, once the number of persons employed in the undertakings or establishments exceed a certain number".

In other Member States the subject of employee representation was a matter for legislation and the workers' representatives often play a significant role in the decision making process. The United Kingdom's approach was to limit the role of the only recognised and independent spokesperson of the employees, namely the trade union movement.

There is insufficient information to conclude that implementation of the ARD in the United Kingdom caused more problems than its implementation in any other Member State. It is possible to say, however, that the philosophy of the Directive, which required the protection of employee rights and the consultation with employees when a transfer was to take place, was a philosophy that did not fit well with the ideological approach of the UK Government. In contrast these issues were not significant in other Member States.

1. Council Directive on the approximation of the laws of the Member States relating to collective redundancies OJ L48/29 of February 22 1975
2. Spijkers v Gebroeders Benedik Abbatoir CV (Case 24/85) (1986) ECR 1119
3. Proposal for a Council Directive COM(94) 300 Final
4. Figures and quotation taken from a Memorandum submitted by the Department of Trade and Industry to the Trade and Industry Committee of the House of Commons HC 226 13-2-91
5. Information from Mr Francisco de los Herras at the European Commission in 1995
6. Wedderburn of Charlton, Baron (1991) 'From Rookes and Barnard to Social Chapter' - contained in Employment Rights in Britain and Europe Lawrence and Wishart
7. Quinn v Leathem (1901) AC 495
- B. Rookes v Barnard (1964) AC 1129
9. Hendy QC, John (1993) A Law Unto Themselves, Conservative Employment Laws London: Institute of Employment Rights
10. Ewing, KD (1993) Swimming with the Tide: Employment Protection and the implementation of European Employment Law ILJ vol 22 no 3 September
11. Directive 92/85 on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding OJ 1992 L34B/1
12. Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship OJ 1991 L283/32
13. Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ 1989 L183/1
14. Directive 76/207 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 OJ 1976 L39/40
15. Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings OJ 1977 L61/26
16. Directive 75/129 on the approximation of the laws of the Member States relating to collective redundancies OJ 1975 L48/29 and Directive 92/56 amending Directive 75/129 OJ 1992 L245/3
17. Nokes v Doncaster Amalgamated Collieries Limited (1940) AC 1014
18. McMullen, John (1987) Business Transfers and Employee Rights Butterworths
19. 1981 SI 1794

20. Hansard [14] HC 680
21. Hansard [425] HL 14B4
22. Hansard HL [425] 1496
23. Hansard HC [14] 680
24. Commission v United Kingdom (Case C-382/92) (1994) ECR 2435
25. Younson, Fraser R (1989) Employment Law and Business Transfers Sweet and Maxwell
26. Hansard HL [425] 1491
27. Pambakian v Brentford Nylons (1978) ICR 665
28. Luiqi Spano and others v Fiat Geotech SpA and Fiat Hitachi Excavators SpA (formerly Fiat Hitachi Construction Equipment SpA) (Case C-472/93) (1996) ECR 4321
29. Foreningen af Arbejdsledere I Danmark v Danmols Inventar (Case 105/84) (1985) ECR 2639 (1986) 1 CMLR 316
30. Botzen v Rotterdamsche Droogdok Maarschippij BV (Case 186/83) (1985) ECR 519
31. Sunley Turriff Holdings Ltd v Thomson and others (1995) IRLR 184
32. Robertson v British Gas Corporation (1983) IRLR 302
33. Adams and others v Lancashire County Council and BET Catering Services Ltd (1996) IRLR 154
34. For example the National Physical Laboratory which was previously part of the DTI and is now managed by SERCO Ltd. Information from the Chief Executive May 1996
35. For example EDS Ltd, who are a major contractor with the Inland Revenue via the Private Finance Initiative, have such a mirror image scheme
36. 1995 SI 2587
37. Elias and Bowers op. cit.
38. Angus Jowett and Co v NUTGW (1985) IRLR 326
39. Clarkes of Hove Ltd v The Bakers Union (1978) WLR 1207
40. South-Durham Health Authority v Unison (1995) IRLR 407
41. Hansard HL [425] 1490
42. R v Secretary of State for Trade and Industry ex parte Unison and others (1996) IRLR 438
43. Hansard HC 26/3/93 Standing Committee F col 541

44. Hansard HC 21/1/93 Standing Committee F col 512
45. 1995 SI 2587
46. Commission v United Kingdom 1994 see above
47. Commission v Belgium (Case 237/84) (1986) ECR 1247
48. Income Data Services/Institute of Personnel and Development 1995 Contracts and Terms and Conditions of Employment - European Management Guides (General editor Peter Burgess) London: IPD
49. Directive 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship OJ 1991 L288/32
50. Landesorganisationen i Danmark v Ny Molle Kro (Case 287/86) (1987) ECR 5465 (1989) IRLR 37
51. Davies, Paul (1994) Contracting Out of Services Report for the European Commission
52. Birk, Professor Rolf (1994) Contracting Out of Services Report for the European Commission
53. Ibid
54. Schmidt v Spar- und Leihkasse der fruheren Amter Bordesholm, Kiel und Cromshagen (Case 392/92) (1994) ECR I-1311 (1994) IRLR 302
55. IDS Employment Europe 1995 Issue 406 October
56. Commission Report to the Council SEC(92) 857 Final
57. Biedma, Eduardo Gonzalez (1994) Contracting Out of Services Report for the European Commission
58. Decree 2065/1974
59. Commission Report to the Council op.cit.

Chapter 7 Relevant cases before the European Court of Justice and issues arising

Introduction

In this chapter it is intended to examine litigation at the European Court of Justice concerning the ARD. It is also intended to examine some of the issues that have arisen.

The issues that will be considered are

- definition of a transfer of an undertaking
- transfers of part of an undertaking
- analysis of who is protected by the Directive
- insolvency
- contracting out of services

The case law of the European Court of Justice has had an important influence over the interpretation of the ARD by the courts in the United Kingdom and in other Member States of the Community.

In discussing the case law concerning the ARD, the Commission said in 1992¹:

"Of the three employment directives, it is this directive which has, by far, engendered the most litigation before the European Court of Justice. A total of 12 judgments have been handed down.."

Professor Rolf Birk² was able to give an analysis in a report, published in 1994, of the

number of judicial rulings concerning the interpretation of the ARD in a number of Member States. These were Belgium (approximately 30 rulings); Germany (approximately 130); France (approximately 260); Luxembourg (approximately 3) and the Netherlands (approximately 35). It is not possible to be precise about how many such rulings have been made by national judiciaries throughout the Community, except to say that it is a significant number. Of the twenty two decisions of the European Court of Justice concerning interpretation of the ARD, six have come from the Dutch courts, seven from Denmark, three from Germany, two from Italy and one from Belgium. The other three were the result of the Commission taking action against Belgium, Italy and the United Kingdom for lack of adequate implementation. There are a number of cases before the Court on which a decision has not yet been reached.

Definition of a transfer of an undertaking

The English language version of Article 1(1) ARD states

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

Subsequently the Directive uses the term "within the meaning of Article 1(1)" on ten occasions. Yet nowhere are any definitions of key words offered. There is no attempt to define the meaning of transfer, undertaking, business or part of a business. It is the meaning of these words and their lack of clarity that has been a cause of much litigation and concern³.

In Belgium the undertaking or business is referred to as an enterprise. Thus a transfer of an undertaking is a "transfert conventionnel d'une entreprise ou d'une partie d'une entreprise"⁴.

In Denmark the distinction between the word business and undertaking is not recognised.

In France the High Court has not distinguished in its judgments between 'd'entreprise' and 'd'établissement'⁵. It has referred to the "modification dans le situation juridique d'employeur"⁶.

German law, on the other hand, has experienced great difficulty in the case of these two terms. There is a clear legal distinction between the words business and undertaking.

In Italy the definition of an undertaking has been interpreted very narrowly in contrast to, for example, France where there has been a very broad definition.

These problems cannot, however, be merely the result of linguistic differences or different approaches by the national courts. It is, perhaps, a failing of the Directive for not recognising the possibilities of different national approaches. As a result it has been left to the European Court of Justice to provide the definitions as to the meaning of Article 1(1). Concern has been expressed about the way that the Court has developed these definitions and it is clear that the original creators of the Directive had no concept of where it would lead⁷. It is possible to argue that the lack of clarity of the ARD in

itself gave the Court the freedom and flexibility to provide very broad definitions. An example of this is shown in the way the Court has approached its interpretation of Article 1(1) in the cases before it.

In JMA Spijkers v Gebroeders Benedik Abbatoir CV and another⁸ there was an Article 177 EEC reference from the Dutch Supreme Court.

Mr Spijkers was employed by a firm which operated a slaughterhouse. The company ceased operating on December 27 1982. The slaughterhouse was purchased by another company who began to operate it from February 7 1983. All the staff, apart from Mr Spijkers and another, were employed by the new undertaking. The original undertaking was declared insolvent by a Court order of March 31 1983. Mr Spijkers started proceedings against the transferee for lost payment and employment.

The Supreme Court posed a number of questions which the European Court decided were about

"...seeking guidance on the implications and criteria of the terms 'transfer of an undertaking, business or part of a business to another employer'.."

The Court held that there were a number of factors which could help decide whether there was a transfer; "tangible assets such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after the transfer and the duration of

any interruption in those activities".

This 'tick list' approach to deciding whether there was a transfer was one taken up by local authorities in the United Kingdom during the next few years when deciding whether the Directive and the TUPE Regulations applied to a particular contract⁹.

The Court went further and gave a definition which was the precursor of the approach adopted in the case of Schmidt (see below).

"It follows that the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity".

The question of what was meant by 'identity' was to be discussed in further litigation, but the Court had established that one has to have regard for the complete picture, rather than look for particular assets or physical objects to be transferred.

The Advocate General, Sir Gordon Slynn, said in this case;

"...in deciding whether there has been a transfer within the meaning of Article 1(1) of the directive all the circumstances have to be looked at. Technical rules are to be avoided and the substance matters more than the form".

Schmidt v Spar und Leihkasse der Fruheren Amter Bordesholm, Kiel und Cronshagen¹⁰ was an Article 177 reference from the Schleswig-Holstein Regional Court.

Frau Schmidt was the cleaner at a bank's branch office in Wacken. She was dismissed when the office was refurbished and the cleaning was given to a contractor, Spiegelblank. The contractor offered to employ Frau Schmidt for the same pay. The amount of cleaning was, however, increased and Frau Schmidt felt that she would be worse off. She therefore took proceedings challenging her dismissal.

The Regional Court asked whether this contracting out was a transfer of an undertaking within the meaning of Article 1(1) and whether it applied to a single employee situation. The United Kingdom and the Federal Republic of Germany argued against the Directive applying because cleaning could not be seen as the transfer of an economic unit or the transfer of premises or tangible assets. The Court returned to its previous approach

"...the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity".

This has had a profound impact in that a Directive originally designed, perhaps, to protect workers in the event of multi-national mergers and takeovers, has been extended to include single person cleaning contractors when the cleaning contract has changed hands.

That there need be no contractual relationship between the transferor and the transferee was shown again in Albert Merckx and Patrick Neuhuys v Ford Motor Co Belgium SA¹¹. This was a case where a car dealership ceased trading and was passed by Ford to a new dealer. Most of the employees were dismissed, but this was held not to be a

factor. Of importance was the fact that Ford had transferred the economic risk associated with the dealership and that the activity was continued without interruption. There had been a transfer of an economic entity that retained its identity.

In Ledernes Hovesorganisation, acting for Rygaard v Dansk Aarbejdsgiverforening, acting for Stro Molle Akustik A/S¹² there was an Article 177 EC reference from the Danish Maritime and Commercial Court. It concerned a Mr Ole Rygaard who worked for a sub contractor on a site building a canteen. The sub contractor fell into difficulties (and was subsequently declared bankrupt) and arranged for its work to be transferred to another sub contractor to finish off. On this date, February 1 1992, two apprentices were transferred, but Mr Rygaard was given three months notice and made available to the transferee during the notice period. In fact Mr Rygaard worked slightly longer than this and was eventually dismissed on May 26 1992.

The question was whether Mr Rygaard transferred as a result of the agreement between the two sub contractors even though they both formally made agreements with the main contractor rather than with each other. There was a clear recommendation from Advocate General Cosmas that the Directive may apply:

"In cases such as that before the national court the continuation, within the context of works already commenced by the original contractor, of specific works limited as to time entrusted by the awarder of the main contract to another employer may come within the scope of Council Directive 77/187/EEC".

The Court, however, disagreed. Mr Rygaard had argued, on the basis of Spijkers and

Schmidt (see above), that there had been a transfer. The Court rejected this by saying

"The authorities cited above presuppose that the transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract".

In an apparent return to Spijkers the Court held that

"Such a transfer could come within the terms of the Directive only if it included the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on in a stable way".

It is difficult to integrate this judgment with that of Schmidt or any case involving a fixed term contract. One could argue that there is little difference between the completion of a particular contract on a building site and the completion of a contract to carry out the cleaning of an office. They are both for fixed terms and, in that sense, are not 'stable' economic entities.

This ruling may possibly be explained by the change in membership of the European Court of Justice (see chapter 4) which might result in more 'conservative' decision making. A further example of this changing approach is found in Annette Henke v Gemeinde Schierke and Verwaltungsgemeinschaft 'Brocken'¹³. In this case a number of local authorities formed a centralised unit to which they transferred some of their administrative functions. Shortly afterwards Mrs Henke, a secretary with one of the local authorities, was dismissed.

The Court considered the purpose of the Directive as explained in its preamble. It decided that the purpose of the Directive was to protect workers against "the potentially unfavourable consequences for them of changes in the structure of undertakings resulting from economic trends at national and Community level..". It is a renewed emphasis on economic trends that makes this judgment different to previous judgments. The transfer of these administrative functions was held not to be a transfer within the meaning of Article 1(1) of the Directive. The Court stated

"It appears that, in the circumstances to which the proceedings relate, the transfer carried out between the municipality and the administrative collectivity related only to activities involving the exercise of public authority. Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary".

This is a new direction for the Court. This transfer appeared to be the transfer of an activity which retained its identity and should, perhaps, have been treated as a transfer under Article 1(1). The impact of such a decision might have been widespread within the United Kingdom if it had been reached earlier, eg. it must now be questionable as to whether employees of local authorities and the NHS would have been protected by the Directive when they were the subject of re-organisation.

There have also been a number of cases concerning the transfer or termination of leases, which have been a major issue in deciding whether a transfer of an undertaking had taken place. In Landsorganisationen I Danmark v Ny Molle Kro¹⁴, for example, there was an Article 177 EEC reference from the Copenhagen Labour Court. It concerned an action by the Danish Federation of Waiting Staff against Mrs

Hannibalsen. In 1980 Mrs Hannibalsen leased the Ny Molle Kro tavern to Mrs Inger Larsen. On October 1 1980 Mrs Larsen concluded an agreement with the Association of Hotel and Restaurant Employees, agreeing to abide by any collective agreements concluded. In January 1981 the lease was rescinded and Mrs Hannibalsen took over the running of the tavern herself, although it was not re opened until March 1981. The tavern was only opened during the summer season. Mrs Hansen worked in the tavern from May 12 to August 19 1993 and was paid a rate that was less than the collective agreement.

The Danish Court asked four questions. The first concerned whether the taking back of a lease in this situation constituted a transfer. The European Court replied that the Directive applied whenever there was a change in the "natural or legal person responsible for the running of the undertaking" and that ownership was irrelevant. "It is of no importance to know whether the ownership of the undertaking has been transferred".

The second and third questions concerned whether the Directive covered the situation of the undertaking being closed, with no employees, at the time of transfer. The Court referred to its judgment in Spijkers and said that all the circumstances should be taken into account to conclude whether the undertaking had retained its identity after the transfer. A seasonal closure of the business would be relevant but would not necessarily lead to the conclusion that there was no transfer.

The fourth question concerned Article 3(2) of the Directive and whether the terms of the collective agreement should continue to be observed for workers who were not

employed at the time of transfer (see below).

In Foreningen Af Arbejdslere I Danmark v Daddy's Dance Hall¹⁵, there was an Article 177 EEC reference from the Danish High Court. Mr Tellerup was employed as a manager of restaurants and bars in a building leased by his employer. When the lease terminated, on January 28 1983, he and all the other staff were dismissed with their statutory notice. The lease was taken up by a company called Daddy's Dance Hall, which re-employed the staff. Mr Tellerup's commission pay was changed to a fixed salary and he asked to be put on a trial period with 14 days notice either way. This was agreed and on April 26 1983 he was given 14 days notice and dismissed.

The Danish High Court asked two questions. The first was whether the Directive applied to a situation where a lease ends and a new one commences with a new lessee. The Court concluded that such a process was capable of falling within the scope of the Directive.

"The fact that in such a case the process takes place in two phases, in the sense that as a first step the undertaking is transferred back from the original lessee to the owner who then transfers it to the new lessee, does not exclude the applicability of the Directive as long as the economic unit retains its identity".

The second question concerned the ability of an employee to waive their rights under the Directive, even if the disadvantages are offset by other advantages. This will be discussed below.

P Bork International A/S (in liquidation) v Foreningen AF Arbejdsledere i Danmark Olsen v Junckers Industrier Hansen and others v Junckers Industrier A/S Handels- OG Kontorfunktionærernes Forbund i Danmark v Junckers Industrier A/S¹⁶ was an Article 177 EEC reference from the Danish Court. It concerned workers at a beechwood veneer factory, the lease of which was taken over by a company in 1980, keeping on all its workers. The company terminated its lease with effect from December 22 1981 and, during that month, terminated all employees. On December 30 the lease was bought by another company who took possession on January 4 1982. The new company employed approximately one half of the staff.

The question was essentially whether the Directive applied to a situation of the termination of a lease, handing it back to the owner who then passes it on to a new party. The Court ruled, once again, that it was a question of whether the undertaking transferred retained its identity.

"The fact that, in such a case, the transfer takes place in two stages inasmuch as the undertaking is initially re-transferred by the lessee to the owner, who then transfers it to the new owner, does not preclude the application of the Directive..".

The fact that a business ceased for a short time is relevant, but not decisive. The Court cited Ny Molle Kro as an example of this.

Transfers of part of an undertaking

The Directive refers to the transfer of a "business or part of a business". The decision

as to who works for the part of the business transferred can be important as potentially large numbers of employees can be affected. This, perhaps, applies especially to support workers providing a service to that part of the business, such as central personnel and finance functions. The matter was considered by the European Court of Justice in Arie Botzen and others v Rotterdamsche Droog dok Maatschappij BV¹⁷.

This was an Article 177 EEC reference from the Rotterdam Court. The plaintiffs worked for a company which was declared bankrupt. A new company was created to which were transferred part of the old company, comprising some 1478 employees out of a total of 3184. Additionally some of the support staff were transferred. The General Section, the Staff Departments, the Ship Repair Department, the Offshore Department and its Staff Department were not transferred.

The questions were firstly whether the Directive applied to situations involving bankruptcy and secondly whether staff only partly involved in the transferred sections were entitled to be transferred. The first question is dealt with below. The other question concerning the status of support staff was dealt with by the Advocate General, Sir Gordon Slynn, who suggested;

"A basic working test, it seems to me, is to ask whether, if that part of the business had been separately owned before the transfer, the worker would have been employed by the owners of that part or by the owners of the remaining part".

The Court held that

"...Article 3(1) of Directive 77/187 must be interpreted as covering...employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred (and) carried out certain duties for the benefit of the part transferred".

This is a matter of concern in the United Kingdom, e.g. in local government when services are contracted out there is a concern about the position of support staff to that part transferred.

The Advocate General in this case submitted that employees should be employed "de minimis" on duties for other parts of the undertaking.

This does not appear to be a satisfactory test. Some positions might not have existed but for the fact that there was more than one part of the business. The de minimis principle adds little. If a person spends sixty per cent of their time with one business it is not clear whether they would be protected or not.

Elias and Bowers¹⁸ suggest that there are three possible approaches

1. An employee should work all their time for the part transferred
2. An employee should work for the majority of their time for the part transferred
3. An employee habitually works for the part transferred

Elias and Bowers prefer the last approach, but this still, inevitably, leaves the question open. How is 'habitually' to be defined and what part of an employee's time needs to be spent on the part transferred to qualify for protection.

Perhaps Sir Gordon Slynn's test (see above) of whether the job would have been performed if the part transferred was a separate business is a more satisfactory test. The conclusion must be that there is no satisfactory guidance and perhaps it is impossible to arrive at a definition that covers all circumstances. It will be necessary to look at the facts of each individual case, although the lack of clarity is not helpful to those who must make decisions during transfers. Recent cases in the UK courts are discussed in the next chapter.

Employees protected by the Directive

There are a number of cases dealing with this subject.

Employed at the time of the transfer

The first issue to be clarified was that protection was only offered to employees employed at the date of transfer. According to Elias and Bowers¹⁹ the issue as to who is employed immediately before the transfer is "the most important and difficult issue in the whole of the Regulations..".

In Knud Wendelboe and others v L.J. Music Aps, in liquidation²⁰ there was an Article 177 EEC reference from the Western Division of the Danish High Court.

Knud Wendelboe was employed by a company whose business was the production of cassette recordings. This business went into liquidation on March 4 1980 when the Bankruptcy Court declared it insolvent. On March 5 the undertaking's activities were

taken over by a new company, which employed Mr Wendelboe from March 6. He was paid a higher salary, but lost his seniority. Proceedings were taken against the old company for unlawful dismissal and pay.

The question was whether the new company was liable for such compensation for employees of the transferor who were not employed in the undertaking at the date of transfer.

The Advocate General, Sir Gordon Slynn, looked at the various versions of the Directive. He felt that the English language and Danish versions could be construed as ambiguous; but that the French, Dutch, Italian and German versions made it clear that it was the employment relationship or contract that was qualified.

The Court concluded that the transferee was liable only for rights and obligations arising from those contracts of employment or employment relationships which existed at the time of transfer. Whether they existed at the time of transfer was a question of national law, subject to the proviso of Article 4(1) which protects employees being dismissed because of the transfer. This issue was considered in Bork where it was concluded that if a worker had been dismissed prior to the transfer and because of the transfer then they "must be considered as still employed by the undertaking on the date of the transfer".

This was also an issue in Ny Molle Kro, discussed above, where the subject of workers who joined the transferee after the transfer was considered. This was important in considering whether collective agreements transferred continued to be applicable to new

employees. The Court confirmed that only employees employed at the time of the transfer were protected. The question of what was the time of transfer is a separate issue which will be considered below.

Choice

This is the question as to whether an employee is free to waive their rights under the Directive. This has been considered in a number of cases and the Court has taken a different view at different times.

In Foreningen af Arbejdsledere I Danmark v A/S Danmols Inventar, in Liquidation²¹ there was an Article 177 EEC reference. Mr Mikkelson was employed by Danmols Inventar A/S as a works foreman. This company suspended payment of debts on September 3 1981 and Mr Mikkelson was dismissed with effect from December 31 1981.

On October 19 1981 the company was transferred to a new company in which Mr Mikkelson was a 33% shareholder, with 55% of the voting rights. He was appointed chairperson, but continued to carry out his duties as works foreman doing the same work for the same pay as before. On December 2 1981 the old company was judged insolvent and Mr Mikkelson made a claim for holiday pay and other pay owing.

The Danish Court posed the question as to whether the expression 'employee' in the Directive meant that the person concerned had to be an employee of the transferor and the transferee. The Court held that the Directive was intended to protect the rights of

workers who have a change of employer as a result of a transfer. It then went on to state

"The protection which the directive is intended to guarantee is however redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer".

Whether the person remained an employee was a question of national law.

The Court then seemed to adopt a different approach in Daddy's Dance Hall. One of the questions in that case was whether an employee can waive their rights under the Directive, even if the disadvantages are offset by other advantages. The answer from the Court was in the negative.

"...the purpose of Directive 77/187 is to ensure that the rights resulting from a contract of employment or employment relationship of employees affected by the transfer of the undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive, in particular those concerning the protection of workers against dismissal, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees".

There is a clear need to protect workers against intimidation by employers to give up their rights under the Directive, but, on the other hand, there will inevitably be workers who do not wish to transfer and it may be seen as correct to allow this

freedom of decision making. The matter was further considered in Katsikas v Konstantidis Skreb v PCO Stauereibetrieb Paetz & Co Schroll v PCO Stauereibetrieb & Co²². These are consolidated Article 177 EEC references from the labour courts of Bamberg and Hamburg.

Mr Konstantidis owned a restaurant which he sold to a Mr Mitossis. Mr Katsikas was a cook in the restaurant. He refused to work for Mr Mitossis and was therefore dismissed by Mr Konstantidis.

PCO transferred that part of its undertaking that was concerned with loading and unloading to another company. Mr Skrebb and Mr Schroll worked for PCO and objected to the transfer. They were then dismissed by PCO.

All three plaintiffs brought actions against the transferor undertaking which had dismissed them. The undertakings denied liability by saying that their obligations had been transferred to the transferee. The references concerned whether Article 3(1) of the ARD permitted an employee to object to the transfer.

The Court held that to stop someone objecting to the transfer of his employment

"..would undermine the fundamental rights of the employee who must be free to choose his employer and cannot be obliged to work for an employer that he has not freely chosen".

It followed therefore that the Directive does not oblige employees to transfer provided

that they choose "freely" not to continue in the employment relationship. It is then for the Member State to "decide the fate of the contract of employment or employment relationship with the transferor". It is a difficult situation for the employee who chooses not to transfer. As was made clear in Berg and Busschers (see below) the transferor is discharged of their obligations.

Berg and Busschers v IM Besselsen and others²³ was an Article 177 EEC reference from the Dutch High Court. The case concerned staff in a bar/discotheque called Besi Mill. The company was taken over on February 15 1983, through a lease purchase agreement (payment by instalments) and Berg and Busschers continued to work for the company after the transfer. On November 25 1983 the lease purchase was dissolved by court order because of faulty performance. The business was returned to Besselsen. Berg and Busschers asked for Besselsen to pay arrears of salary.

The first question was whether, after the date of transfer, the transferor is relieved of all obligations arising from the contract. The Court replied that Article 3(1) transferred the obligations, although Member States had the opportunity to legislate for joint liability between the transferor and the transferee. If they had not done this then

"..the transferor will be discharged from his obligations as an employer by reason of the transfer alone, and this legal consequence will not depend upon the consent of the employee concerned".

Definition of employee

It has been left to national law to determine who is an employee and, therefore, who is protected by the ARD. In Mikkelson the Commission had argued for a Community definition of employee and, indeed, in the case of Levin²⁴ the Court held that the term worker had a Community meaning. This was essential in order to stop any frustration by Member States of the freedom of movement of workers. The Advocate General, Sir Gordon Slynn, quoted from another case²⁵ where it was said

"Articles 48 to 51 of the Treaty, by the very fact of establishing freedom of movement for 'workers', have given a Community scope to this term...if the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of the migrant worker...nothing in Articles 48 to 51 of the Treaty leads to the conclusion that these provisions have left the definition of the term 'worker' under national legislation".

In Mikkelson the Court decided that this logic did not apply because the ARD was only aimed at partial harmonisation, i.e. extending the existing rights of workers in each country to include transfers. The Court appears to have opted out of a purposive approach. If this legislation is part of the Community's social policy, it is difficult to comprehend how the decision as to whom is protected can be left to the Member State. There can be no attempt to harmonise minimum rights or achieve a level playing field unless employees who are protected in one Member State can receive the same protection in another Member State. It cannot be satisfactory to exclude many people who are in an employment relationship, such as many individual self employed people,

from the protection of the Directive.

In 1992 the Secretary of State for Employment produced the following list of the self employed as a percentage of the civilian work force in Member States²⁶

| | | |
|-------------|---|------|
| Belgium | - | 13.0 |
| Denmark | - | 8.5 |
| Germany | - | 10.2 |
| France | - | 13.6 |
| Greece | - | 32.5 |
| Ireland | - | 18.8 |
| Italy | - | 21.8 |
| Luxembourg | - | 9.7 |
| Netherlands | - | 8.8 |
| Portugal | - | 28.2 |
| Spain | - | 17.9 |
| UK | - | 11.6 |

There may possibly be good reasons for some differentiation, e.g. rural economies may have a large proportion of self employed small farmers. This wide variation in the numbers of self employed may suggest, however, that the definition of employee used in individual Member States differs as between them. The result is likely to be that some workers will be protected by the ARD in some Member States, but not in others.

Insolvency

The ARD is silent as to insolvencies²⁷ and the European Court of Justice has only been able to reach decisions by looking to the purpose of the Directive. The subject has been considered in a number of cases:

Industriebond FNV and Federatie Nederlandse Vakbeweging (FNV) v The Netherlands²⁸ was one of two early cases concerning the applicability of the ARD in cases of insolvency. The facts are considered here separately, but the issues will be dealt with in the discussion of the case following.

This was an Article 177 EEC reference from the Hague District Court. As has previously been discussed (chapter 6), the Regional Employment Offices need to give their permission before terminations of employment can take place. The Regional Employment Offices acted under guidance from the Government, which initially took the view that the law on transfers of undertakings did apply in situations of bankruptcy and 'suspension of payments'. They subsequently reconsidered and issued guidance to the effect that neither Dutch law, nor the Directive, applied to such situations. The trade unions brought an action against the Dutch State to render this subsequent decision ineffective.

In H.B.M. Abels v The Administrative Board of the Bedrijfsvereniging Voor De Metaalindustrie en de Electrotechnische Industrie²⁹ there was an Article 177 EEC reference from the Social Security Court at Zwolle in the Netherlands.

Mr Abels was employed by a company which was granted permission by the court to provisionally suspend payment of debts ('surseance van betaling') on September 2 1981. This order was made final on March 17 1982. On June 9 1982 the Court declared the Company insolvent and appointed a liquidator. The liquidator sold the company to Transport Toepassing en Productie BV (TTP) on June 10 1982. Mr Abels was employed by TTP from June 10 1982, but was not paid from June 1 to June 9 and was also owed holiday pay and a bonus.

He claimed these amounts from the trade association, who denied liability. Their defence was that the transferee was liable because the Dutch Civil Code had implemented Article 3 of the Directive which transferred the rights and obligations under the contract of employment to the transferee.

The main issue was whether Article 1(1) of the ARD applied in liquidation or insolvency proceedings. The Advocate General, Sir Gordon Slynn, returned to the purpose of the Directive which was to safeguard employee rights in the event of a transfer. The Danish Government claimed that employees most in need of protection were those with insolvent employers, whilst the Dutch Government claimed that applying the Directive might deter potential purchasers. The Advocate General concluded;

"The counter productive result of applying the Directive, which seems a real possibility, is so contrary to its objectives that in the absence of other clear indications it seems to me that the intention was not to apply the provisions to undertakings which are in liquidation".

The Court agreed and then went on to consider such situations as when a company has suspended its debts through judicial processes:

"It follows that the reasons for not applying the directive to transfers of undertakings taking place in liquidation proceedings are not applicable to proceedings of this kind taking place at an earlier stage".

The result is that a situation of uncertainty has been created. The Court did not draw a definitive line, but did conclude that difficulties short of liquidation were within the scope of the Directive. It is by no means clear that this decision protects workers and that insolvent companies are able to be rescued when there is an obligation to recruit the entire work force.

The subject was again considered in a later case; D'Urso and others v Ercole Marelli Elettromeccania Generale SpA (in special administration)³⁰. This was an Article 177 EEC reference from the Milan Court. The transferor company was put into special administration proceedings by a decree of the Ministry of Industry dated May 26 1981, but continued trading. In September 1985 the whole undertaking was transferred to a new company which had been formed for this purpose. There were 940 employees transferred and 518 that remained, amongst whom was Mr D'Urso and Mrs Ventadori. They claimed that their contracts should have been transferred.

The first question was whether the contracts of employment automatically transferred. The Italian Government put forward three arguments

- if they did then there would be a restriction of free enterprise, to which the Court

replied that such a restriction was an inherent purpose of the Directive

- such an interpretation would cast doubts on collective agreements concerning the transfer, to which the Court replied that the rules applied to all, including trade unions

- employees would be disadvantaged because a potential transferee would be discouraged if they had to take on all the staff. The Court replied that there was a possibility of ETO exceptions and that national law was able to relieve the transferee of obligations after the transfer.

The answer to the question was a clear statement that the Directive applied to all contracts of employment at the time of transfer.

The second question was whether it applied in situations governed by the provisions of the type found in Law No 26 of 30 January 1979 governing emergency measures to be employed in the special administration of large undertakings in difficulties. The Court recited the arguments in Abels and looked at the purposes of the Italian law. Where the undertaking has been instructed to continue trading the Directive applies and where the purpose is liquidation, it does not.

This question as to the purpose of the proceedings was also discussed in Luigi Spano and others v Fiat Geotech SpA and Fiat Hitachi Excavators SpA³¹. This concerned a technical re-organisation which transferred part of the enterprise to a new company, leaving surplus staff with the old company which was judged to be in financial difficulties. This appears to be a process that was similar to the 'hiving down' of enterprises in the United Kingdom. This process was permitted by Regulation 4 of the TUPE Regulations. The Court held that the directive is applicable to the transfer of an

undertaking which "has been declared to be in critical difficulties".

Transfers of undertakings will inevitably be times when there is an apparent need for flexibility amongst acquirers of labour and sellers of labour. The solutions provided are either the wholesale transfer of the work force of the transferor together with their contractual rights protected, unless the undertaking is insolvent and to be liquidated, or this suggested flexibility in not standing in the way of legislation to deal with the problem of "surplus employees". This is a wholly unsatisfactory situation, e.g. at what point is the decision made to liquidate as opposed to rescue the business. During insolvency procedures it is possible to be considering both these options for much of the time.

Contracting out of services

The concern regarding the affects of the ARD upon the contracting out and privatisation of services appears to be at its most acute within the United Kingdom. This is, perhaps, understandable, in the context of the Government's programme with regard to these matters. One European Commission view is that it is a 'peculiarly British problem'³².

There are two cases concerning this matter that have appeared before the European Court of Justice which influenced litigation within the United Kingdom. The first was Dr Sophie Redmond Stichting v Bartol and others³³. This was an Article 177 EEC reference from the Groningen Court. The Dr Sophie Redmond Foundation was an organisation which provided assistance to drug addicts in the Netherlands, particularly

to people of Surinamese and Antillean origin. Mr Hendrikus Bartol and eight other defendants were employees of the Foundation. All funds were received from the local authority in Groningen, which, in January 1991, switched its funding to another organisation called the Sigma Foundation. It is important to note, when considering the TUPE Regulations that these bodies were 'non commercial' undertakings.

The questions were whether this was a transfer of an undertaking as per Article 1(1) of the ARD. The Court looked to the purpose of the Directive in protecting the rights of workers and referred to the various situations in which leases had been transferred and been held to be transfers. The fact that a decision was taken unilaterally by a public body to switch its funding was not relevant. It was argued that the Foundation was insolvent and that it should be excluded from the Directive as in Abels, but the Court did not accept this.

The Court then based its judgment on Spijkers and returned to the question as to whether the business retains its identity. It held that all the factual circumstances should be taken into account and that it was finally for the national courts to decide:

"..it is necessary to determine, having regard to all the circumstances of fact surrounding the transaction in question, whether the functions performed are in fact carried out or resumed by the new legal person with the same activities or similar activities, it being understood that activities of a special nature which pursue independent aims may, if necessary, be treated as a business or part of a business within the meaning of the Directive".

Thus an undertaking of a 'non commercial nature' can be seen as a business or part of a business so that the Directive applies.

There must be concern that the Court would not now come to the same decision. This case contrasts with that of Annette Henke, where local authority re-organisation was held not to be an economic re-organisation. It might be questionable as to whether the UK Government's stipulation in the original TUPE Regulations, concerning non commercial organisations, might now be regarded as correct.

The second relevant case also concerned important issues. In Rask and Christensen v ISS Kantineservice³⁴ there was an Article 177 EC reference from the Maritime and Commercial Court of Copenhagen. On January 1 1989 Philips A/S contracted out the running of its four staff canteens to ISS. Philips paid a monthly fee to ISS and allowed it the use of its kitchens and facilities free of charge. Mrs Anne Watson Rask and Mrs Kirsten Christensen were formerly employed by Philips. They were transferred to ISS on the same salary and seniority. ISS subsequently altered the timing of when wages were paid and the way in which they were made up, although the total remained the same. Mrs Rask and Mrs Christensen wanted matters to remain unchanged and were later dismissed when they refused to continue employment under the new conditions.

The question was whether a transfer within the meaning of Article 1(I) had taken place. The plaintiff argued that there had not been a transfer because the business was only ancillary to Philips' main business and that full and entire control had not been transferred with relation to pricing and customers. In an important decision, concerning arguments on contracting out, the Court stated

"The fact that, in such a case, the activity transferred is only an ancillary activity of the transferor undertaking not necessarily related to its objects cannot have the effect of excluding that transaction from the scope of the Directive. Similarly, the fact that the agreement between the transferor and the transferee relates to the provision of services provided exclusively for the benefit of the transferor in return for a fee, the form of which is fixed by the agreement, does not prevent the Directive from applying".

The Court then went on to consider the question of whether the business had retained its identity and the need to consider all the factual circumstances.

The Business Services Association is an employers' organisation that represents companies involved in the cleaning and catering contracting business. They conducted a survey of their own and published the results³⁵. The survey concerned whether the ARD applied to contracting out in the various Member States. The results were as follows:

France - generally contracting out situations are not covered with some exceptions which include

1. non fixed term contracts
2. employees must have worked on the same site for at least six months
3. employees must have worked at 30% of their time on that site
4. there have been no 'working time interruptions' for more than four months

Germany - contracting out situations covered for one year after the transfer, but only

since the Schmidt decision.

Netherlands - unless collective labour agreements say otherwise, the Directive is applicable where contracts are won from direct labour organisations, but not where contracts change hands between companies.

Belgium - unless collective labour agreements say otherwise, the Directive does not apply to contracting out.

Italy - subject to collective agreements the Directive applies where a service is contracted out, but does not apply where contracts change hands between contractors.

Portugal - the Directive does apply where a contract changes hands between companies, but not where it is first contracted out.

Spain - the Directive applies in all situations, except where employees have less than four months service.

Luxembourg - the Directive applies in all situations

Ireland - the Directive does not generally apply to contracting out

Denmark - the Directive generally applies to contracting out.

Mr John Hall, then Director General of the Business Services Association, said³⁶

"The legal uncertainties surrounding the issue of when the Regulations apply, and the resultant dilemmas facing those putting service contracts out to tender, have brought chaos to public sector contracting under the Government's market testing and competitive tendering programmes".

This is rather an extreme diagnosis which is not borne out by the facts nor the results of their own survey. There is, however, uneven implementation and there has been significant doubt about the applicability of the Directive.

There must be concern that the Court will change its approach in future. Apart from the indications in Annette Henke of a more conservative approach there is now possibly further evidence contained in the advice of the Advocate General in Suzen v Zehnacker Gebäudereinigung GmbH and another³⁷. This case is due for consideration by the Court in 1997 and concerns a change in a cleaning contractor at a school run by a religious order. The Advocate General's view that a change in contractor was not within the scope of the Directive, particularly because there was no direct contractual or other relationship between the outgoing and the incoming contractors. If adopted by the Court this could have a significant effect upon the scope of the ARD.

Professor Paul Davies³⁸ raises the very interesting question in his report as to whether contracting out is, or ever can be, compatible with the ARD. On the one hand the Directive is concerned to protect workers where there is a transfer of a business. On the other hand the purpose of contracting out is to allow competitive pressures to be brought to bear on the provision of the service. It may be argued that the protection of employee rights and the fostering of competition are irreconcilable, as the latter is

aimed at reducing costs.

If one tries to ignore political motivations, such as the weakening of trade unions and changing the nature of local authorities; the aims of contracting out are

1. to reduce costs
2. to increase efficiency and flexibility.

Both of these reasons are likely to lead to job losses and a reduction in employment. Many of the local authority functions that have been contracted out have been labour intensive (e.g. cleaning, parks etc) and the only significant way of increasing profits is to perhaps change the working conditions of the employees.

Conclusions

Thus the European Court of Justice has given the term 'transfer of an undertaking' a wide meaning. It is possible to conclude, at the moment, that

- there is a need for a stable economic entity (Ryegaard)
- ownership of the undertaking to be transferred is not relevant (Ny Molle Kro)
- temporary closure of the transferred undertaking may not be relevant (Ny Molle Kro)
- the end of a lease and its re-issue to a new lessee may constitute a transfer (Daddy's Dance Hall and Bork)
- one should take into account the transfer of tangible and intangible assets as well as whether customers and staff transfer, but it is important to make a judgment based upon the whole picture (Spijkers)
- of great importance is whether the economic entity has retained its identity (Spijkers)

and Schmidt) and the similarity between what exists after and what existed before (Spijkers).

- it is now, however, questionable as to whether the Directive applies to non 'economic' re-organisations (Annette Henke), but it may be too early to make this judgment.

The Directive has had a much greater impact upon transfers of undertakings than had originally been envisaged. There has been confusion, especially within the service sector, about the extent of its applicability. The European Court of Justice has extended the definition so that almost all transfers are now covered by the Directive.

The confusion must be the responsibility of the Commission and those who drafted the Directive initially. The lack of definition of key terms has enabled the European Court to provide its own definitions, despite the opposition of some Member States such as the United Kingdom and Germany.

There are still uncertainties with respect to the transfer of part of an undertaking and the conclusions reached concerning transfers in insolvency situations are not satisfactory. It is an argument underlying this thesis that there would have been problems in the United Kingdom in any event. These problems have been compounded by an inadequately drafted directive which has resulted in much litigation in many Member States.

1. Commission report to the Council 2/6/92 - SEC/92/857
2. Birk, Professor Rolf (1994) Contracting Out Of Services Report to the Commission
3. These definitions have played a significant part in the consultation and revision exercise which has taken place - see chapter 9
4. Birk op.cit. - the transfer of an enterprise or part of an enterprise
5. Ibid - an enterprise and a business
6. Ibid - a change in the legal position of the employer
7. Statement to the author by the Commission civil servant responsible for the amendment of the Directive - Francisco de los Herras
8. (Case 24/85) (1986) ECR 1119 (1986) CMLR 296
9. Discussions by the writer with the Borough Solicitor at the London Borough of Barnet
10. (Case 392/92) (1994) ECR-1 1311 (1995) ICR 237
11. (Joined cases C-171/94 and C-172/94) (1996) ECR 1253 (1996) IRLR 467
12. (Case C-48/94) (1995) ECR 2745 (1996) IRLR 51
13. (Case C-298/94) (1996) IRLR 701
14. (Case 287/86) (1987) ECR 5465 (1989) IRLR 37
15. (Case 324/86) (1988) ECR 739 (1988) IRLR 37
16. (Case 101/87) (1988) ECR 3071 (1989) IRLR 41
17. (Case 186/83) (1985) ECR 519 (1986) 2 CMLR 50
18. Elias QC, Patrick and Bowers, John (1994) Transfers of Undertakings: The Legal Pitfalls Longman
19. Ibid
20. (Case 19/83) (1985) ECR 457
21. (Case 105/84) (1985) ECR 2639
22. (Case C-132,138,139/91) (1992) ECR 6577 (1993) IRLR 179
23. (Case 145/87) (1988) ECR 2559 (1989) IRLR 447
24. DM Levin v Staatssecretaris van Justitie (Case 53/81) (1982) ECR 1035
25. Hoekstra (nee Unger) v Bestuur der Bedrijfsvereniging voor Detailhanden en Ambachten (Case 75/63) (1964) ECR 177
26. Hansard HC col 679 31 January 1992

27. The Employment Insolvency Directive 80/987/EEC is concerned with this subject OJ 1980 L283/23

28. (Case 179/83) (1985) ECR 511

29. (Case 135/83) (1985) ECR 469 (1987) 2 CMLR 406

30. (Case 362/89) (1991) ECR 4105 (1992) IRLR 136

31. (Case C-472/93) (1996) ECR 4321

32. Statement made to the author by a Commission civil servant dealing with the matter

33. (Case C-29/91) (1992) ECR 3189 (1992) IRLR 366

34. (Case C-209/91) (1992) ECR 5755 (1993) IRLR 133

35. Facilities vol 12 no 11 1994 p25

36. Business Services Association, Commonwealth House, 1/19 New Oxford Street, London WC1A 1NU

37. 15.10.96 case C-13/95

38. Davies, Paul (1994) Contracting Out of Services Report to the Commission

Chapter 8 A consideration of the issues arising from the implementation of the ARD in the United Kingdom and other Member States

Introduction

In order to consider the impact of the ARD on employment law in the United Kingdom, the following issues will be considered.

1. Transfers of contracts of employment and the employment relationship
2. Employee choice in a transfer
3. Part time, temporary and fixed term contracts
4. Dismissals
5. Joint liability
6. Two year qualification
7. Transfers of part of an undertaking
8. Consultation
9. Economic, technical or organisational exceptions
10. Insolvency
11. Pensions
12. Compulsory competitive tendering

It is proposed here to consider these issues in the light of litigation in the United Kingdom, which has been influenced by the decisions of the European Court of Justice, (see chapter 7).

1. Transfers of contracts of employment and the employment relationship

Article 3(1) contains the essence of the ARD:

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

One of the concerns here is the meaning of 'contract of employment' and an 'employment relationship', and whether these two terms are complementary or alternatives.

Lord Wedderburn¹ summed up the question by saying that the courts are set a puzzle, in order to decide which of the workers' rights are transferred. The contract of employment is one part of the employment relationship which may include other aspects. An important question, perhaps, is not which rights are transferred, although this will be considered, but who are the employees whose rights are transferred?

The ARD states in its title that the objective is the "safeguarding of employees' rights", but it offers no definitions of who are the employees. This is a matter that is left to national law². National law is, however, not clear and there may be considerable differences between Member States in the definition of employee or self employed.

The dependent self employed

In McMeechan³ the President of the Employment Appeal Tribunal, Mr Justice Mummery, asked the question "How do you tell the difference between a person who is employed and one who is not employed?" He then went on to say that "it was a problem that ought to be, but is not, easy to resolve".

There are a potentially large number of people in the United Kingdom who are treated as self employed but have all the characteristics of being employees. In March 1995 there were just over three and one quarter million self employed workers in Great Britain⁴. Between 1981 and 1991 there was a net increase in self employment of 1.1 million people. This was an increase of 52%⁵. Over two thirds of the self employed have no employees and this self employed group, with no employees, accounted for 80% of the 1981/1991 growth⁶. In a survey⁷ in 1987 it was estimated that 40% of self employed people had previously been unemployed.

Thus the majority of the self employed work on their own with no employees and are dependant upon using their own skills and labour. A traditional view might be that they are entrepreneurs just setting up business and planning to grow and ultimately employ other people. Another view might be that they are people who have no choice but to become self employed, as a significant number of them were previously unemployed. There are industries or occupations where self employment is the norm. There are also people who choose self employment because of the apparent advantages of being taxed on a schedule D basis.

The employer, or acquirer of labour⁸, not only benefits from not having employment protection obligations and costs, but also saves expense through not having to pay employers' national insurance contributions.

Whatever the reasons there are a number of people who have all the characteristics of being employees, but are treated as self employed. It is suggested here that these numbers might be large, as the following examples help to show.

Example 1. A recent study⁹ examined free lancers in the publishing industry and concluded that "freelancers in publishing are essentially casualised employees, rather than independent self employed. In objective terms they are 'disguised wage labour'... Their position is very little different from that of employees... They are usually dependent on just one or two client publishers".

Example 2. In the construction industry it is possible to conclude that some 58% of the manual work force (excluding local government) is treated as self employed¹⁰. This is some 45% of the total industry work force. The author concludes that, in the industry, "self employment, as an employment status, is an economic fiction".

Example 3. A recent study of the human resource policies of a major financial services company mentioned, almost in passing, that the company employed some 3000 people at its head office and "has around 4000 self employed financial advisers"¹¹. To an outsider these financial advisers would be indistinguishable from the employees. They have branch offices, managers, sales targets and sales conventions. They can be promoted and dismissed, but they are treated as self employed¹².

The characteristics of these self employed is not that they are full time or part time. Nor is it that they are manual or professional in their type of work. It is that they are economically dependent upon one, or a few, employer(s) and that they have an employment relationship with the 'acquirer of labour'.

A statutory definition of an employee is contained in S230(1) ERA 1996 and S295 TULRCA 1992¹³. The definitions offered are identical, i.e. "an individual who has entered into or works under...a contract of employment".

It is apparent that there are many workers in the United Kingdom who do not meet this statutory definition and are treated as self employed even though the difference between them and employed workers may only be one of the method in which their earnings are assessed for taxation purposes. These workers, as shown in the examples above, do not receive the protection of the TUPE Regulations because the definition of employee is left to national law. The courts will look at the facts of a particular case to establish whether or not a person is an employee, but the courts only have the opportunity to look at those cases that come before them.

What is transferred

The contract of employment is transferred and becomes a contract with the transferee as if it had been agreed with the transferee at its inception.

It is also clear that the employment relationship can cover a wide range of obligations.

In Wilson v West Cumbria Health Care NHS Trust¹⁴ two porters claimed damages

against the NHS Trust, to whom their contracts had been transferred. The damage had allegedly occurred whilst they were employed by the transferor, the Health Authority. A county court judgment held that a contingent tort liability was transferred along with the contract of employment. Similarly in DJM International¹⁵ the Employment Appeal Tribunal held that liability for an act of alleged sex discrimination transferred to the transferee. Although it is possible to see the logic of this approach in the protection that it offers an employee, it is difficult not to feel that a certain amount of injustice has been done to the transferee employer. It is not possible to precisely quantify the financial cost of such allegations, unless the transferor is able to agree to indemnify the transferee against such claims. There is a possibility of damage also to an organisation's reputation.

Thus, if one is treated as an employee, significant protection is offered. It is the problem of those that are treated as self employed that needs to be considered.

2. Employee choice in transfers

The common law position on choice in transfers has already been discussed, but it is important here because the Directive is silent on the issue and the European Court of Justice has not been consistent in its approach (see chapter 7). It has wavered between the claims of paternalism and individual choice. It is a question of whether the employee should be able to put themselves at a possible disadvantage during a transfer.

S33(4) of TURER has now clarified matters in statute in the United Kingdom. Employees have the right to refuse to be transferred, but they are then left in a nether

region with no rights with the transferor or the transferee:

"Where an employee so objects, the transfer of the undertaking or part in which he is employed shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor".

If the employees have refused to transfer, then their contract with the transferor is terminated, but they cannot be treated as if they were dismissed. It is difficult to visualise how this can be seen as a protective piece of legislation for such workers, who, presumably, will not be entitled to compensation.

In Photostatic Copiers¹⁶ it was argued that this element of choice did not exist before the 1993 TURER amendment to the Regulations. The Employment Appeal Tribunal, however, concluded that the common law principle that a novation of the contract could not take place without the knowledge of the employee was still applicable¹⁷.

There is also the issue of whether employees are able to renegotiate their contracts and agree to alterations to their terms and conditions of employment. This has been tested¹⁸ with the Employment Appeal Tribunal concluding that the parties could not "vary the terms of the contract by agreement or affirmation" if the reason for the variation is the transfer itself. Thus employees cannot agree to a change in their contract, but also cannot affirm that change by continuing to work and seeming to accept the alteration. This case is being appealed, but it does appear to create a very rigid approach, where employees who genuinely accept the change are precluded from

doing so. It is an approach that is permitted in insolvency situations by the proposed revised ARD.

The question of how an employee objects to their transfer has also been considered. In Hay v George Hanson¹⁹ the work of an employee was to be transferred from a district council to a private contractor. The question was whether there need be a clear and unequivocal statement objecting to the transfer. The Employment Appeal Tribunal (EAT) stated that "drafting of the Regulations leaves much to be desired". The concern of the EAT was not the protection of the employees' livelihood, but the protection of the employees' right not to be transferred against their wishes. There is a state of mind which needs to be transmitted to the transferee. There is no specific form for the objection to be made, but if it is clear that there is one and if this information has been transmitted, this appears to be sufficient.

3. Part time, temporary and fixed term contracts

Nowhere in the ARD, or the TUPE Regulations, is the question of part time, temporary or fixed term contract employees mentioned. The definition of who constitutes an employee is left to national law. This allows for differences between Member States and the opportunity to exclude large numbers of potential employees from legislative protection.

This was recognised in the preamble to the proposed revision of the Directive²⁰ and safeguards proposed so that Member States are not to be allowed to discriminate against employees covered by Directive 91/383 EC²¹.

The numbers of part time employees is increasing. In the three months to November 1995, for example, the number of full time jobs in the United Kingdom fell by 9000, but the number of part time positions increased by 50 000²².

The law in the United Kingdom has changed since the ARD has been in existence. In R v Secretary of State for Employment²³ the House of Lords ruled that certain restrictions on employment protection for part time workers were discriminatory as some ninety per cent of employees working less than 16 hours per week were women. This discrimination was not in accord with the Equal Pay Directive²⁴ or the Equal Treatment Directive²⁵. The Government amended the legislation in January 1995²⁶ to take account of this judgment.

Before 1994 many part time workers would not have qualified for protection against unfair dismissal and, as a result, would have received no protection from the TUPE Regulations. There have, therefore, been inequities within the United Kingdom with different employees receiving protection at different times. This is partly a result of not having a Community definition of 'employee', so that people in different Member States of the EU receive similar protection.

4. Dismissals

Article 4(1) of the ARD states that "The transfer...shall not in itself constitute grounds for dismissal". This has been transposed into the TUPE Regulations in Regulation 8(1) which provides that if the reason or principal reason for dismissal is the transfer, then the dismissal will be treated as unfair in terms of Part V of the EPCA 1978 (now Part

X ERA 1996).

There are two related issues to be considered here. Firstly, when the transfer takes place and, secondly, the reason for the dismissals.

When the transfer takes place

Regulation 5(3) of the TUPE Regulations states that "...a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, (is) a person so employed immediately before any of those transactions". A person receiving the protection of the Regulations is, therefore, someone who is employed immediately before the transfer. It is important to establish when the transfer takes place as there is no guidance within the Regulations themselves. This is, perhaps, especially true in the situation of insolvency²⁷, which is also omitted from the Directive.

Where there is just one transaction in the transfer process it is perhaps clear when the transfer takes place²⁸. In Longden and Ferrari²⁹, which concerned a company in receivership, there were a number of steps which were held to have taken place;

- March 7 1991 - administrative receivers appointed
- March 14 1991 - receivers contacted with a view to investigating a purchase of all or part of Ferrari
- March 22 1991 - offer for one division
- March 26 1991 - receiver's solicitors fax draft contract to prospective purchaser
- March 27 1991 - receivers accept offer

- March 27 1991 - purchasers fax receiver with family tree of whom they would like to employ and agree to pay £4000 to keep company ticking over
- March 28 1991 - appellants dismissed by receiver; not on family tree
- April 5 1991 - prospective purchaser agrees to pay £20 000 for exclusive option to conclude purchase by April 10
- April 10 1991 - business transferred and some staff re-employed

This case shows a series of events that led to the transfer of an undertaking that was insolvent. The appellants claimed that they were dismissed because of a transfer which took place in two or more transactions and that the first relevant transaction took place on March 26 1991 when the receiver's solicitors faxed a draft contract of sale. The Industrial Tribunal and the Employment Appeal Tribunal did not accept this argument. All these transactions were events leading to the transfer, but, crucially, the Tribunal had to consider which transactions "gave effect" to the transfer. They concluded that this had been on April 10 1991 when the transaction was completed. The Employment Appeal Tribunal refused to accept, despite some doubts, that the Tribunal had erred in finding that the appellants had been dismissed, nevertheless, because of the transfer.

The reason for the dismissal

In order to receive the protection of the TUPE Regulations the employee must establish that the dismissal was by reason of the transfer. The defence of 'economic, technical or organisational reasons' is discussed below. Difficulties occur when the process leading to the transfer is prolonged or complex, as in the Longden v Ferrari case above, making it important to establish when the transfer took place.

The process should not be too prolonged. In Ibex³⁰ the company went into administrative receivership on August 8 1992 and 40 employees were dismissed as redundant, taking effect from November 4 1992. An offer to purchase the company was made on November 11 1992 and completed on February 13 1993. The Employment Appeal Tribunal held that

"A transfer was, at the stage of dismissal, a mere twinkle in the eye and might well have never occurred...it seems to us, on the facts, to be difficult to say, by reason of the timing of the dismissal and the sale of the business, that the employees would have been employed at the date of completion but for their dismissal".

In Harrison Bowden v Bowden³¹ the Employment Appeal Tribunal accepted that "there is..a conceptual difficulty in distinguishing between a prospective transferee and the actual transferee". In this case administrative receivers had been appointed and on January 29 1991 the Company was advertised for sale. On the following day there was an expression of interest in the purchase. On the next day, January 31 1991, all the work force were dismissed. The applicant was then employed to help the business to be handed over as a going concern. The transfer was completed between February 4 and 8 1991. The question was whether the dismissals on January 31 were in connection with the transfer of the business. The Industrial Tribunal posed the following question (Mr Gibson was appointed by the receivers to run the company):

"What was in the mind of Mr Gibson: what motivated him on 31 January 1991 when he dismissed the applicant? Was he dismissing to make the company more able to be transferred and more easily and/or at a better price? Was the dismissal therefore in

direct connection with the transfer of the business to a proposed or possible buyer? Was it something totally independent whereby the receiver had come to the conclusion that he could simply not afford to have the staff and then at some later date an approach was made to buy the business but it was long after the dismissal had taken place, so that the two were not connected, the one to the other".

The Employment Appeal Tribunal held that any other approach than that the dismissals were in connection with the transfer would be to open a loophole in the legislation. It is clear that once a link can be established between the dismissal and the transfer then the dismissal can be held to be unfair. It is also clear that it is not possible to predict whether an Industrial Tribunal will establish that link. It is a matter of fact for the Tribunal to decide.

The decision in Litster³² is important because it both ensured that another loophole was closed and established that there was a purposive approach to be taken by the UK courts in the implementation of the ARD.

The case, which was heard by the House of Lords, concerned 12 appellants who were employed by the Forth Dry Dock Company which went into receivership in September 1983. On February 6 1984 the staff were dismissed at 3.30 pm. One hour later, at 4.30 pm, Forth Estuary purchased the assets from the receiver and began to recruit its own staff, but this did not include any of those employed by the old company. The House of Lords reviewed the relevant decisions of the European Court of Justice and concluded:

"It is...clear that under Article 4 of the Directive, as construed by the European Court of Justice, a dismissal effected before the transfer and solely because of the transfer of the business ..is prohibited..the question is whether the Regulations are so framed as to be capable of being construed in conformity with that interpretation of the Directive".

Prior to this case the leading authority on the subject had been Secretary of State for Employment v Spence³³. In that case there had been an interval of three hours between the dismissal of the transferor's work force and the transfer. This was held to be sufficient with the conclusion that the employees were not employed immediately before the transfer. The result was to weaken the Directive and Regulations.

In the Litster case the House of Lords looked at the objectives of the Directive and concluded that the Regulations could be construed accordingly. The Court held that:

"In effect this involves reading Regulation 5(3) as if there were inserted after the words 'immediately before the transfer' the words 'or would have been so employed if he had not been unfairly dismissed in the circumstances described in Regulation 8(I)'".

There is a lack of detail and precision in both the Directive and the Regulations that in this area and others has led to the requirement for extensive interpretation by the judiciary. This may be justifiable in terms of the Directive, because directives are not intended to be detailed as their intention is to enable individual Member States to transpose them into national law. The European Court of Justice also adopts a purposive approach to the interpretation of legislation and will look to the objectives

of the legislation when making judgments. The TUPE Regulations, on the other hand, require more precision, especially when one considers that the UK courts have not always had the same approach to legislative interpretation as the European Court of Justice.

5. Joint liability

Article 3(1) of the ARD deals with the subject of joint liability between the transferor and the transferee:

"Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship".

It was left to the Member States to choose whether they should have continuing liability on behalf of the transferor as well as the transferee. It seems to be an approach which could only result in further litigation if there were not a precise statement of when the transferor continued with liability for obligations which had arisen from the contract of employment. The UK Government, however, decided not to include such a provision in the TUPE Regulations.

In Allan v Stirling³⁴ the Scottish Employment Appeal Tribunal decided that the Regulations did not transfer to the transferee "responsibility for a dismissal entirely carried out by the transferor and taking effect before, or simultaneously, with the

transfer, to the exclusion of any liability on the transferor in the absence of an express provision to that effect". This decision caused some confusion and a period of uncertainty as to whether joint liability existed in UK law or not.

This decision was reversed on appeal to the Court of Session³⁵. The Court noted that the United Kingdom had chosen not to exercise the power to provide specifically for joint liability. The Court approved the terms used in Ibex³⁶ that the word 'transfer' meant taking away from one and handing over to another. Indeed the Court held that it could have no other meaning. As a result it is firmly established that, in the event of a transfer of an undertaking, as defined in Article 1(1) of the ARD, there is no continuing liability on the part of the transferor and that all obligations arising from the contract of employment are transferred to the transferee.

6. Two year qualification

Article 4(1) of the ARD provides that the transfer of an undertaking shall not in itself constitute grounds for dismissal by the transferor or the transferee. This is transposed into UK law by Regulation 8(1) of the TUPE Regulations where the sanction is that such a dismissed employee will be treated as unfairly dismissed in accordance with Part V of the EPCA (now Part X of the ERA 1996). This includes the rule that, in order to qualify for protection against unfair dismissal, the employee needs two years continuous employment with the employer.

Article 4(1) also provides that

"Member States may provide that the first sub paragraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of Member States in respect of protection against dismissal".

In Milligan v Securicor³⁷ it was argued that this clause allowed the United Kingdom to use its discretion to exclude employees with less than two years service from the provisions of the Regulations. The Employment Appeal Tribunal accepted the argument that the UK Government had not specifically excluded employees with less than two years continuity of employment and that such employees were, therefore, not excluded.

Such a decision was clearly unacceptable to the Government who reversed it in Regulation 8 of the CRTUPE Regulations 1995. The Court of Appeal, however, in MRS Environmental Services v Marsh and Harvey³⁸ reversed the decision, making this Regulation 8 unnecessary.

In R v Secretary of State for Trade and Industry ex parte Unison, GMB and NASUWT³⁹ the trade unions concerned argued that it was contrary to Community law to exempt employees with less than two years continuous service from the protection against dismissal provided by Article 4 of the ARD. They also argued that the two year qualifying period indirectly discriminated against women contrary to Community law. The High Court did not accept this argument and held that Article 4(1) paragraph 2 permitted Member States to derogate from the protection offered by Article 4(1) in respect of specific categories.

"There can be little argument that a statutory provision in our domestic law which

exempts from the right not to be unfairly dismissed those who have less than two years service ...is a legitimate exercise of the right to derogation".

The Court stated that it bore in mind the fact that this issue was not one of those that the Commission complained about when it took action against the UK Government for failure to transpose the Directive adequately. The Court also held that the discriminatory argument was not satisfied by the evidence.

7. Transfer of part of an undertaking

When a business is transferred to another business, then, except in certain circumstances, the employees and their contracts of employment also transfer. A problem occurs when only part of a business is transferred. What is the position of the transferee in relation to the employees who are employed by the other parts of the transferor's business, who are not transferred?

The matter has been the subject of a number of cases before the Employment Appeal Tribunal. Buchanan-Smith v Schleicher International Ltd⁴⁰ is a case which concerned a small company of four full-time employees and one part-timer which specialised in the sale and servicing of shredding machines. The servicing side of the business, together with its stock, was sold at book value. At the same time the sales side of the business ceased to function. Miss Buchanan-Smith was a director and company secretary with a two percent shareholding. She was "something of a salesperson, an administrator of the business, and an administrator of the internal side". Miss Buchanan-Smith was employed by the transferee but was dismissed after about seven

months. She then claimed 12 years of redundancy payments based on her service with the previous business which she claimed had been transferred.

The Employment Appeal Tribunal accepted that there was a transfer of part of the business and protection was offered by the TUPE Regulations. The question was whether Ms Buchanan-Smith was transferred with that part or not.

The EAT relied upon the case of Botzen⁴¹, which had taken place in the European Court of Justice (see chapter 7). The test of whether the transferee has to take on all the obligations of an employee's contract and employment relationship is whether that employee has been assigned to the part of the business transferred. The question that results is, of course, what does being assigned mean?

In Duncan Web Offset⁴² three employees who were not transferred complained to an Industrial Tribunal. The Employment Appeal Tribunal suggested a number of indicators. These were:

"The amount of time spent on one part of the business or another; the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business".

All three employees spent time working for other parts of the Group, although the majority of their time was spent on the part transferred. In another case, that of Michael Peters Ltd⁴³, the EAT held that a chief executive of a group of twenty five

companies was not transferred to the purchaser of four of the subsidiary companies, because he had not been assigned to that part transferred. He would have spent time on the part transferred, but it could not be said that he was assigned to them.

8. Consultation

There are three issues that will be dealt with here. They are:

With whom should consultation take place

What are the objectives of consultation

When should consultation take place

With whom should consultation take place

Prior to the 1995 CRTUPE Regulations the obligation to consult was with a representative of an independent trade union which was recognised by the employer.

After the amendments resulting from these Regulations there has been an obligation, from March 1 1996, to consult with "appropriate representatives". These representatives, according to Regulation 9(4) of the CRTUPE Regulations are either "employee representatives elected by them or if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union".

Thus the choice is now between representatives of an independent trade union, if so recognised by the employer, or elected employee representatives. This amendment was

necessary because of the voluntary nature of trade union recognition in the United Kingdom which effectively meant that compliance with consultation requirements under the TUPE Regulations was also voluntary.

Regulation 11 of the CRTUPE Regulations provides that employee representatives are persons who have been elected for the specific purpose of being consulted about the transfer or they may be persons already elected for another purpose. In that case "it is appropriate (having regard to the purposes for which they were elected) for their employer to inform and consult them under that Regulation(10)".

There is no guidance as to what appropriate purposes there might be for an employer to decide to consult already elected representatives. Indeed there are no provisions to deal with a situation where these employees refuse to be consulted on this issue. In Regulation 9(4) CRTUPE the employer may choose which to consult in the event of there being a recognised independent trade union and elected staff representatives. There is no provision to deal with the situation where the latter, if chosen, wish the matter to be dealt with by the trade union.

Employee representatives must be employed by the employer at the time when they are elected (Regulation 11 CRTUPE). There is no guidance as to whether an employee who would have been so employed had they not been unfairly dismissed would be eligible to stand for election (compare the case of Litster⁴⁴).

There is no indication as to whom the electorate should be. It is possible to argue that it should be one of a number of alternatives, such as

- those to be transferred
- those in a grade/category/division from whom transferees will be chosen
- the whole company

This has been dealt with by the courts in reference to trade union representatives. In Griffin v South West Water⁴⁵ it was held that workers' representatives does not mean just the representatives of the workers being made redundant. It means the representatives of the workers as a whole. Presumably it is possible that this could apply to the non union elected representatives.

The objectives of consultation

Prior to TURER, Regulations 10(2) and 10(6) of the TUPE Regulations required an employer to consult with trade union representatives and "consider any representations made by the trade union representatives; and reply to those representations and, if he rejects any of those representations, state his reasons". It is difficult to perceive how this could be interpreted as consultation and difficult to conclude that this Regulation was not a deliberate attempt by the Government to limit the effects of the requirements of the Directive.

As a result of TURER 1993 the words "with a view to seeking their agreement to measures to be taken" were added to Regulation 10(5). This added a requirement for consultation which was absent from the original Regulations, where an exchange of views was all that was required. The position now is that the employer now needs to consult with the "appropriate representatives" with a view to seeking their agreement.

In R v British Coal⁴⁶ consultation was defined as

"...fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

It is, however, difficult to envisage a newly elected group of employees being able to have such meaningful consultation on the implications of a proposed transfer.

When should consultation take place.

Regulation 3 of the CRTUPE Regulations changed the words in SI88 TULRCA from consultation must begin "at the earliest opportunity" to consultation must begin "in good time". The CRTUPE Regulations did not amend the TUPE Regulations in the same way. It was left as "long enough before a relevant transfer". There is, however, an additional problem with the new requirement to consult "appropriate representatives". Additional time will be needed in order to hold elections. Regulation 9(10) of the CRTUPE Regulations provides that an employer shall be treated as complying with the Regulation if "the invitation (to hold elections) was issued long enough before the time when the employer is required to give information under paragraph 2 to allow them to elect representatives by that time". The Divisional Court⁴⁷ held that this was sufficient.

There is a need to impose a time limit because, otherwise, recalcitrant employees could

delay the elections in order to delay the consultation process. On the other hand these Regulations give no guidance as to how long a period is meant by "long enough before..". One must assume a high likelihood of litigation on this point at some time in the future. It is, perhaps, especially a problem for companies in financial difficulties who need to act rapidly. The consultation process is lengthened by an, as yet, indeterminate amount of time.

9. Economic, technical or organisational reasons

Regulation 8(2) of the TUPE Regulations provides that

"Where an economic, technical or organisational reason entailing changes in the work force of either the transferor or the transferee before or after a relevant transfer is the reason or the principal reason for dismissing an employee.."

The phrase 'economic, technical or organisational' (ETO) is a direct reproduction of the words used in Article 4(1) of the ARD. There was no attempt to define these terms in Regulation 2 and they clearly appeared to be an invitation to the courts for a decision on their meaning. Lord McCarthy, during the 1981 debate in the House of Lords when the Regulations were introduced, called these words 'gobbledegook'.

The words have been considered in a number of cases. In Berriman v Delabole Slate⁴⁸, Mr Berriman was employed as a quarryman in Cornwall. The undertaking was transferred to Delabole Slate Ltd. His new employers offered him employment at a lower rate of pay in order to bring his earnings into line with their other employees.

The question was whether the employer's action was an ETO reason "entailing changes in the workforce". The Court of Appeal held that standardisation of pay was not an ETO reason entailing such changes. The intention of the Regulations was that the protection of employment included the protection of the existing terms of service.

This leaves the transferee, however, in a difficult and potentially troublesome situation. In this case there was one employee, but it is not difficult to envisage a situation where, as a result of a transfer, a number of transferred employees might be on a different pay structure to those that were already employed⁴⁹. It is, perhaps, one of the failings of the Directive that it is concerned primarily with those employees being transferred. It does not take into account any difficulties that might occur in the transferee undertaking with existing employees. These difficulties are particularly apparent when the transferring staff are on a higher pay structure than the transferee's existing staff. The transferee has the option to increase the pay of their existing employees, but does not have the option of reducing the pay of transferred employees.

There was further clarification in Wheeler v Patel⁵⁰. Mrs Wheeler was dismissed by the transferor and not employed by the transferee. One reason was to obtain the best possible price, which was claimed as an economic reason. In a previous case, Anderson v Dalkeith⁵¹, this had been held to be an acceptable reason by an Industrial Tribunal. The Employment Appeal Tribunal in Wheeler disagreed as this would be too broad an interpretation. The court felt that the terms 'economic, technical or organisational' should be construed ejusdem generis, which would limit their scope. In Trafford v Sharpe and Fisher⁵², however, the Employment Appeal Tribunal held that

"The rights of workers must be safeguarded 'so far as is possible'. It is not always possible to safeguard the rights of workers. As is recognised in the second sentence of Article 4(1), the rights of workers not to be dismissed on the transfer of undertakings must not stand in the way of dismissals which take place for economic reasons entailing changes in the workforce. In such cases the rights of workers may be outweighed by the economic reasons".

It appears that one must look to the result to discover whether the ETO reasons have entailed a change in the workforce. One might conclude, however, that the dismissal of a worker to obtain a better price was an economic reason entailing such a change.

In BSG Property Services⁵³ the company won the contract in a competitive tender to provide Mid Bedfordshire District Council with housing maintenance services. Two days earlier the Council had made its housing maintenance staff redundant. The company had tendered on the basis of using self employed people to do the work. This method of working had led the parties to conclude that there was no transfer and that, in any case, there was an ETO reason in the change of the workforce. The Employment Appeal Tribunal dismissed this argument. Apart from concluding that there was a transfer, within the meaning of the TUPE Regulations, the EAT concluded that there was no ETO reason. When looking at the reason for the dismissals, one had to look at them at the time they took place. There may have been a subsequent reorganisation, but at the time of dismissal, the reason for those dismissals were the transfer. As a result the transferee was liable for their unfair dismissals.

The words in the Directive and the Regulations are 'economic, technical or

organisational' (emphasis added). This would suggest that the three are alternatives and perhaps should not have been taken ejusdem generis. The words appear to offer three alternatives, which could, if liberally interpreted, cover almost any situation. If the word **and** had been used instead of **or** the possible exceptions might have been much more limited.

10. Insolvency

Regulation 4, which deals with the practice of hiving down, has already been dealt with. The ARD is silent on the subject of insolvency and it is, with hindsight, perhaps simple to criticise the authors for not providing for the situation that many transfers will take place as a result of businesses becoming insolvent.

It is doubtful whether the practice of hiving down was in accord with the ARD. It did not protect employees' rights and may actually have harmed them. It is not possible to guess the motivation of the authors of Regulation 4, except insofar that the Government had an antipathy towards the Directive as a whole. It is possible to surmise that the Government may have been trying to negate the effects of the Directive in insolvency situations. After the case of Litster⁵⁴ the possibility of using the 'hiving down' process became restricted.

11. Pensions

In Adams v Lancashire County Council⁵⁵ the argument was put forward that as pension rights are recognised by the Community as a form of pay, then it followed that

employees who were transferred should not lose that part of their pay which was in the form of pensions contributions. This case concerned a number of 'dinner ladies' who were transferred when the school catering services of Lancashire County Council were the subject of compulsory competitive tendering.

The High Court held that the Council of Ministers must have decided to make an exception to the protection offered by the Directive in the case of pensions, even though this left a serious gap in full protection of all rights to deferred pay. It held that "Regulation 7 of TUPE excepts all pension rights. In doing so it correctly implements the Directive [the ARD]".

12. Compulsory competitive tendering

One area where the Directive and the Regulations had, perhaps, an unforeseen effect was in relation to the Government's programme of contracting out of services and the privatisation of public services. In a number of areas the Regulations have played an important role in protecting employee rights. As the Home Secretary, Mr Clarke, said in 1993 on the subject of the contracting out of prisons:

"I think that it is fair to say that, when the EC directive and the TUPE regulations were drawn up, the draftsmen did not have in mind the type of transfer of work from the public to the private sector..."⁵⁶

In that debate the Home Secretary accepted that the Regulations applied to the issuing of tenders for the running of Manchester prison.

The Regulations have also applied in situations such as

- the change of the National Health Service to trust status
- the reorganisation of local government
- the privatisation of state owned industries

and also to the programme of compulsory competitive tendering introduced into local government.

The Local Government Planning and Land Act 1980 was the first piece of legislation to carry provisions on competitive tendering under the new Government. Local authorities were obliged to carry out a competitive tendering process if they wished their own workforces to perform certain categories of work, such as new local construction, building maintenance and highways work.

There were a number of reasons why the Government ostensibly pursued this policy.

A Government review summed up five main reasons⁵⁷

1. to save money
2. to save management time
3. to obtain expertise not available in house
4. to retain flexibility
5. to re-establish management control (from the trade unions)

It is perhaps not insignificant that the first item mentioned was the saving of money.

The hoped for result from compulsory competitive tendering was that services would not only be provided more effectively, but more cheaply. As Professor Napier stated⁵⁸

"Competitive tendering for public sector work is usually only commercially attractive

for companies because they will be able to do this work with reduced labour costs".

This meant that significant savings could be made by reducing the size of the workforce and/or reducing levels of pay. This, of course, is where there is a conflict between the aims of the Directive and the Regulations and Government policy. If the Directive and the Regulations were shown to apply to contracting out then the scope for savings would be considerably lessened.

The Local Government Act 1988 extended the range covered by compulsory competitive tendering to such activities as

- refuse collection
- cleaning of buildings
- street cleaning
- catering
- ground maintenance
- vehicle maintenance

The Secretary of State was empowered to make additional orders under S2(3) of the Act to include other services as defined activities and therefore subject to compulsory competitive tendering. This power has been extensively utilised and the range of services covered now includes professional areas such as personnel and the legal profession.

The Government's attitude to the relevance of the TUPE Regulations to contracting out has, at best, been ambivalent. There have been requests to clarify the situation from

the inception of the Regulations. In the original debate in the House of Commons, Mr Teddy Taylor MP, very perspicaciously, asked the question

"Precisely what does an undertaking mean? For example could it possibly refer to a local authority cleansing department being privatised, or must it be a private business?"⁵⁹

In 1993 the question was still being asked. Mr Terry Rooney MP asked⁶⁰,

"Is the Attorney General saying that all activities generally regarded as compulsory competitive tendering fall within the jurisdiction of the TUPE Regulations and that, in the past ten years, their application has been misinterpreted?"

Regulation 2(1) originally excluded undertakings that were "not in the nature of a commercial venture". This phrase was removed by TURER, but it may have resulted in the conclusion that the Regulations might not apply to many contracting out situations as it might be possible to say that they were not commercial ventures. In a case that preceded Spijkers⁶¹, namely Hadden v University of Dundee Students Association⁶², the question of whether a contracted out service was a commercial venture was tested. Mrs Hadden was employed by the students union as a manageress of their catering facilities. The facilities were contracted out and Mrs Hadden was made redundant and subsequently employed by the contractor. At a later date the students union took over the catering again, but did not re-employ Mrs Hadden.

The question was whether the catering facility was in the nature of a commercial

venture. The contractors were remunerated by means of a management fee and a percentage of profits. The facilities and premises were provided by the students union. It was held that no transfer had taken place because this was not a commercial venture.

The interpretation of the law became clearer in subsequent years with the removal of the commercial venture test and the decisions of the European Court of Justice (see Chapter 7).

Kenny and others v South Manchester College⁶³ concerned the provision of education services at Thorne Cross, a young offenders institution in Cheshire. Teaching and education services were provided by Cheshire County Council, but, after a tendering exercise, they were taken over by South Manchester College. The issue had become whether the undertaking had retained its identity. The High Court stated

"The prisoners and young offenders who attend, say, a carpentry class next Thursday will, save those released from the institution, be likely in the main to be the same as those who attended the same class in the same classroom the day before and will doubtless be using exactly the same tools and machinery".

After the tendering exercise the education department was held to have retained its identity and therefore a transfer had taken place.

Dines⁶⁴ was an important case regarding the applicability of the TUPE Regulations to compulsory competitive tendering because it involved the moving of a contract from one contractor to another. It involved a number of cleaners who worked at Orsett

Hospital in Essex. They firstly worked for a contractor, Initial Health Services, who lost the contract to Pall Mall Services Group. The workers were dismissed by Initial and were subsequently re-employed by Pall Mall, but at a lower rate of pay.

Both the Industrial Tribunal and the Employment Appeal Tribunal ruled that there had not been a transfer of an undertaking and dismissed claims under the TUPE Regulations. The case went to the Court of Appeal, which ruled that the Tribunal had misdirected itself in law. It discussed the different situations in which a transfer might take place.

"It will be seen that a possible transfer of an undertaking can take place in a number of different circumstances, including the following:

- (a) The undertaking may be sold direct by A to B
- (b) A may carry on certain activities as part of its business and then decide to contract out these activities to B
- (c) A may carry out an undertaking on B's premises and then, at the expiration of a lease or for some other reason, a similar undertaking may be carried on thereafter either by B or by a new lessee.

Effectively the reason for the cessation of A's activities on B's premises may be as a result of competitive tendering, whereby after the cessation of A's contract the activities are carried on by C".

After Kenny and Dines it was possible to say

"In the light of the two rulings...contracting out of local and central government

services will almost always constitute a TUPE situation, unless the work is capable of being packaged or contracted out in such a way that it is not essentially the same".⁶⁵

This might be the situation that the Government had sought to avoid in its inadequate implementation of the Directive. It might remove the opportunity to save money by the reduction of staff numbers and their pay. One example, cited by Cirrel and Bennett⁶⁶ was the case in 1992 where, in a tendering exercise by Fife District Council, all the private tenderers withdrew from the tendering exercise once they realised the implications of applying the Regulations.

An important case directly affecting local authority contracting out of services was Wren v Eastbourne Borough Council⁶⁷. This concerned the contracting out of the Borough's refuse collection service. Mr Justice Wood stated that

"It is the substance rather than the form which is of the essence. That it can take place through a number of transactions or phases is also clear".

A second case involving a local authority contract was Kelman v Care Contract Services Ltd⁶⁸. Mr Justice Mummery summed up the case law to date:

"The cumulative effect of the decisions on the Directive is that a transfer of an undertaking may occur for the purposes of the Directive even though: (a) there has been no transfer of the ownership of assets, tangible or intangible.... (c) the undertaking may consist only in the provision of or the right to provide services".

Professor John McMullen⁶⁹ suggested that the following principles concerning contracting out can be extracted from the case law;

- "1. The transfer of services can of itself be a transfer of an undertaking.
2. The fact that assets appear in the shopping list of factors...does not mean that their absence is crucial.
3. It seems clear that the overriding test is whether there is a transfer of an economic entity or unit which retains its identity...In looking therefore for a change of identity to exclude the applicability of the transfer rules it could be argued that what is required is a very substantial change in the method of operation; often this may not occur.
4. In considering outsourcing situations it is not material that the service provision is under a fixed term contract with limited security of tenure..and that the owner of the undertaking remains under some statutory or contractual duty to provide the service (albeit through a sub contract)".

A possible example of point 3 (a very substantial change) occurred in Mathieson and another v United News Shops Ltd⁷⁰. This concerned the manageress and assistant manageress in a hospital shop. The shop was put out to tender and the staff were made redundant. Ten out of thirteen of the old staff were employed by the transferee on different terms and conditions. The shop was renovated, expanded and a much greater variety of goods were sold.

The Industrial Tribunal concluded that the hospital had destroyed the old shop and "had invited an entirely new concept to be put in its place". There was, therefore, no transfer, because the identity of the undertaking had not transferred.

The Employment Appeal Tribunal accepted that the Industrial Tribunal had looked at the entity before and after and had come to its decision on the facts. It was stated that the fact that another tribunal might come to a different conclusion was not relevant and the appeals were refused.

Litigation in other Member States

It is proposed here to consider, briefly, examples of litigation in certain other Member States. The intention is to show that it is not only the United Kingdom that has experienced problems with interpreting the Directive, although it seems that the United Kingdom has experienced more problems than the other Member States considered.

Belgium

The impact of the 1978 Collective Bargaining Agreement, which included transfer protection, was limited and, according to Professor Birk⁷¹, caused no litigation in the Belgian High Court. Article 6 of the 1985 Agreement refers to the "transfert conventionnel d'une entreprise ou d'une partie d'entreprise" and differs very little from Article 1(1) of the ARD, although it does not refer to the term business and only uses the term for 'undertaking'. According to the official commentary on Article 6 an enterprise is defined as a judicial or technical entity and the term 'part of business' applies to a subsidiary.

There are few rulings that relate to contracting out and the courts have rarely gone beyond the strict legislative provisions. The European Court of Justice rulings have

been followed , e.g. in following Spijkers⁷² to define the transfer of an undertaking as the transfer of an economic identity⁷³.

Denmark

There is limited English language information available on litigation in the Danish courts. Professor Paul Davies⁷⁴ states that "section 3(1) of the 1979 Act (implementing Article 4(1) of the Directive) has not given rise to much litigation".

A number of cases from Denmark, such as Ny Molle Kro⁷⁵ and Rask⁷⁶ have resulted in important judgments from the European Court of Justice. These were considered in Chapter 7.

France

The High Court has accepted that transfers take place in such cases as: the transfer of a meat products store; the continuation of a joinery section when separated from other company activities; the takeover of an hotel; the takeover of a business selling cars of the same manufacture⁷⁷.

As in other countries the influence of the European Court of Justice decisions in this field have been important.

Germany

German jurisprudence has experienced considerable difficulty in overcoming the vagueness of §613a(1) BGB. German law differentiates between an enterprise or undertaking and a business or part of a business. The BGB mentions only the transfer of a business or part of a business. This is a differentiation not used by other judicial systems in this study.

The labour courts have not always been consistent in their approach to the definition of a transfer⁷⁸. There has been a distinction drawn between the criteria required for a transfer within the production sector and the service sector, with an emphasis on tangibles being transferred. There were also a number of contract changeovers, concerning security and cleaning contracts, which were held not to be transfers.

These cases took place before the case of Schmidt⁷⁹ (see chapter 7) which altered the whole approach of the German courts. This case was an Article 177 EEC reference from the Schleswig-Holstein labour court to the European Court of Justice and widened the interpretation of the meaning of a transfer of an undertaking.

Subsequently the Government has introduced new legislation, which became effective on January 1 1995 (see chapter 3).

Greece

Greek law is concerned with a change in the person of the employer. In Greek case law

a change of employer is said to have occurred if certain conditions are satisfied:

- the undertaking continues to exist as an economic unit
- the change of employer may have occurred in any manner, e.g. a contract or by statutory provision
- a legal relationship between the old and new employers is not necessary
- there is no absolute requirement for consent or knowledge by the employees, unless contained in the contract of employment or if it leads to worse conditions of employment.

The essential condition is that the undertaking should retain its identity.⁸⁰

Ireland

The Irish Courts have been heavily influenced by the European Court of Justice and the decisions of the UK courts. One case referred to by Professor Paul Davies⁸¹ is Bannon v Employment Appeals Tribunal and Drogheda Town Centre Ltd.⁸², which took place in the Irish High Court. This concerned the contracting out of security services for Drogheda town centre. The contract was won by Jae Brade Security Services Ltd who offered continuing employment to the appellant, but at a different location and at lower rates of pay. The High Court, prior to Rask⁸³, was able to say that contracting out of services was a transfer of an undertaking and that the business had retained its identity:

"The same security services are being provided by Jae Brade as were being provided before the change of company, and they are being provided for the same persons, the tenants of the shopping centre. So it is precisely the same business as before".

Italy

The mode of transfer has been given a broad meaning by the Supreme Court which held, on December 10 1986, that Article 2112 applied

"..whenever the owner of an undertaking changes while the organisation of its operating assets remains unchanged. This is true irrespective of the legal means by which this change of ownership is effected, and of whether certain assets are detached from the transferred undertaking and remain the property of the transferor".

Transfers by share acquisition are excluded (Supreme Court 3/7/92).

The concept of an undertaking has been treated narrowly, however. In a decision of 13 November 1986, the Supreme Court defined an undertaking as

"..a functional set of assets sufficient to begin or carry on a business activity, these assets being considered not only in themselves but in terms of their practical function".

Traditionally the Italian Courts have not regarded contracting out as a transfer of an undertaking. The view has been that a transfer of a contract does not lead to a real succession in the ownership of an undertaking. In a Decision of 4 December 1986, the Supreme Court held that a succession

"..does not constitute a transfer of an undertaking since the second operator's pursuit of a business activity derives from a separate source and a separate holding of the

franchise, without any derivative or causal relationship with the previous operation. Nor in this situation is it relevant...that the holder of the franchise which expired or was withdrawn, transferred the business assets to the new operator after the new franchise had been granted"⁸⁴.

The Netherlands

The Dutch courts have been influenced by the decisions of the European Court of Justice. There have been six reported Article 177 EC referrals to the European Court. This, according to Professor Birk⁸⁵, is because the Netherlands has no history of protection for workers involved in transfers. This has resulted in the Dutch courts relying upon the European Court of Justice decisions. There has, therefore, been an emphasis on the maintenance of the identity of the business transferred. Professor Birk⁸⁶ sees this as the perfect example of national courts co-operating with the European Court.

Portugal

There is limited case law in Portugal concerning the ARD. Most of the matters are the concern of collective agreements. An example of this is the Agreement concluded on December 23 1980 and renewed later. It was between the Cleaning Contractors Association and the trade unions. In July 1981 it was extended by government decree to the rest of the industry. Article 46 of the Agreement included the following:

- loss of contract does not lead to the termination of staff
- the successful tenderer will retain the staff

- the workers will retain all rights and privileges, although the new contractor will not be liable for outstanding debts.

The extension order was then the subject of a dispute in the Portuguese Constitutional Court, which eventually held that it did not conflict with the constitutional right to freedom of enterprise.

The courts have generally held that the replacement of contractors has not constituted a transfer of an undertaking. The Court of Lisbon took this view in a decision of April 17 1988⁸⁷:

"Article 37 of the Labour Contracts Law relates to transfer of a business or the right to operate a business, from one of the parties to the other, the transferor conveying to the transferee the business assets which represented the security for payments due to the employees...In the present case the second operator paid nothing to the first and received nothing from him. There is thus no basis in law for making him liable for debts with which he is in no way concerned and which cannot be secured against the assets of the new operator or those made available to him for use under specified conditions by the public authority which owns the business".

Spain

Generally the Spanish courts have not regarded a change of contractor as a transfer within the meaning of Article 44 of the Workers' Statute 1980, unless the infrastructure is transferred. In a decision of the Supreme Court of 8 July 1991⁸⁸ concerning a case

where the State took back tax collection management from a private agency, it was held that

"..the necessary conditions for one undertaking to be the successor to another, within the meaning of Article 44 of the Workers' Statute, are not satisfied on the principle that a distinction must be made between those public franchises which involve providing the operator with the infrastructure or basic business organisation to perform the service, in which case transfer of the franchise..would be subject to the acquired rights requirements of Article 44 of the Statute, and those..in which the operator is not provided with the basic means of operation..and Article 44 is not applicable".

In a decision of 5 April the same Court held

"There is no transfer of an undertaking or succession of one undertaking to another..there is no requirement to assume a previous employers' obligations when, as in the present case, the production unit to which the operation relates is not transferred and when neither the sectoral nor the conditions of contract deal with the labour law aspects".

Eduardo Gonzalez Biedma⁸⁹ sets out the courts' views as follows

1. A contract cannot be equated with an undertaking. An undertaking is an entity which performs the contract
2. In situations of changing contractors there is not a transfer of the contract, but the ending of one and the beginning of another

3. In cases where the basic infrastructure or business structure is transferred, Article 44 applies.

Conclusions

It is possible to say that there has been a lack of clarity in the law concerning transfers of undertakings. It is also possible to say that there have been a number of reasons for this. Firstly, the Government incorrectly transposed the ARD into UK law, by

1. failing to give adequate definitions of important terms such as the meaning of transfer and undertaking;
2. introducing a test so that the Regulations did not apply to 'non commercial' undertakings and thus attempting to exclude large sections of the working population;
3. introducing rules excluding the Regulations from certain insolvency situations and thus removing the protection of the ARD from employees in such a situation;
4. limiting the rules on consultation so that it only occurred where there were recognised independent trade unions, thus excluding a significant number of employees from this requirement.

The result of the Government's approach was to exclude employees from the protection of the Directive, including many employees who worked for local authorities. The Government's ambivalence towards the applicability of the Directive may have been a reason for many local government workers being dismissed because of redundancy as a result of compulsory competitive tendering. As the Parliamentary Opposition spokesperson asked of the Chancellor of the Duchy of Lancaster in December 1992;

"Will the Minister now attempt to give a straight answer....if the situation is as clear as he suggests in relation to TUPE, can he explain why the Foreign Office has suspended programmes for market testing until further clarification is given, the Welsh Office has told its health authorities to cease contracting out while it seeks legal advice and the Health and Safety Commission has put its programme on hold because it received contradictory legal advice".⁹⁰

This situation is as a result of a piece of legislation that the Government had introduced, albeit reluctantly, some eleven years earlier. The legislation was introduced reluctantly because it was a piece of legislation which was not in keeping with the Government's policies towards employment rights. The Government was intent on reducing legislative interference in employer/employee relations and pursuing an approach to industrial relations that was quite different from other Member States of the Community.

It is partly because of this opposition that the Regulations have been unclear and confusing. It is perhaps one of the problems of introducing legislation intended to apply to a number of States that do not all have the same approach to employee protection. It is also partly explained by the lack of definition in the Directive itself.

It is not possible to state that the problems experienced in the United Kingdom have been greater than the problems experienced in all other Member States. This is because there is not enough information available. It is possible to say that the problems experienced in the United Kingdom have been greater than most other Member States. This can be seen to be so from reading the report on contracting out of services,

prepared for the Commission in 1994. It is clear from this that the United Kingdom experienced significant problems. Other Member States had problems, e.g., Germany, where the result of the Schmidt case was unexpected and widened the scope of the Directive. The problems in other countries have, perhaps, been as a result of decisions of the European Court of Justice rather than of the Directive being transposed inadequately.

It is also against the United Kingdom that the Commission had the most significant number of complaints when it took action concerning failure to implement the ARD adequately. The two other countries that it took action against were Italy and Belgium. A basic problem is that the approach of the United Kingdom was different. Its ideological approach meant that it was extremely reluctant to introduce a measure that would be more suitable to countries with a corporate approach. The measure was intended to protect employees in certain situations. The UK Government's attitude is that such matters should be left to the parties concerned and should not be the subject of a Community Directive.

1. Wedderburn of Charlton, Baron (1986) The Worker and the Law London: Penguin
2. See the case of Föreningen Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation. (Case 105/84) (1985) ECR 2639 where the European Court of Justice held that the Directive only covers a person who is defined by national law as an 'employee'
3. McMeechan v Secretary of State for Employment (1995) IRLR 461
4. Employment Gazette October 1995 p380
5. Campbell, Martin and Daly, Michael (1992) Employment Gazette June p269
6. Employment Gazette 1995 October p380
7. Bevan, Julie (1987) Department of Employment Research Paper no 71 Barriers to Business Start Up: A Study of the Flow into and out of Self Employment
8. Collins, Hugh (1990) Independent Contractors and the Challenge of Vertical Disintegration to Employment Laws OJLS vol 10 no 3 p353
9. Stanworth, Celia and John (1995) The Self Employed without Employees: Autonomous or Atypical? Industrial Relations Journal vol 26 no 3 September p221
10. Harvey, Mark (1995) Towards the Insecurity Society: The tax trap of self employment London: Institute of Employment Rights October
11. IRS Employment Review October 1995 no 593 p3 - the company referred to is Allied Dunbar Assurance Ltd
12. The writer was personnel manager of this company in its early years
13. There is a wider definition contained in the Sex Discrimination Act 1975 S82 and the Race Relations Act 1976 S78 which is relevant for the purposes of those Acts
14. Wilson and others v West Cumbria Health Care NHS Trust - reported in IRS Employment Review August 1995 no 589
15. DJM International Ltd v Nicholas (1996) IRLR 76
16. Photostatic Copiers (Southern) Ltd v Okuda and Japan Office Equipment Ltd (in liquidation) (1995) IRLR 11
17. The decision in Photostatic Copiers has subsequently been over ruled in Secretary of State for Industry v Cook and others, reported in the Independent newspaper, January 15, 1997, p14
18. Wilson and others v St Helens Borough Council (1996) IRLR 320
19. Hay v George Hanson (Building Contractors) Ltd (1996) IRLR 427
20. COM(94) 300

21. Directive 91/383 EEC on supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed duration employment relationship or a temporary employment relationship OJ 1992 L206/19
22. Figures from the Labour Force Survey quoted in an article in 'The Guardian' newspaper January 18 1996 p16
23. R v Secretary of State for Employment ex parte Equal Opportunities Commission and another (1994) IRLR 176
24. Directive 75/117 on the approximation of the laws of Member States relating to the principle of equal pay for men and women OJ 1975 L45/19
25. Directive 76/207 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 OJ 1976 L39/40
26. The Employment Protection (Part-time Employees) Regulations 1995 SI 31
27. Lord Keith of Kinkel in Litster v Forth Dry Dock Engineering (1989) IRLR 161 said insolvencies were "a situation commonly forming the occasion for a transfer of an undertaking"
28. Ibid
29. Longden and Paisley v Ferrari Ltd and Kennedy International Ltd (1994) IRLR 157
30. Ibex Trading Co Ltd v Walton and others (1994) IRLR 564
31. Harrison Bowden Ltd v Bowden (1994) ICR 186
32. Litster v Forth Dry Dock Engineering (1989) IRLR 161
33. Secretary of State for Employment v Spence and others (1986) IRLR 248
34. Allan and others v Stirling District Council (1994) IRLR 208
35. Stirling District Council v Allan and others (1995) IRLR 301
36. Ibex Trading Co Ltd v Walton (1994) IRLR 56
37. Milligan and another v Securicor Cleaning Ltd (1995) IRLR 288
38. Cited in Lawtel, reference LTL 11/7/96: TLR 22/7/96
39. (1996) IRLR 438
40. (1996) IRLR 547
41. Botzen v Rotterdamsche Droogdok Maatschappij BV (Case 186/83) (1985) ECR 519 (1986) 2 CMLR 50
42. Duncan Web Offset (Maidstone) Ltd v Cooper and others (1995) IRLR 633
43. Michael Peters Ltd v Farnfield (1995) IRLR 190
44. Litster op.cit.

45. Griffin and others v South West Water Services Ltd (1995) IRLR 16
46. R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others (1994) IRLR 72
47. R v Secretary of State for Trade and Industry ex parte Unison, GMB and NASUWT (1996) IRLR 438
48. Berriman v Delabole Slate Ltd (1985) ICR 546
49. An example might be the National Health Service, many of whose functions have been transferred to NHS Trusts. Whereas the existing staff are guaranteed their current salaries on transfer, significant numbers of new staff recruited by the Trusts are in a local, and therefore different, pay system
50. Wheeler v Patel and another (1987) ICR 631
51. Anderson v Dalkeith Engineering Ltd (1985) ICR 66
52. Trafford v Sharpe and Fisher (Building Supplies) Ltd (1994) IRLR 325
53. BSG Property Services v Tuck (1996) IRLR 134
54. Litster see above
55. Adams and others v Lancashire County Council and BET Catering Services Ltd (1996) IRLR 154
56. Hansard HC 218 col 425 3 February 1993
57. Competitive Tendering in the Public Sector 1988
58. Napier, Professor Brian (1993) CCT, Market testing and Employment Rights London: Institute of Employment Rights
59. Hansard HC [14] col 683
60. Hansard HC 21/1/1993 Standing Committee F col 508
61. (1986) ECR 1119
62. (1985) IRLR 449
63. (1993) IRLR 265
64. Dines and others v Initial Health Care Services and Pall Mall Services Group Ltd (1994) IRLR 336 (1995) ICR 978
65. Cirrel, Stephen and Bennett, John CCT Law and Practice Longmans loose leaf
66. Ibid
67. Wren and others v Eastbourne Borough Council and UK Waste Control Ltd (1993) ICR 955 (1993) IRLR 425
68. Kelman v Care Contract Services Ltd and another (1995) ICR 260

69. McMullen, John (1994) Contracting Out and Market Testing - the Uncertainty Ends? ILJ vol 123 no 3 September 230
70. 15-2-95 EAT 554/94 reported in IRS Employment Review July 1995 No 588 IRLB 11
71. Birk, Professor Rolf (1994) Contracting Out Of Services Report for the European Commission
72. (1986) ECR 1119
73. Birk, Professor Rolf op.cit.
74. Davies, Paul (1994) Contracting Out Of Services Report for the European Commission
75. Landsorganisationen I Danmark v Ny Molle Kro. (1989) IRLR 37
76. (1992) ECR 5755
77. Birk, Professor Rolf op.cit.
78. Ibid
79. (1994) IRLR 302
80. Iliopoulos, Constantin (1994) Contracting Out Of Services Report for the European Commission
81. Davies, Paul op.cit.
82. (1992) ELR 203
83. (Case C-290/91) (1992) ECR 5755
84. Biedma, Eduardo Gonzalez (1994) Contracting Out Of Services Report for the European Commission
85. Birk, Professor Rolf op.cit.
86. Ibid
87. Biedma op.cit.
88. Biedma op.cit.
89. Ibid
90. Ms Mowlam MP to Mr Waldegrave MP Hansard HC 216 col 16 December 14 1992

Chapter 9 A consideration of the proposals for a revised ARD¹

Introduction

The purpose of this chapter is to examine the proposed Directive. The Department of Employment, in its document², provided a comparison of the original Directive and the proposed changes (see Appendix A). It is intended to consider these changes with regard, firstly, to the extent to which they overcome the 'problems' the original Directive is perceived as having and, secondly, to what extent they take into account the various views expressed by a number of organisations and individuals. Finally there will be a consideration of the position of the proposed Directive in the United Kingdom and its approach to consultation and employee rights.

The views of the following will be taken into consideration;

1. Those organisations and individuals that took part in the consultation exercise conducted by the UK Government between October and December 1994³;
2. The House of Lords Select Committee on the European Communities, which produced a report in March 1996⁴ (hereafter referred to as the House of Lords Committee);
3. The Committee of the Regions⁵ and the Economic and Social Committee of the European Union⁶.

4. The UK Government and the European Commission.

The hypothesis to be tested will be that the new Directive, despite the history of litigation and consultation, will not solve the problems caused by the original ARD. Instead new difficulties and litigation will result. This will be exemplified by creating a number of models of the new Directive.

Purpose of the Directive

The Commission commences its document⁷ by providing that

"The Directive has proved to be an invaluable instrument for protecting employees in cases of corporate reorganisation, ensuring peaceful and consensual economic and technological restructuring..."

There are no examples described in the document, but a link is made between the original ARD (the 1977 Directive will be referred to as the original ARD and the proposed version will be referred to as the proposed ARD) and the increasing number of mergers and acquisitions that have taken place as a result of the establishment of the internal market. The Commission quotes figures⁸ showing this increased activity. This is only partially reproduced here to show this development.

| Year | National | EC | International |
|-----------|-------------|-------------|---------------|
| 1983/84 | 101 (65.2%) | 29 (18.7%) | 25 (16.1%) |
| 1989/1990 | 241 (38.7%) | 257 (41.3%) | 124 (20%) |

National is a merger or acquisition between two or more firms of the same nationality; EC includes firms from at least two Member States; International involves firms from outside the EC.

It is clear that activity has increased and become more international during this period. The Commission points out that the original ARD was part of an overall programme to protect employees. It does concede that

"It could be, however, argued that the Directive's failure to provide for greater flexibility in the event of transfers of undertakings of insolvent businesses or of undertakings facing major economic difficulties, as well as its failure to cover explicitly the transnational dimension of corporate restructuring, may have jeopardised or at least prejudiced the very objectives it was intended to achieve".

Thus the two major failings identified are

- the problem of applying the Directive in situations of insolvency and
- the lack of sufficient rules concerning transnational restructuring.

These are not the only problems. There are others, such as the application of the Directive to the contracting out of services and to small businesses. It might be possible to consider that one of the important problems of the original ARD was that it applied, whether by intent or as a result of subsequent litigation, to a variety of different situations which did not necessarily require the same solution. Some of these situations are

- the transfer of small businesses

- contracting out of services
- insolvencies
- transfers of multi national undertakings

One of the conclusions of this study will be that in attempting to provide for these situations in the new ARD the Commission has made a proposal which will be the cause of further problems of definition.

Proposed Article 1 Clarification of transfer

The original Directive applied to transfers "as a result of a legal transfer or merger". The proposed Directive widens the scope of this definition to transfers "effected by contract or by some other disposition or by operation of law, judicial decision or administrative measure".

The problem, according to the Commission, has been that the linguistic interpretations of the term 'transfer' have been different as between Member States. The French version refers to "cession conventionnelle" or contracted transfer. The Dutch, German, Italian, Spanish, Portuguese and Greek versions are similarly limited. The new definition reflects the wider interpretation adopted by the European Court of Justice. In Daddy's Dance Hall⁹ the Court gave a broad interpretation and stated that the Directive applies as

"soon as there is a change resulting from a conventional sale or from a merger, of the natural or legal person responsibleand it is of no importance whether the ownership

of the undertaking has been transferred".

In this case there was no contractual relationship between the first lessee and the second lessee, even though the Court held that the "second lessee has been in fact substituted for the first lessee". One lease came to an end and another was granted and a transfer took place, albeit in two stages.

The lack of an apparent need for a relationship is important when considering the transfer of contracts between two sub contractors via the contractor as in Dines v Initial Health Care Services¹⁰.

According to the UK Government's commentary, the amendment would not appear to have any effect upon the English language version and would not extend further the scope of the TUPE Regulations.

The Economic and Social Committee felt that the new definition was both "more explicit and more exhaustive", but felt that the definition should go even further and specify that it applies to "all transfers.. which affect workers".

This is a view that is supported by the Trades Union Congress (TUC) and the European Trade Union Confederation (ETUC) in their evidence to the House of Lords Committee. The reason for their concern was that the revision does not expressly extend the Directive to cover share transfers. They pointed out that the recommendation of the Economic and Social Committee in 1975 when they had considered the original Directive had been that concentrations between undertakings

which did not involve a change of employer should be included. Lord Wedderburn, a member of the House of Lords Committee, suggested that the only reason that it had been excluded in 1975 was because the matter was handled by DG V and that competition law was handled in other Directorates¹¹. It does, however, seem unlikely that this amendment will facilitate such a widening of the Directive.

Distinction between an activity and an entity

The proposed Directive, in Article 1(1), also draws the distinction between the transfer of an economic entity retaining its identity and the transfer of an activity only. In the proposal a transfer of an activity only will not be a transfer but an activity plus an economic entity that retains its identity will be a transfer. This appears to be a step back from the decision in Schmidt¹² where the issue was one of a continuation of identity. The problem, according to Professor John McMullen¹³,

"is that in many of the extreme cases in the context of contracting out already decided since Christel Schmidt such as the changeover of cleaning contractors (in Dines where there was little more than the resumption of an activity) it was specifically held that there was a transfer..".

This is a concern of the UK Government. When the proposed revision was first considered by the House of Commons Select Committee on European Legislation¹⁴, the Government's view was expressed by Ms Ann Widdecombe, Minister of State at the Department of Employment:

"The Government has long believed that the existing Directive is unduly rigid, hinders the development of good business practice and competition particularly in relation to the contracting out of services...The Commission's intention to exclude from the Directive's scope the transfer of an activity...is welcome as recognition of the present problems and uncertainty in this area".

The Commission's version is the latest in a number of proposals to try to restrict the scope of the Directive. During the negotiations, the French representatives put forward their own version, which was to exclude from the Directive

- transfers out of a function (i.e. part) of a business
- transfers between providers of a function
- transfers taking the function back in house

unless there is a transfer of assets, tangible or intangible¹⁵.

Apparently this did have some support, but seemed unlikely to gain unanimous agreement. The problem of lack of clarity in the proposed ARD was recognised by Ms Widdecombe¹⁶ when she stated

"The Government is concerned, however, that the proposed text is not yet sufficiently precise to provide legal certainty and clarity for employers, employees or national courts".

Lack of clarity

This lack of clarity is a criticism that is levelled at this new definition by many of the

parties to the consultation process, as will be shown below. The issue is whether the Directive should apply to the process of contracting out of services and, if so, to which part of that process.

The Confederation of British Industry (the CBI) criticised the lack of clarity of the proposal and stated that "it was never envisaged that the original Directive should cover such situations". They suggested an alternative draft to Article 1(1), which they felt would exclude contracting out¹⁷:

"The transfer of an economic entity which retains its identity, taken to mean a self contained set of tangible and intangible elements, and whose function is effectively continued or resumed, shall be deemed to be a transfer within the meaning of this directive.

However, the transfer of a mere activity, which is in the nature of a support or ancillary service to the trading objective of an undertaking, resulting from a contract whereby the undertaking entrusts to another undertaking on its behalf the performance of this activity, whether or not it was previously performed directly by the first undertaking, shall not in itself constitute a transfer within the meaning of this Directive. Similarly, simple loss of such an activity by the first undertaking shall not constitute a transfer within the meaning of this directive".

This is a view supported by employers and employers' organisations. The Institute of Directors felt that the 'transfer of an activity' should be excluded altogether. The Post Office welcomed the proposed distinction. It has had particular problems resulting from

the franchising of post offices. It felt that the resulting operation, after the transfer to the franchisee, "stays very much under the control of Post Office Counters". They wanted this included and suggested their own amendment:

"The transfer of part of an undertaking, where the conduct of the principal activity of the transferor remains under the control of the transferor as an integrated agency, which includes the undertaking transferred to the transferee, shall not be deemed to be a relevant transfer under this Directive".

It is suggested that this might lead to significant litigation as to where the line would be drawn between those franchise operations that were affected by the Directive and those that were not.

Not all employers agreed with the need to change the definition significantly from the original ARD. The Heating and Ventilating Contractors Association, which represents approximately 1200 companies in its industry, including some 500 companies in the building maintenance services business, said that the Directive had caused "fundamental problems", but

"In spite of the problems posed by the Directive, the building services maintenance industry has perforce made rapid progress in adjusting to the requirements of the Directive. Indeed, the existence and effects of the Directive are now accepted as a commercial fact of life".

There were further problems connected with removing contracting out from the effects

of the Directive. Planned Maintenance Engineering Ltd, a contracting company employing some 1000 staff, stated

"...that having accepted TUPE, and found practical ways of managing our way through it, we have in fact already accepted that we have inherited previously accumulated entitlements with the employees (redundancy etc). In fact we price the job to inherit these entitlements, but we also price on the basis that we can pass these on to others when we lose a contract at the end of its term".

The concern is that if the rules were now to change and contracting out were no longer to be a transfer within the meaning of the Directive, then a large number of undertakings would be left with significant redundancy costs when they lose a contract. Instead of being able to pass on the employees to the new contractor, they would remain with the transferor, together with the consequent liabilities.

The Heating and Ventilating Contractors Association also highlighted other problems which resulted from the transfer of contracts. Firstly there is a problem with obtaining sufficient information about existing staff liabilities from the present contractor so that costs can be assessed in order to put in a tender; secondly there is, apparently, a problem with contractors who lose tenders and give the staff to be transferred a significant wage increase prior to the transfer; and thirdly there is also, apparently, a problem with contractors who lose a contract and then replace employees due to be transferred with "employees of a lower calibre", thus shedding unwanted labour "leading to a form of social dumping".

These are real problems to the organisations concerned and are not issues raised by the CBI in its submission to the UK Government. They are issues, however, that will need to be dealt with whether contracting out continues to be part of the Directive or not. It is suggested that this is a problem for national legislation, rather than for Community law. It would be an extremely difficult area in which to legislate and could best, perhaps, be solved by agreements amongst the employers themselves. It is perhaps a reflection of the lack of dialogue between employers and employees and Government in the United Kingdom, unlike many other Member States, that employers look to the state for a solution to problems that could best be solved by and among the social partners.

The trade unions have taken a different point of view both from the Government and those interests represented by the CBI. The Civil and Public Services Association stated, in its reply to the Government, that in the area of market testing the

"Acquired Rights Directive and TUPE have made good business practice incumbent. Private contractors have been obliged to seek legitimate means of providing cost-effectiveness without resorting to redundancies of staff and short changing of the public who expect quality of service".

They felt that the attempt to distinguish between the transfer of an economic entity and the transfer of an activity would only create greater "ambiguity" and that it would "spur a series of legal challenges".

The Trades Union Congress (TUC) also opposed the attempt to exclude sub contracting

from the scope of the Directive and stated that they have suggested to the Government that they should discuss with the social partners how "a new model of competition in the public sector could be developed which reflects the application of TUPE and the ARD". The focus should be on service quality rather than a continual reduction in labour costs.

One of the possible reasons for the UK Government not publishing the results of its consultation exercise was that the views expressed were predictable. On the whole the employers were opposed to the inclusion of sub contracting and the trade unions were in favour of the position which they felt had been reached by the European Court of Justice. It is true that these views are predictable, but this does not mean that they are not valuable. The problem, perhaps, is that there is disagreement about the objectives of the Directive and of the role of Community law. The CBI felt that these issues should be settled by national law and invoked the principle of subsidiarity. The reason, one must assume, is because the CBI believe that their approach is the same as that of the UK Government. In their reply to the Government they state that "they fully support the Government approach". The TUC believed that the rationale for revising the Directive was only to codify and clarify the law, not to weaken the rights of workers guaranteed by the Directive.

It is perhaps unfortunate, but not surprising, that the debate about the role of the Directive, the role of Community law and of subsidiarity are couched in terms of short term self interest rather than a longer term perspective.

A local authority perspective¹⁸ is added by the contributions of the local authority

associations and individual authorities. Their position is a request for legal certainty and is perhaps best summed up by the Chief Executive of Durham County Council who states

"In terms of local authority competitive tendering, there is now a fair degree of certainty of those situations in which TUPE will apply. Contractors seem now readily to accept the position and many have positive comments to make about the benefits to them of a workforce transferring on familiar terms and conditions. It seems to me to be inevitable, if the proposed change in Article 1 is introduced, that we will be back to the days of uncertainty and expensive litigation".

In their evidence to the House of Lords the local authority associations¹⁹ suggested that, until Wren v Eastbourne Borough Council²⁰, there was a divergence between the view of the European Court of Justice and the view of the UK Government as to whether the Directive applied to contracting out. The result was "considerable uncertainty and expense".

The concern of these Associations confirmed the concern of the Chief Executive of Durham County Council (above) that

"It is of paramount importance that the scope of any new Directive is clear and does not give rise to new areas of uncertainty".

There was also some concern expressed to the House of Lords Committee that the exclusion of contracting out was also discriminatory as this would affect a much larger

proportion of women than men.

The House of Lords Committee confirmed that "there was general agreement that the wording proposed was not helpful and that the proposal was more likely to create new problems". Their proposal was that the Directive should give a non exhaustive list of factors to be considered when determining the applicability of the Directive to a particular case. This list should include the following matters

- "- the organisational structure of the activity or activities concerned;
- the continuity, as regards character, extent and time, of the activity or activities concerned;
- the employees taken over by the transferee;
- the physical assets, contracts and goodwill transferred."

The Committee commended the wording from Spijkers²¹ as a guide to the Community draftsmen. It is a return to the check list approach to decide whether the Directive applies in a particular case. The Committee made the point that no one factor was decisive, but that one needs to look at all the facts to decide whether a relevant transfer had taken place. This, however, seems to invite the very uncertainty that the Committee and its witnesses were opposed to. The Committee felt that the test should be whether a business retains its identity.

The Law Society's Employment Committee accepted that the Commission's proposal was a compromise as did the House of Lords Committee. If this is to be the case, however, it must be questionable as to whether any amendment can be produced and

agreed that is also clear and open. Compromise may be inevitable given the role of the social partners in the legislative process. If the representatives of employers and employees are given a significant role, then a compromise or disagreement is inevitable on such a piece of legislation as the proposed ARD, upon which strong views are held.

European Parliament

This amendment has created much opposition within the European Parliament. The proposal was first put forward by the Commission to the Council on September 8 1994. The letter, sent by Commission member Karel Van Miert²², suggested that the Council should act in May 1995, which meant that Parliament and the Economic and Social Committee should deliver their opinions by February 1995. Such was the opposition within the Economic and Social Committee that an opinion was not forthcoming and created the possibility of a "constitutional clash" (see below - Commissioner Flynn).

On January 16 1996 a debate in the European Parliament took place on the subject of the revised Directive. Mr Steven Hughes MEP, Chair of the Employment and Social Committee, said

"So, these are our concerns: that we might have fresh legal uncertainty, that employees' rights might be reduced and that women employees in particular might be negatively affected. Our question to the Commissioner is very simple. Will he give us a guarantee in some form that he will leave Article 1 as it appeared in the original directive? Will he accept an amendment, an opinion that he sends the Council? With

that understanding, we can make progress..."

The response from Commissioner Flynn, at the end of the debate, was to undertake to discuss the matter further with his colleagues and return. Accordingly the Commission, on February 7 1996, announced that it was dropping the amendments to Article 1(1).

"Mr Pdraig Flynn, EU Commissioner for Social Affairs, advised fellow commissioners to drop the clause to avoid a 'constitutional clash' with the European Parliament".²³

Despite this concession, Members of the European Parliament and the Committee on Social Affairs and Employment put down a total of 40 amendments to the Commission proposals.

It was proposed, however, that the Commission will produce a new document in the latter part of 1996 discussing, and perhaps clarifying, the definition of a transfer of an undertaking. It is not clear what, if any, is the legal status of this document. As of December 31 1996, this document had not been produced.

Proposed Article 1(3)

This provides that the new Directive should apply to "public or private undertakings engaged in economic activities whether or not they are operated for gain". The aim is to exclude such provisions as the commercial venture test put into the original TUPE Regulations by the UK Government by accepting the view of the European Court of

Justice in Dr Sophie Redmond Stitching²⁴. In this case the Advocate General had pointed out

"The text of the Directive itself does not make any distinction between the undertakings with a commercial purpose and others...the Directive is part of a Community programme of social action".

Proposed Article 1(4)

The original Directive did not apply to sea going vessels, although, as the Commission pointed out²⁵, France, Germany, Italy, Spain, Portugal and Ireland have applied the principles of the Directive to such vessels. The UK Government also stated that the TUPE Regulations are capable of being applied to the transfer of ships, provided that this involves more than a transfer of assets²⁶. The Government interpreted the proposed Directive as "attempting to apply the same approach at a European level and not to require any change to UK legislation"²⁷.

Conversely the National Union of Maritime, Aviation and Shipping Transport Officers (NUMAST) felt that to apply the Directive to situations where complete companies were sold, but not to apply it in a situation where a single ship was transferred was "perverse and unfair".

The discretion provided by the proposed Directive is to allow Member States not to implement the provisions concerning consultation and information. There are a considerable number of employees who are affected. Figures provided by the National

Union of Rail, Maritime and Transport Workers to the House of Lords Committee showed the total employees of the merchant marine of Member States to be 165.555 employees as at December 31 1993.

The House of Lords Committee started from the position that one group of employees should not be treated differently from another group unless there was some objective justification and approvingly quoted the ETUC as saying that "the fundamental principle remains that all workers should enjoy the equal protection of the Directive".

The Commission does not justify the exclusion apart from saying that it provides the appropriate flexibility required by the maritime sector. It is, however, difficult to justify why employees working on board a cross channel ferry, with a voyage time of between one and perhaps six hours, should be treated differently to the employees of a company working in Dover or Calais docks. As a result of the discretion permitted in the proposed Directive, it is conceivable that crews working for different ferry companies on the same route could be treated differently in identical situations.

This is the first of a number of discretions permitted by the Directive which may result in very different levels of protection being offered to employees in different Member States. In some Member States it will be possible for the employees to be deprived of choice in the matter of a transfer. The European Court of Justice had held in Katsikas²⁸ that for an employee not to be free to choose his employer "would undermine the fundamental rights of the employee". The Commission, with the support of the employers²⁹, felt that this would be appropriate in the case of sea going vessels.

Proposed Articles 1(5), 3(4), 4(3), 4(4) and 4(5)

These Articles are taken together here as they are all concerned with transfers and insolvency. The original Directive was silent concerning the problems of insolvency. One of the problems, highlighted in the case of Abels³⁰ was the apparent contradiction between the aims of the Directive in protecting employees and the need to facilitate the rescue of insolvent undertakings in order to save jobs. Professor Paul Davies, in his evidence to the House of Lords Committee, stated that

"..although the argument made by the Commission is not implausible, it has not yet been demonstrated by reliable research that the problem actually exists in practice..".

The European Court of Justice perceived the problem in Abels, however, and this perception has been adopted by the Commission in its proposals. The Articles in the proposed Directive give Member States the discretion to

1. Exclude the provisions of the Directive where the insolvent transferor is in the process of liquidation proceedings, but not where it is in proceedings which will lead to its rescue. The liquidation proceedings will need to be under the supervision of a competent public authority, which, according to Article 3(4) "may be an insolvency practitioner authorised by a competent public authority".

2. Allows the Member State, in non liquidation proceedings, to provide for the non transfer of any debts owing to employees by the transferor before the date of the transfer or before the insolvency proceedings. Apart from the need for the supervision

of the insolvency practitioner, there is a condition which provides that employees must at least receive that level of protection provided by Directive 80/987, which guarantees certain payments to employees from insolvent employers.

3. The Member States may permit employers, or persons exercising the employer's powers, and the employees' representatives to change the terms and conditions of employment in order to ensure the survival of the undertaking. These parties may also agree that there are ETO reasons justifying dismissals.

4. Member States may confer on the judicial authorities the power to alter or terminate contracts of employment or employment relationships in order to ensure the survival of the undertaking.

All these powers are discretionary and could lead to very different results in different Member States.

The CBI's view of the distinction between liquidation and non liquidation proceedings is that it is unclear and unhelpful. They suggested

1. that it could encourage liquidations instead of some alternative insolvency proceedings.

2. that it resulted in unequal treatment of employees in different insolvency situations, which was unfair.

3. that the provisions providing for agreement between the employees and employer may be impractical because of the time that they might take. Further that there was scope for employees to delay the "efficient handling of the insolvency situation" by

challenging whether their dismissals or changes in terms of employment were necessary to ensure the survival of the undertaking.

The need for clarity was important to avoid litigation. Their suggestion was that the Directive should refer to "recognised insolvency or reorganisation procedure". Member States could then seek recognition for their existing or future procedures. There is no suggestion as to whom should be given the authority to recognise individual Member States' insolvency procedures and which were to be defined as liquidation proceedings and which were not. The implication is that it is merely a question of the Member State registering their procedures and that then it would be clear when the Directive applied and when it did not.

The CBI's preferred position is, however, to exclude all insolvency proceedings from the scope of the Directive as its inclusion is "in the interests neither of industry nor employees". Their concern is the effect that inclusion has on the sale and rescue of the insolvent company.

It is not clear how the removal of insolvency proceedings from the Directive actually helps its objectives, namely the protection of employees in a transfer of their undertaking. To remove insolvent undertakings from the effect of the Directive is to remove employee rights and to invite abuse by employers. Such abuse could result in undertakings starting insolvency proceedings unnecessarily in order to avoid their potential obligations under the Directive.

Mr Stephen Hill³¹, in his evidence, exposed the fundamental contradiction in the

United Kingdom between the Directive and insolvency proceedings and, perhaps, inadvertently produced the strongest argument in favour of keeping such proceedings within the scope of the Directive. He stated

"One has to consider where the duty of an insolvency practitioner lies. Different Member States will have different laws and views about it. The United Kingdom insolvency culture is that the insolvency practitioner is there to get the creditors' money back. He is the creditors' man".

The CBI's views, understandably, are endorsed by other employers participating in the consultation process. One notable exception being the Chemical Industries Association who supported the changes proposed by the Commission.

The CBI's attitude was also endorsed by the Society of Practitioners of Insolvency, who describe the legislation as "an impediment to the rescue of businesses..". In their evidence they claim that there are numerous examples of cases where the prospect of taking over accrued liabilities under employment contracts has either deterred prospective buyers or forced them to discount the price. Their preferred option is no Directive at all and their second preferred option is a Directive that excludes all insolvency situations.

The TUC, like the CBI, was also unhappy with the proposals with regard to insolvency situations. Their concern was that they would have a "detrimental effect on workers' rights", because

I. the protection offered by the Insolvency Directive was very weak.

2. there is no justification in giving employers the right to apply to a court to make unilateral changes to contracts of employment or to implement dismissals.

3. It is unlikely that a trade union would have access to the financial information which would enable them to challenge the employers' judgment that changes were necessary to ensure the survival of the undertaking. This, of course, also applies to the employee representatives that the employer might be consulting within the United Kingdom, who will have been newly elected under the CRTUPE Regulations.

This suspicion of the judicial authorities being able to make decisions on employment and terms of employment is repeated by the CPSA who stated that this was the same as allowing employers to make unilateral changes.

The TUC concludes its evidence on this subject to the House of Lords by saying

"The insolvency proposals lack empirical justification, are inappropriate to the UK insolvency regime, cause difficulties of transposition, will lead to increased litigation and a substantial reduction in employee protection".

Their suggestion is that one should provide that employment debts do not transfer in insolvency situations, providing that the protection offered under the Insolvency Directive is increased. This is an issue that will be considered below.

One of the problems for the United Kingdom is highlighted in the evidence of the European Insolvency Practitioners Association. They pointed out that it is difficult for their members to be specific with comments about the proposals in the United Kingdom

because "...their own law and administration of the law are in many ways totally different from that of the United Kingdom, being mainly Court driven". There is a greater suspicion within the United Kingdom of the use of the courts in industrial relations, as shown by the TUC's evidence to the House of Lords.

Committee of experts

On July 19 1995 a joint meeting of the European Parliament's Committee on Social Affairs and Employment and the Committee on Legal Affairs and Citizens' Rights took place. The meeting was held to consider insolvency issues and the proposed Directive. A panel of invited experts³² gave evidence on the subject.

One of the experts, Mr Werner Bayreuther, had been Director for Social Affairs and Employment at Treuhand from 1991 to 1994. Treuhand was the agency responsible for privatising companies in the former East Germany. This must, arguably, have been a period of the largest series of transfers of undertakings in the Community ever. Treuhand handled 13 thousand companies during this period. Mr Bayreuther felt that the ARD had produced positive results because of the co-operation extended by works councils. He did not agree with the attempt to distinguish between different types of insolvency. Of the 13 thousand companies handled by Treuhand at this time 3400 had gone into insolvency proceedings, but only 400 of those had been declared bankrupt. The rest had been saved by the sale of parts which resulted in the saving of, he said, some 110 thousand jobs.

He felt that the attempt to distinguish liquidation proceedings from other insolvency

proceedings was difficult because at the beginning of the process it is not always possible to say whether the business will be rescued or liquidated. This is a view supported by one of the other experts, Mr Stephen Cavalier³³, who endorsed the view of the German Bundesrat which considered the issue and stated ³⁴

"The differentiation is inappropriate because in the beginning of an insolvency procedure it is uncertain whether it will come to a continuation of a business (with different forms) or its liquidation, Furthermore, the aim of an insolvency procedure can change during the time of the procedure".

For different reasons one of the other experts, Madame Foulon, of the Labour Relations Directorate of the Conseil National du Patronat Francais, felt that the proposals would not protect jobs. She said that "it is the survival of companies that will protect jobs, not the text of a directive"³⁵.

The problem exposed by these experts is that the evidence that the ARD is an hindrance to the rescue of jobs during insolvency is mainly anecdotal. There is no firm evidence, backed up by research, that there is a problem. As Mr Cavalier explained³⁶;

"It is difficult to see the basis on which the Commission states..that it is 'firmly convinced' ..that there must be a reduction in employee rights...The onus must lie with the Commission to provide evidence of any prejudicial impact..".

The concern, as Professor Paul Davies explained at the same meeting, is that it is the creditors who will suffer from the application of the Directive to insolvency situations.

If a potential transferee is required to employ all the staff of an insolvent transferor on the same terms and conditions of employment, then a lower price is likely to be offered compared to a situation where the transferee had a choice of which, if any, staff to take. The creditors of the transferor will therefore receive less from the sale. If there is only anecdotal evidence concerning the effect of the Directive on transfers out of insolvency, then the decision for the national state is whether to give preference to the creditors of an insolvent business or whether to give preference to job protection. There is no evidence that the two views coincide as is proposed. It is suggested that this choice is left to the Member State, because of the discretion permitted in the proposed Directive, which could result in significant differences in protection offered by different Member States.

The second point made by Professor Paul Davies, both to the Committees of the European Parliament and to the House of Lords, is that if there is a problem it does not necessarily coincide with the distinction between liquidation and non liquidation procedures. The question should not be about whether a business goes into liquidation or not, but whether a transfer takes place. "The Directive is, or ought to be, concerned with the fate of the transferred businesses and their employees, not with the fate of the transferor as such"³⁷.

The solution that Professor Davies proposed was the same as that put forward by the TUC, namely not to require the transfer of employment debts from the transferor in situations of insolvency. The approach was suggested by Advocate General Slynn (now Lord Slynn and Chair of the House of Lords Committee) in Abels³⁸;

"...if the Directive had made a clear provision that pre existing debts were not the liability of the transferee, it would go some, perhaps a substantial, way to suggest that the risk of a potential purchaser being deterred from buying would be reduced".

This, of course, is provided for in the proposed Article 3(4). It is Professor Davies' suggestion that, without further research and some greater safeguards, this non transfer proposal would be sufficient. This cautious approach has the significant advantage of ending concern about the distinction between liquidation and non liquidation proceedings. It is unlikely, of course, to satisfy the employers who think that the Directive should be excluded from insolvency situations.

The exclusion of insolvency is suggested by employers because of the alleged effect it has on rescues and resulting returns for creditors. It is, however, arguable that insolvency is a unique situation and requires unique treatment. Perhaps it requires special attention and needs to be looked at in conjunction with Directive 80/987/EEC, resulting in a new Directive concerned with insolvencies and balancing the interests of both creditors and employees. If this is not practicable, which seems likely, then its inclusion within the proposed ARD should surely be concerned with the objectives of the proposed ARD, namely employee protection in the event of a transfer. It is difficult not to conclude that the objective of the insolvency amendments within the new ARD are there to weaken the Directive and work towards 'creditor protection' rather than employee protection.

The potential differences between the United Kingdom and other Member States are highlighted by the House of Lords Committee in giving its opinion on the insolvency

proposals. Of concern were the proposals to allow agreements between employers and employees and/or the courts to amend contracts of employment. The Committee points out the "novelty" of this approach in the United Kingdom, but notes that the proposals are discretionary. This need to apply the Directive in different Member States with different approaches to industrial relations/collective bargaining may be the reason for such discretion within the proposed Directive. The result, however, may be to create differing levels of protection in different States.

Proposed Article 2

Proposed Article 2(2) ensures that Member States cannot exclude from the Directive contracts of employment or employment relationships solely because of

1. The number of hours worked or to be worked
2. The employment contracts being of a fixed duration within the meaning of Directive 91/383/EEC
3. The employment relationship being of a temporary nature within the meaning of Directive 91/383/EEC

The protection given to these employees is without prejudice to "national law as regards the definition of contract of employment or employment relationship"³⁹. The UK Government interprets this ⁴⁰ as meaning that Article 2(2) is without prejudice to Article 4(1), second paragraph, which states

"Member States may provide..shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect

of the protection against dismissal".

This, according to the UK Government, means that all these categories of employees with less than two years service will not be protected by the Directive. Fixed term contracts, therefore, of less than two years duration and temporary contracts of less than two years duration will not be protected. The UK Government's determination that this two year rule will apply is exemplified by its confirmation in Regulation 8 of the CRTUPE Regulations. It is a paradox, for example, to suggest that temporary contracts should not be excluded, but also to say that temporary contracts of less than two years duration are excluded. The insistence of the Government of the two year qualification rule may have the effect of negating any improvements introduced by the proposed Directive in this respect.

Gender issues

There is also a gender issue that applies to this proposal and to the attempt to exclude contracting out:

1. 58% of employees in the public sector are female
2. Whilst 24.6% of all employees work part time, 44.2% of women work part time
3. Women constitute 86% of all part time employees
4. 47.2% of women employees are either part time or temporary or both
5. Women make up 56% of temporary employees, including those on fixed term contracts⁴¹

In a study by the Equal Opportunities Commission⁴² of the first round of competitive

tendering in local government, it was estimated that, in the sample studied, 96% of the net job loss that occurred were jobs held by women. Part time employment fell by 22% during the same period. This was during a period when the original ARD had been transposed, albeit incorrectly, into UK law. The attempted protection offered by the proposed ARD is to be welcomed, but it is questionable as to how it will help such employees when they are required to have a minimum of two years service.

Definition of employee

Of further concern is the decision to continue to leave to Member States the definition of employee. This confirms the decision of the European Court of Justice in Mikkelson⁴³ which has been previously considered. The Commission accepted that there is a wide variation within national laws but concludes

"However the Commission considers, after long discussions with the social partners and national experts, that the introduction of a Community wide definition for the sole purposes of this Directive would create rather than solve problems".

It can only here be conjectured as to how this decision was reached, but one must assume that obtaining unanimous agreement at the Council of Ministers for a Community wide definition of the meaning of employee would be difficult. Professor Hepple, in his evidence to the House of Lords Committee, explained that this lack of definition has been a source of frustration for those who drafted the original Directive. The original draft (considered at length by a Committee of Experts, of which Professor Hepple was one, in 1974) referred only to the employment relationship in the English

version. The final version was adopted after doubts that the word 'travailleur' would be sufficient to cover all forms of the relationship. The result has been that in France, for example, the definition has been interpreted to cover most employment relationships, whilst, in the United Kingdom, the definition has been limited to those with a contract of service.

Proposed Article 3(1)

Joint liability

In the original Directive, joint liability was discretionary. The proposed Directive makes it obligatory but individual Member States will be able to limit the transferor's joint liability to "those obligations which arose before the date of transfer and fall due within the first year following that date".

The Commission reported⁴⁴ that seven Member States had introduced some form of joint liability. Within these seven there were differences concerning the length of time during which the transferor remains jointly liable with the transferee, e.g. in Spain the period is three years, but only one year in the Netherlands and Germany. The justification for this proposal by the Commission is surprising given their approach to the different national definitions of employee. The justification is that "these wide variations in national law and practice expose one of the weaknesses of the Directive as a measure of harmonisation".

In the consultation exercise carried out by the UK Government⁴⁵ there were a total

of 242 replies opposing the principle of joint liability and only 19 supporting the principle. Of those 242 opposing there were 177 which were replies from members of the Exclusive (Plymouth) Brethren. Their concern was put forward in the form of a written statement to the House of Lords Committee⁴⁶. They were worried that they would not be able to sell their businesses because it would mean becoming jointly liable with non believers⁴⁷. Their views were given one sentence in the report of the House of Lords Committee.

Unknown liability

There is a discretionary element which permits the Member State to limit the liability of the transferor to those liabilities that arose before the date of transfer (see above). The issue of being liable for unknown expenses incurred by another is one of concern. Gateshead Metropolitan Borough Council⁴⁸ stated

"The proposed joint liability on pre-transfer obligations was felt to be unhelpful as it appeared that a local authority could potentially be liable if an external contractor made staff redundant, even though it would no longer be under the Council's control..".

This was a view supported by the Association of District Councils and by the other Local Authority Associations and the Local Government Management Board. The Heating and Ventilating Contractors Association felt that joint liability would cause uncertainty in the application of the Directive and

"The inherent doubt this would create concerning the allocation of risk between

transferor and transferee would mitigate against our Members' efforts to re-coup costs incurred through the application of the Directive".

Planned Maintenance Engineering Ltd put the position simply

"What should be done is to say whichever employer commits the transgression of the (non TUPE) industrial relations legislation pays!".

This approach may be attractive but could seriously weaken protection provided for transferred employees in the event that the transferor or transferee is unable to pay, e.g. because of insolvency.

Employers in general and local authorities in particular were against the principle of joint liability. The CPSA supported the proposals as a clarification of "disputes between transferors and transferees on which party is liable for members' redundancy payments accrued before the transfer". The TUC's view, however, was more sceptical. Their view was

"The proposed amendment is convoluted and difficult to apply. It is difficult to see how liability will be apportioned between two employers. It is not clear what effect this has on liability for dismissals connected to the transfer or future redundancy payments".

It is perhaps a reflection of the difficulties experienced with this Directive that one trade union can cause an Article to be called a clarification, whilst the TUC can call it "convoluted and difficult to apply".

The Law Society's Employment Committee asked some questions about Article 3(1) which perhaps show the nature of the questions still to be answered. Their questions were

1. Should the liability be joint or joint and several?
2. Is the liability of the transferor restricted to pre existing debts or other liquidated liabilities or can the Article be used to apportion contingent liabilities that may occur many years later, e.g. redundancy payments?
3. Does the mandatory effect of Article 3(1) override an agreement between the parties to apportion liability between them?

These are important questions and perhaps illustrate the potential for litigation should the proposed Directive not be clarified.

Proposed Article 3(3)

This Article, concerning the transferability of pension rights, remains unchanged, but has clearly been a source of confusion in the United Kingdom.

The Society of Pension Consultants, in its brief comments on the proposed Directive, stated

"...since no changes are proposed to Article 3.3, it appears that it is not intended to clarify the extent to which occupational pension scheme rights are protected. There is a lack of clarity on the position of personal pension schemes, where the employer contributes".

The National Association of Pension Funds (NAPF) made the point that the words in the Directive do not seem to include the Local Government Superannuation Scheme nor, "on a strict interpretation", private pension plans funded for by an employer.

The Institute of Personnel and Development stated in their submission that it is not feasible for the transferee to take over the transferor's pension scheme in most cases, but the issue according to the NAPF is that

"Because it has not been changed, the wording of Article 3(3) has done nothing to settle the current legal debate over whether the Directive operates so as to exclude the obligation by the transferee to provide equivalent pension benefits on transfer where employees had enjoyed the benefit of a pension as part of their terms and conditions in the employment of the transferor or whether the Directive operates only to prevent the transfer of accrued pension benefits".

The Law Society's Employment Law Committee felt that there was a need for an "avoidance of doubt" amendment. Their view was that the inclusion of transfer of pension rights would create "such widespread concern that it would endanger the Directive itself".

The House of Lords Committee accepted that there was a difference between the transfer of pension rights and the provision of comparable pension rights and urged the latter for inclusion in the Directive, but only after a feasibility study "looking at the legal and technical questions involved as well as the financial implications".

One aspect of this debate is that the Commission, despite the apparent need for clarification, has not made any proposals for amending the original Directive. It is to be left to the judiciary to resolve the problem and bring some clarity to the situation. It is only possible to conjecture here as to the reasons why the Commission has not made new proposals. One view might be that they do not think that there is a problem to be resolved. Another view might be that obtaining agreement between Member States might be very difficult to achieve. It is interesting, perhaps, that the judiciary seems to have a role as a decision maker when the political organisations are not able to reach a decision. The apparent vacuum is left for the courts to fill and make decisions as an independent arbiter.

There is now a clear judgment of the High Court⁴⁹ which temporarily settles the matter in the United Kingdom. The Court concluded that the general purpose of the Directive was to protect workers' rights in a period of economic and technological change, but made an exception in the case of pension rights. The Court concluded that protection has to be provided only to current rights or to immediate or prospective pensions and not to future rights. This remains an area of concern because, although there may be clarity as a result of the Court ruling, there will continue to exist a large gap in the protection of employees who are transferred from one employer to another.

Proposed Article 5

This strengthens the protection afforded to representatives of the employees and the need for representation to be protected even if the business does not preserve its autonomy.

The comments resulting from the UK Government's consultation exercise preceded the introduction of the CRTUPE Regulations. The concern of employers was that the effect of the proposals would be to change the right of employers to voluntarily recognise trade unions to a situation where they would be compelled to recognise them. However, clarity is still an issue. The Engineering Employers Federation stated

"The wording of Article 5(1) is a matter of concern as it would seem to be stronger than the existing Article 5(1) but this is not totally clear".

This point is emphasised by the Institute of Personnel and Development who stated that Article 5.1 and 5.2 needed clarification;

"We have reservations if this means that an organisation is forced to have reconstituted employee representatives and recognition of trade union(s) which are unrepresentative of the transferee's workforce in the same collective bargaining unit or classes of worker".

It does seem a potential source of confusion and grievance for an employer to negotiate with one set of employee representatives for part of his workforce and another, whose rights are preserved, for the transferred part. The intention is clearly to preserve the rights of representatives of the employees, but in so doing it may well be a source of potential conflict.

Proposed Article 6

Proposed Article 6(4) sets out to correct one of the perceived failings of the original ARD, namely the lack of sufficient rules covering transnational restructuring. The proposed changes mean that the information and consultation procedures required by the Directive will apply irrespective of whether the decisions leading to the transfer are made by the employer or by a controlling establishment elsewhere. The Commission emphasise two points. Firstly the text does not impose any obligations on the controlling undertakings as such and, secondly, there is no proposal for consultation to take place between employees and the controlling undertaking, thus by passing the immediate employer.

It might be said that the Commission, in its attempt to avoid "problems of extra territoriality" has failed to deal with multi national organisations within the Community. Employees will still be left talking to their immediate employers even though the decisions are taken by other people/organisations within the Community.

The proposals, however, reflect the amendment to the Collective Redundancies Directive⁵⁰ which stated

"Whereas it is necessary to ensure that employers' obligations as regards information, consultation and notification apply independently of the fact that the decision on collective redundancies emanates from the employer or from an undertaking which controls that employer.."

Article 6(5) excludes undertakings or businesses which have less than 50 employees or less than the workforce thresholds for the election or nomination of a 'collegiate body' representing the employees. In the original Directive the 'collegiate body' exception existed. This meant that those member States which had minimum numbers of employees as a threshold for such bodies as works councils were able to set their own limits as to when consultation took place. Thus, according to the Commission, Member States set their own thresholds as follows;

| | |
|--------------------------|---------------|
| Luxembourg | 150 employees |
| Belgium | 100 employees |
| Greece, Spain and France | 50 employees |
| Netherlands and Denmark | 35 employees |
| Germany | 20 employees |
| Italy | 15 employees |

As a result the United Kingdom was obliged to apply the consultation procedures to all undertakings irrespective of size⁵¹.

The amendment may be seen as allowing such countries as the United Kingdom to have a minimum threshold and achieve some harmonisation with other Member States. This is an approach favoured by the UK Government. In a debate in the House of Commons on the CRTUPE Regulations⁵² the Government justified raising the limit on the minimum number of redundancies before consultation takes place by stating

"...this measure will remove more than 90 per cent of businesses from the obligation

to consult...we estimate the value of this deregulatory measure at some £85 million per annum..".

Mr Michael Stephen MP, during the debate, perhaps exemplified an argument in favour of exempting smaller businesses:

"..it is rather bureaucratic - and, frankly, rather silly - to say that an elaborate system of collective representation is needed in situations where there are fewer than twenty people involved. The employer could get all the workers concerned together in a small room..to be collectively consulted by their employers".

It is difficult not to agree with this, except that there is a significant effect of a 50 employee threshold. This is the removal of some 35% of the UK workforce from the protection of the Directive and exclude some 90% of all transfers⁵³.

Both the TUC and the CBI were in agreement on this issue. They both saw no reason for employee thresholds. The Heating and Ventilation Contractors Association was sceptical because the information and consultation proposals in general "pays scant regard to the nature and composition of the workforce in a mobile, often thinly dispersed, highly flexible workforce as required in a service industry..". Their concern was about the applicability of the threshold limit in a situation of a fluctuating workforce. The CPSA opposed the proposal partly because it was concerned about the position of small subsidiaries of larger organisations; a concern that was supported by the ETUC.

The House of Lords Committee accepted the concept that it may be a burden upon smaller businesses, but considered the figure of 50 employees to be arbitrary. They suggested a figure of 20, which would have the effect of safeguarding the position of 75 per cent of employees in the United Kingdom.

There is an apparent conflict between the need to allow employees to be consulted and informed, and the need not to impose too many rules upon small businesses. There is, however, a danger from exempting businesses of a certain size. Whatever figure is ultimately arrived at will be arbitrary. Perhaps an alternative approach would be to ensure all employees have the right to be informed and consulted, but to make the process less demanding for a smaller undertaking. If the emphasis was on informing through a staff meeting and a written notification, there might not be the requirement to enter into a process that might be more suitable for a larger undertaking.

Final provisions

It is not proposed here to consider in any detail the remaining provisions of the proposed Directive as the most important areas have been considered above. For the sake of completeness, the remaining Articles are

Article 7 - allows Member States to introduce measures more favourable to employees, either by legislative means or by collective agreement.

Article 8 - obliges Member States to introduce the means to enable all employees, who consider themselves wronged by a failure to comply with the Directive, to pursue claims by judicial means

Article 9 - provides a date of 31 December 1996 as the latest date for implementation. This will be changed in the final version of the proposed Directive. As a result the transposition of the new Directive will fall due after the next UK general election.

Article 10 - this provides for the repeal of Directive 77/187/EEC at the same time as the proposed Directive is transposed into national law.

The UK Government consultation exercise

It is proposed to use the report of the UK Government consultation exercise as a means of summarising views on the proposed Directive.

The Government carried out its consultation exercise between October and December 1994. The results have not been published because, it is suggested, all the responses were predictable. Little was learnt from the exercise by the UK Government⁵⁴. There were, however, 328 replies to the Government's consultation process. Many of these were from organisations representing industries as well as from individuals and individual companies. The participants welcomed the opportunity to participate and contribute to the debate. The Chemical Industries Association, for example, stated

"It is an opportunity for our members to outline for example practical difficulties they might experience if legislation were implemented in a particular way or to indicate what usual practice is in the industry. It is very difficult to assess how the consultation exercise influences the final Directive. As is often the case the UK consults on an EU consultation document and the Member States' responses form part of the overall reaction. There is evidence however that over time if enough interested groups make

the same point that it does influence the shape of the final Directive".⁵⁵

The UK Government sent out 1536 consultation documents to 960 people or organisations. There were 328 replies received, but this included 177 replies from members of the Exclusive (Plymouth) Brethren who are in business plus 52 from local Councils. Of the completed replies the number⁵⁶

| | | |
|--|---|-----|
| who broadly support the Government's position | - | 30 |
| who agree that the Directive needs greater clarity | - | 41 |
| who support the exclusion of contracting out | - | 19 |
| who oppose the exclusion of contracting out | - | 85 |
| who support joint liability | - | 19 |
| who oppose joint liability | - | 242 |
| who support small firm derogations on consultation | - | 124 |
| who oppose small firms derogation | - | 24 |
| who support insolvency provisions (broadly) | - | 21 |
| who oppose insolvency provisions | - | 9 |
| who believe pensions should be included | - | 41 |
| who believe pensions should be excluded | - | 2 |

These figures in themselves are meaningless, as one reply can be either the Trades Union Congress or an individual. They are useful, perhaps, as an indicator of the Government's attitude. The first analysis is of those who support the Government's position. Not only is this a minority of the crude figure total but the question itself indicates that there is a firm Government position and that, perhaps, the consultation

exercise is a means of gathering or assessing support for that position. There is no statement which enumerates those opposed to the Government's position, although two of the other replies indicate significant numbers opposed. These are the replies on whether pensions should be included or excluded and whether contracting out should be excluded or not. Both totals indicate a significant majority against the Government's position. A sceptical approach would be to suggest that this is the reason for non publication and, further, that this has had no influence on the Government's position.

Significantly only four respondents stated that they had ever changed or shelved plans to contract out work or changed contractors as a result of the TUPE Regulations. The following is a summary of the response taken from the Department of Employment report on the exercise;

Article 1(3) - the majority were in favour of applying the Directive to public and private undertakings whether or not they were operated for gain.

Article 1(4) - only the TUC responded and agreed that sea going vessels should be included.

Article 1(5) - those who responded wanted greater clarity in its applicability to UK law.

Article 2 - union representatives welcomed the inclusion of all staff, but others were concerned about the inclusion of part time and temporary staff.

Article 3(1) - a variety of opinions were reported but, the report suggests, "most people who have agreed with joint liability appear not to have really thought the matter out properly".

Article 3(4) - problems suggested here are the meaning of 'competent public authority' and the problem of encouraging firms to consider insolvency as a way of enabling transferees to avoid accrued liabilities to employees.

Article 4(3-5) - law firms are quoted as to the advantages in being able to agree variations in terms and conditions, but the CBI and the Unions were opposed.

Article 5 - few commented on this, but two employers believed the amendment would enhance rights and not just safeguard them. Others wanted greater clarity.

Article 6 - the Plymouth Brethren wanted exemption for small businesses, but the CBI and the TUC were opposed.

Article 8 - greater clarity needed and the preservation of the two year qualifying period made explicit.

Pensions - a substantial number of respondents raised this issue with only the CBI saying that they should not be included.

It is difficult not to conclude, if the Department of Employment summary is typical of all such exercises, that the optimism expressed by the Chemical Industries Association

(see above) concerning consultation exercises is ill founded. The summary does not reflect well the diversity of opinion on the proposals. One factor that appears in the Government summary, and in the individual contributions that have been studied, is the desire for clarity and certainty. It is clear that the proposed Directive does not provide this.

Discretion

One of the factors inhibiting clarity and certainty is the amount of discretion contained in the proposed Directive. Excluding Section IV, concerning Final Provisions, there are a total of 24 numbered articles and sub sections. Of these 11 contain discretionary elements.

This discretion is contained in

Article 1(4) - Member States need not apply the consultation requirements to sea going vessels

Article 1(5) - Member States need not apply Articles 3 (1,2 and 3) and 4 (1 and 2) in situations which are the subject of bankruptcy proceedings with a view to liquidation

Article 2 - The Directive is without prejudice to national law regarding the definition of contract of employment and employment relationship. The Member State will still decide who is an employee and who is therefore protected

Article 3(1) - Member States may limit the transferor's joint liability to those obligations which arose before the date of the transfer and fall due within the first year following that date

Article 3(2) - Member States may limit the period for observing such terms and conditions (contained in transferred collective agreements) with the proviso that it shall not be for less than one year

Article 3(4) - Member States may provide that the transferor's debts due before the date of transfer or opening of insolvency proceedings shall not be transferred

Article 4(1) - Member States may exclude specific categories of employees who are not covered by the laws and practice of Member States in respect of protection against dismissal

Article 4(3) - Member States may allow the employer, or the person carrying out the function of employer, and the employee representatives to change the terms and conditions of employment as a means of ensuring the survival of the business

Article 4(5) - Member States may limit the application of consultation procedures, where consultation already takes place, through an arbitration board

Article 6(5) - Member States may limit the obligations on consultation to businesses with 50 employees or more

It is not suggested here that these areas of discretion fundamentally alter the objectives of the proposed Directive. It is suggested, however, that different levels of protection for employees as between one Member State and another may result from the exercise of these variables.

Conclusions

In its background report the European Commission stated

"The Directive has on a fundamental level been a successful instrument for protecting employees in the event of corporate re-organisations and essential consensual economic and technological restructuring of enterprises and in laying down standards to promote a level playing field for companies in the European Union".

It is difficult to see how a "level playing field" can be created with such variables. In Appendix B there are two possible models of the use of this discretion. It is not suggested that this is an example of the way that two Member States will implement the proposed Directive. The reality is that different Member States may choose a variety of paths to implementation. Both approaches would be entirely acceptable under the terms of the proposed Directive.

The difference between different Member States, in terms of who is protected by the Directive, is potentially very large.

1. It would, for example, enable the United Kingdom to exclude the 8.8 million

employees who work for businesses employing less than 50 people⁵⁷ from Section III, whilst another Member State includes them.

2. It will enable also the United Kingdom to exclude the 34 000 people employed to work on UK sea going vessels from the same provisions, but allow Italy, for example, to include the 31 thousand people employed to work on Italian sea going vessels⁵⁸.

3. It will allow Greece, Italy and Portugal to treat in excess of 20 per cent of their civilian workforce as self employed, whilst Denmark and the Netherlands have less than 10 per cent.

4. In some Member States employees will receive more protection during insolvency situations than in other States.

It may also be a matter of some concern that there could be differences of approach within Member States as and when there is a change of government. It is possible to conceive that a Labour government in the United Kingdom might take a different approach than a Conservative government. The result might be the transposition of different approaches into national law at different times. This, it is suggested, is not a satisfactory result arising from a piece of Community legislation.

In order to illustrate the compromise that is contained within the proposed Directive, a comparison is contained in Appendix D on the wishes of the employers and the trade unions⁵⁹. It may be that the discretions introduced into the text are both the result of conflicts of views between Member States and between the social partners. It may also

be that obtaining a consensus view is more difficult in 1996 than in 1977. It appears, however, that in order to reach a compromise, the central objective of the Directive is perhaps not emphasised enough. If the central objective is the protection of employee rights during a transfer then this needs to be the over-riding criterion in making decisions concerning the proposed amendments. This will be further considered in the next chapter.

1. Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses COM(94) 300
2. European Commission Proposal to revise the 'Acquired Rights' Directive. A Consultation Document published by the Department of Employment 1994
3. The author is grateful for information provided by the Department of Trade and Industry; The Confederation of British Industry; The Post Office; The Chemical Industries Association; The Engineering Employers Federation; Planned Maintenance Engineering Ltd; The Heating and Ventilating Contractors Association; The Federation of Small Businesses; The Newspaper Society; The British Hospitality Association; The Food and Drink Federation; The Electricity Association; The Engineering Construction Industry Association; The Building Employers' Confederation; The Trades Union Congress; The Civil and Public Services Association; The Manufacturing Science and Finance Union; The Law Societies of Scotland and also England and Wales; The Equal Opportunities Commission; The Institute for Personnel and Development; The National Association of Pension Funds Ltd. and the Institute of Directors.
4. Select Committee on European Communities Transfer of Undertakings: Acquired Rights HL 38 5th Report (95/96 session)
5. Committee of the Regions Opinion on the Proposal etc. CdR 143/95
6. Opinion on the Proposal for a Council Directive on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses CES 317/95
7. Commission Proposal op. cit.
8. XXth Report on Competition Policy (Commission of the European Communities)
9. (Case 324/86) (1988) ECR 739
10. (1989) IRLR 161
11. House of Lords Committee op.cit. p13
12. (Case 392/92) (1994) ECR-1 1311 (1995) ICR 237
13. Commentary on proposals prepared for the Law Society's Employment Committee and forwarded to the author by the Law Society
14. Twenty Seventh Report Session 1993-94 HC. 48 - xxvii
15. Information given to the writer by the UK Permanent Representation in Brussels
16. Twenty Seventh Report HC op.cit.
17. These views and all those subsequently quoted are the result of correspondence between the author and the organisation concerned
18. The author acknowledges the assistance of the Association of District Councils, the Local Government Information Unit, Gateshead Metropolitan Borough Council, Oxford City Council, Cambridgeshire County Council, Durham

County Council, Derby City Council, Darlington Borough Council, Erewash Borough Council, London Borough of Barnet, The Vale of Glamorgan Council, Darlington Borough Council and the Royal Borough of Kingston upon Thames.

19. The Association of District Councils; Association of County Councils; Association of Metropolitan Authorities and the Local Government Management Board gave joint evidence.

20. (1993) IRLR 425

21. (Case 24/85) (1986) ECR 1119 (1986) CMLR 296

22. Letter dated 8 September 8 1994, Interinstitutional File No 94/0209 (CNS)

23. 'Financial Times' newspaper February 8 1996 p2

24. (Case C-29/91) (1992) ECR 3189 (1992) IRLR 368

25. Commission proposal op. cit.

26. Department of Employment consultation document op.cit.

27. House of Lords report op.cit. p91

28. (Case c-132,138,139/91) (1992) ECR 6577 (1993) IRLR 179

29. CBI evidence to the House of Lords Committee op.cit. p25

30. (Case 135/83) (1985) ECR 469

31. Practitioner at Coopers and Lybrand giving evidence on behalf of the CBI to the House of Lords Committee

32. Professor Dr Rolf Birk, Professor Paul Davies, Mr Werner Beyreuther, Mr Stephen Cavalier and Mme Chantal Foulon

33. Of Brian Thompson and Partners, Solicitors

34. December 16 1994 Resolution 896/94

35. Minutes of the Committee meeting of July 19. Minutes dated July 20 1995
Brussels Info Memo: Audition No 21

36. Presentation by Mr Cavalier to the Committee hearing of July 19 1995

37. Evidence to the House of Lords Committee and to the Social Affairs and Legal Affairs Committees of the European Parliament

38. (Case 135/83) (1985) ECR 469

39. Article 2(2) of the proposed Directive

40. Consultation document op.cit.

41. Information taken from the written evidence of the Equal Opportunities Commission to the House of Lords Committee op. cit. p120

42. Estcott, Karen and Whitfield, Dexter (1995) The Gender Impact of CCT in Local Government Equal Opportunities Commission
43. (Case 105/84) (1985) ECR 2639
44. European Commission Proposal op.cit.
45. Department of Employment Consultation document op.cit.
46. Letter from Messrs Birch, Haywood and Anderson HL 38 (95/96 session) p104
47. They quote 2 Corinthians 6 v 14-17 - "be not diversely yoked with unbelievers"
48. Evidence to House of Lords Committee
49. Adams and others v (1) Lancashire County Council and (2) BET Catering Services Ltd (1996) IRLR 154
50. Directive 92/56 of 24 June 1992 amending Directive 75/129 on the approximation of the laws of the Member States relating to collective redundancies OJ 1992 L245/3
51. Commission v United Kingdom (Case 382/92) (1994) ECR 2438
52. Hansard vol 271 no 44 p199 6 February 1996
53. Department of Trade and Industry evidence to House of Lords Committee op. cit. p84
54. Information collected from DTI sources
55. Stated in a letter to the writer by Mary Adsley, Senior Executive, Employee Relations, Chemical Industries Association
56. Information taken from the report prepared by the Department of Employment, now Department of Trade and Industry
57. Evidence presented by the DTI to the House of Lords Committee op. cit. p54
58. Information supplied by the National Union of Rail, Maritime and Transport Workers to the House of Lords Committee op. cit. p140
59. The information is taken from the CBI and the TUC submissions to the UK Government consultation exercise and the House of Lords Committee

Chapter 10 A proposal for revised TUPE Regulations based upon an interpretation of the proposed ARD

Introduction

It is proposed here to produce a new set of UK regulations based upon the assumption that the proposed ARD has been adopted and that this adoption takes place during 1997. It seems that the European Parliament will produce its Opinion by the end of 1996¹ and possibly either the subsequent Dutch or Luxembourg Presidencies will put it on a Council agenda². The new regulations are written with the intention of producing rules that fulfil the objectives of the ARD, namely to protect the rights of employees during a transfer of an undertaking.

Although the amendments contained in TURER 1993 and the CRTUPE Regulations 1995 are included, and the concepts of two years service and elected representatives remain, the Regulations are unlikely to be acceptable to the UK Government (see below). It is hoped to illustrate not only the problems which would occur within the United Kingdom, but also the fact that the proposals allow so much discretion that there is unlikely to be uniform protection within the Community for employees affected by a transfer.

There is no attempt to do the work of a parliamentary draftsman and there is no attempt to amend or take into account any other current legislation which might be affected. The focus of the recommendations are based upon the text of the original Regulations as amended, taking into account its objectives and the issues that have

arisen out of the original ARD and the consultation processes. It is further suggested that any set of regulations should aim to implement the objectives of the Directive and not be a compromise between the sides represented by the social partners.

Preamble and citation

STATUTORY INSTRUMENTS

1999 No.....

TERMS AND CONDITIONS OF EMPLOYMENT

The Protection of Employment (Transfer of Undertakings) Regulations 1999

Laid before Parliament in draft

Made.....

Coming into Operation.....

Whereas a draft of these Regulations has been approved by resolution of each House of Parliament in pursuance of paragraph 2(2) of Schedule 2 to the European Communities Act 1972(a); Now, therefore, the Secretary of State, being a Minister designated for the purposes of Section 2(2) of that Act in relation to rights of employees and the obligations of employers on the transfer or mergers of undertakings, businesses or parts of businesses(b), in exercise of the powers conferred by that section, hereby make the following Regulations-

Citation, commencement and extent

1.-(1) These Regulations may be cited as the Protection of Employment (Transfer of Undertakings) Regulations 1999.

(2) These regulations shall come into operation on.....

The new Directive is likely to be approved by the Council of Ministers in 1997 and it is assumed that two years will be permitted for their transposition into national law and that the UK Government will take the two years. No account is taken here of the possible results of a general election. It is also suggested that for ease of distinction the title be reversed. This may also emphasise their purpose more clearly. It is the purpose

that the European Court of Justice is likely to take into account and it is that which will be emphasised during the writing of these draft Regulations.

Regulation 2

Interpretation

2.-(1) In these Regulations

"collective agreement", "collective bargaining", "contract of employment", "employers' association", "recognised" and "trade union" have the same meanings as in the 1992 Act;

"employee" has the same meaning as the 1992 Act except in so far as it also includes those who have an employment relationship with an employer;

"employment relationship" means a relationship of economic dependency on an employer by a person who provides that employer with services;

"the 1992 Act" means the Trade Union and Labour Relations (Consolidation) Act 1992;

"the 1996 Act" means the Employment Rights Act 1996

"relevant transfer" means the transfer from a transferor to a transferee of an economic entity that retains its identity immediately subsequent to the transfer;

"transferor" and "transferee" shall be construed accordingly;

"undertaking" includes any trade or business that can be construed as an economic entity;

"appropriate representative" means, for the purposes of these Regulations, either representatives of a "trade union" recognised by an employer for the purposes of collective bargaining, or alternatively and additionally, representatives of the employees elected for the purposes of the consultation requirements of these Regulations.

In the original proposals for the revised Directive the Commission had proposed the exclusion of a "transfer of only an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly.."³. This approach was designed to exclude transfers resulting from contracting out of services and was an approach supported by employers and opposed by trade unions (see chapter 9). The amendment was dropped by the Commission in order to make progress through the

European Parliament. The recommendations are therefore in line with current Commission proposals and the decisions of the European Court of Justice. 'Relevant transfer' is defined as the transfer of an economic entity that retains its identity.

The definition of employee is left to Member States, which leads to anomalies as between countries. The proposals here widen the scope of the definition to include those that have an employment relationship, which, it is suggested, is a state of economic dependency by a worker on an acquirer of labour. It is appreciated that such Regulations would not be the place to change the definition of employee, as this would need more comprehensive legislation, despite the fact that this widening of the definition would aid the objectives of the new Directive.

The definition of appropriate representative attempts to reconcile these Regulations with the CRTUPE Regulations. Consultation will take place with either representatives of recognised trade unions or employee representatives elected for the specific purpose of consultation about the transfer. As will be shown later this might include consultation with both trade union and employee representatives. The need for these provisions is perhaps an indication of the difference of approach between the 'corporatist' Member States and the 'ideological' one. In the corporatist States there will be existing mechanisms for consultation in most cases.

The reference in the original TUPE Regulations to the exclusion of the transfer of a ship from the definition of part of an undertaking is removed here. The legislation referred to is updated from the original Regulations, but excludes all the references to Northern Ireland legislation.

Regulation 3

A relevant transfer

3.- (1) Subject to the provisions of these Regulations, these Regulations apply to a relevant transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or a part of one which is so situated.

(2) Subject as aforesaid these Regulations so apply whether the transfer is effected by sale or some other disposition or by operation of law.

(3) Subject as aforesaid, these Regulations so apply notwithstanding-

(a) that the transfer is governed or effected by the law of a country or territory outside the United Kingdom;

(b) that the persons employed in the undertaking or part transferred ordinarily work outside the United Kingdom;

(c) that the employment of any persons is governed by such law.

(4) It is hereby declared that a transfer of an undertaking or part of one may be effected by a series of two or more transactions between the same parties and that there need not be a contractual relationship between the parties.

(5) A transfer may take place whether or not any property is transferred to the transferee by the transferor.

It is additionally emphasised here that there need not be a contractual relationship between the transferor and the transferee and that such transfers may take place in more than one transaction.

Regulation 4

Transfers and Insolvency

4.- (1) Subject to paragraph 4(2) below, the insolvency of the transferor, the transferee or a part of an undertaking shall have no effect upon these Regulations.

(2) The employer, whether the transferor, the transferee or such person exercising the employers' powers, whether appointed as part of insolvency proceedings or not, may agree with the employees, or their appropriate representatives, to alter the terms and conditions of employment as part of an agreement to ensure the survival of the undertaking. The transferor, transferee or the person exercising the employers' powers, shall make available sufficient information to enable a decision to be made on the basis of full disclosure of information; shall provide

the employees, or their appropriate representatives, with sufficient resources to enable them to have sufficient time for appropriate consideration.

Professor Paul Davies, in his evidence to the House of Lords Committee, stated that there is no evidence, other than anecdotal, to show that rescues of insolvent undertakings were deterred by the rights given to employees by the Directive. It would seem reasonable, therefore, not to make an exception of rescues from insolvency until evidence is produced.

This is important for the employees concerned. The proposed ARD gives Member States the discretion to exclude the transfer of debts from transferor to the transferee in insolvency situations, thus depriving the employees of the opportunity to claim money owed from the transferee. It is suggested here that this option should be part of the consultation with the employees and should be part of the process of rescuing an undertaking.

If the objective is the protection of the rights of workers, there can be no reason for excluding insolvency situations. The logic of the European Court of Justice in excluding some insolvency situations is suspect when set against this test. It seems a strange interpretation of the legislation for some workers to suffer in order for other workers to be protected. This is the apparent result of the Court's decisions. The aim of the Directive is to protect employees, not to protect some at the expense of others. The aim of this simple regulation is to ensure that protection is the norm and that only the employees, or their representatives, with full information, can agree to alter terms and conditions of employment in order to help rescue their undertaking.

It is suggested here that if some insolvency situations are to be treated as an exception, then they are better dealt with elsewhere where there can be an examination of the whole issue. It is important to examine the relationship between creditors and employees of undertakings, but this should not take place in a Directive which has the objective of protecting employees during a transfer, even if this transfer takes place as a rescue of an insolvent undertaking.

If insolvency proceedings are to be included, and it does seem likely to be so, then it is suggested that the approach of the House of Lords Committee be adopted, namely that "in the interests of certainty (and the reduction of costs on all sides) the Directive should set out the insolvency procedures of each Member State to which the Directive will apply"⁴. There is a problem in the divergence of procedures between Member States and especially the role of the courts in insolvency proceedings. Traditionally, in the United Kingdom, the courts have played a lesser role than in other Member States. The House of Lords Committee recognised this in asking for the acceptable procedures in each Member State to be specified.

Regulation 5

Effect of relevant transfer on contracts of employment etc

5.- (1) A relevant transfer shall not operate so as to terminate the contract of employment or employment relationship of any person with the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) above, on the completion of a relevant transfer-

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract or relationship, shall be transferred by virtue of this Regulation to the transferee; and

(b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee;

(c) without prejudice to paragraphs (2)(a) and (2)(b), the transferor shall have liability to the transferee for any obligations arising from the contracts of employment, or the employment relationship, of the transferred staff for the period prior to the date of transfer, providing that this obligation will cease, at the latest, one year after the date of transfer;

(3) Any reference in paragraph (1) or (2) above to a person employed in an undertaking or having an employment relationship with an undertaking, or part of one transferred by a relevant transfer, is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed, or in an employment relationship, immediately before any of those transactions;

(4) Paragraph (2) above shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence;

(5) Paragraph (1) is without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment or employment relationship without notice if

(a) a substantial change is made in his working conditions to his detriment; but no such right shall, without prejudice to paragraph (5)(b) below, arise by reason only that, under paragraph (1) above, the identity of his employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment;

(b) he chooses not to transfer to the transferee, in which circumstances he shall be deemed to be dismissed by the transferor by reason of redundancy and S139 of the 1996 Act is amended accordingly.

This firstly deals with the question of joint liability. It provides that the employees only have a cause of action against the transferee, being the organisation most likely to be able to pay compensation claims. It does, however, provide that the transferor may be liable to the transferee for any claims arising during the first year after the date of the transfer. This should meet the requirements of the new ARD without prejudicing the rights of employees.

It also deals with the employee who chooses not to transfer. This would result in the employee's redundancy by the transferor instead of being left without compensation for

losing their job, as is the situation with the current ARD.

Lastly it also emphasises that the employment relationship is as important as the contract of employment.

Regulation 6

Effect of a relevant transfer on collective agreements

6.- Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by Regulation 5(1) above, then

(a) without prejudice to S139 of the 1992 Act or Regulation 4(2) above, that agreement, in its application in relation to the employee, shall after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly, anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee; and

(b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement.

The purpose of this regulation is to protect the position of the collective agreement and trade union rights. In this it fails, because of the voluntary nature of trade union recognition by employers. It does not seem appropriate to use a set of regulations to make an exception to the voluntary recognition rights of employers. Although the aim of the regulation can only be achieved by either making recognition compulsory or making the collective agreement legally binding, it is felt that this is not the place to make this substantive change.

Regulation 7**Exclusion of occupational pension schemes**

7.- Regulations 5 and 6 shall not apply-

(1)(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Social Security Pensions Act 1975 or

(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme;

(2) For the purposes of paragraph (1) above any provisions of an occupational pensions scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.

Regulation 8**Dismissal of an employee because of a relevant transfer**

8.- (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act as unfairly dismissed if the transfer or a reason connected with it is the reason or principal reason for his dismissal.

(2) Where an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer is the reason or the principal reason for dismissing an employee-

(a) paragraph (1) shall not apply to his dismissal; but

(b) without prejudice to the application of section 98 of the 1996 Act the dismissal shall be regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3) The provisions of this Regulation apply whether or not the employee in question is employed in the undertaking or part of the undertaking transferred or to be transferred.

(4) Paragraph 1 above shall not apply in relation to a dismissal of an employee if the employee is excluded by the application of sections 237 or 238 of the 1992 Act or sections 108 to 110 of the 1996 Act.

This has been amended to take into account the CRTUPE Regulations and ensure that

the protection of the Regulations is given only to those employees with at least two years service.

Regulation 9

Effect of relevant transfer on trade union recognition

9.- (1) This regulation applies where after a relevant transfer the undertaking or part of the undertaking transferred maintains an identity distinct from the remainder of the transferee's undertaking.

(2) Where before such a transfer an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer-

(a) the union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and

(b) any agreement for recognition may be varied or rescinded, only after consultation with the trade unions concerned.

In order to ensure that the transfer of union recognition is meaningful, it is suggested in Regulation 9(2)(b) that it will only be possible to rescind trade union recognition, after there has been consultation with the trade unions concerned. This allows for government policy that recognition should be entirely voluntary, but also allows the trade union an opportunity to state its case.

Regulation 10

Duty to inform and consult

10.- (1) In this Regulation and Regulation 11 below references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not employed in the undertaking or the part of the undertaking to be transferred) who may be affected by the transfer or may be affected by measures

taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult all the persons who are appropriate representatives of any of those affected employees, the employer shall inform those representatives of-

(a) the fact that the relevant transfer is to take place, when, approximately, it is to take place and the reasons for it; and

(b) the legal, economic and social implications of the transfer for the affected employees; and

(c) the measures which he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures which the transferee envisages he will, in connection with the transfer, take in relation to such of those employees as, by virtue of Regulation 5 above, become employees of the transferee after the transfer or, if he envisages that no measures will be so taken, that fact.

(3) For the purposes of this Regulation the appropriate representatives of any employees are-

(a) employee representatives elected by them; or

(b) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of that trade union;

or, in the case of employees who both elect employee representatives and are of such a description, then the employer should consult both, either jointly or separately.

(4) The transferee shall give the transferor such information at such time as will enable the transferor to perform the duty imposed on him by virtue of paragraph 2(d) above.

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) by post to the union at the address of its head or main office.

(6) Where an employer of any affected employee envisages that he will, in connection with the transfer, be taking measures in relation to any such employees he shall consult all the persons who are appropriate representatives of any of the affected employees in relation to whom he envisages taking measures. This will be done with a view to seeking their agreement to measures to be taken.

(7) In the course of those consultations the employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(8) If in any case there are special circumstances which render it not reasonably practicable for the employer to perform a duty imposed on him by Regulations (2) to (7) above, he shall take all such steps towards performing that duty as reasonably practicable in the circumstances. With regard to 3(a) above this will mean giving the employees

sufficient time to elect representatives and informing those employees of the consequences resulting from a failure on their part to elect representatives.

(9) The obligations in paragraphs (2) to (7) above will apply to the transferor and the transferee, regardless of whether the decisions leading to the relevant transfer are taken by the employer or by an undertaking which directs the employer.

(10) Regulations (2) to (9) will apply to all affected undertakings or activities regardless of the number of employees employed in the undertaking, or part, transferred, except that in undertakings or activities where there are less than 10 employees the consultation may be direct with the employees and there is no obligation to consult with appropriate representatives.

Regulation 10(3) defines appropriate representative, but takes away the employer's choice in deciding which representatives to consult. In these regulations the employer may consult either the elected representatives or the trade unions or, if they both exist, the employer will need to consult both.

The employer, in regulation 10(8) is obliged to give employees sufficient time to elect representatives and warn them of the consequences of failing to elect them.

Regulation 11

Failure to inform or consult

11.- (1) Where an employer has failed to comply with any requirements of Regulation 10 above, a complaint may be presented to an industrial tribunal on that ground-

- (a) in the case of a failure relating to employee representatives, by any of the employee representatives to whom the failure related;
- (b) in the case of a failure relating to representatives of a trade union, by the trade union; or
- (c) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) above a question arises whether or not it was reasonably practicable for him to perform a particular duty or what steps he took towards performing it, it shall be for him to show-

- (a) that there were special circumstances which rendered it not reasonably practicable to perform his duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) On any such complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of paragraph (2)(d) or, so far as relating thereto, paragraph (8) of regulation 10 above, he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with Regulation 10(4) above unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(4) Where the tribunal finds a complaint under paragraph (1) above well-founded it shall make a declaration to that effect and may-

(a) order the employer to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (3) above and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(5) An employee may present a complaint to an industrial tribunal on the ground that he is an employee of a description to which an order under paragraph (4) above relates and that the transferor or transferee has failed, wholly or in part, to pay him compensation in pursuance of the order.

(6) Where a tribunal finds a complaint under paragraph (5) above well-founded it shall order the employer to pay the complainant the amount of compensation which it finds is due to him.

(7) An industrial tribunal shall not consider a complaint under paragraph (1) or (5) above unless it is presented to the tribunal before the end of the period of three months beginning with-

(a) the date on which the relevant transfer is completed, in the case of a complaint under paragraph (1);

(b) the date of the tribunal's order under paragraph (4) above, in the case of a complaint under paragraph (5); or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of three months.

(8) An appeal shall lie and shall lie only to the Employment Appeal Tribunal on a question of law arising from any decision of, or arising in any proceedings before, an industrial tribunal under or by virtue of these Regulations.

(9) In this Regulation "appropriate compensation" means such sum not exceeding four weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

(10) For the purposes of Regulations (10) and (11) above persons are employee representatives if-

(a) they have been elected by employees for the specific purpose of being given information and consulted by their

employer under Regulation 10 above; or

(b) having been elected by employees otherwise than for that specific purpose, it is appropriate (having regard for the purposes for which they were elected) for their employer to inform and consult them under that Regulation, and (in either case) they are employed by the employer at the time when they are elected.

This is as per the original Regulations, as amended.

Regulation 12

Restrictions on contracting out

12.- Any provision of any agreement (whether a contract of employment or not) shall be void in so far as it purports to exclude or limit the operation of Regulations 5, 8 or 10 above or to preclude any person from presenting a complaint to an industrial tribunal under Regulation 11 above.

Signed by the Secretary of State

Dated.....

These proposed regulations are written with the aim of fulfilling the objectives of the ARD and its proposed successor. As was said in Spijkers the overwhelming objective of the Directive is the protection of workers during a transfer. These Regulations achieve this. There is little discretion and there are few compromises which might result from a process of negotiation between the social partners. The Regulations would be perfectly acceptable under the proposed ARD, but it is inconceivable that they would be implemented by the UK Government. It is an example of how the discretions within the proposed ARD could be used in totally different ways by a corporatist Member State from an ideological Member State.

1. The Opinion was actually produced in January 1997
2. Communication to the author in September 1996 by the UK Permanent Representation
3. Taken from the Department of Employment Consultation Document on the proposal to revise the Acquired Rights Directive
4. HL Paper 38 p21

Chapter 11 Conclusions

Introduction

It is proposed to come to conclusions concerning the following

- the inadequacies of the ARD
- the inadequacies of the TUPE Regulations
- the inadequate enforcement of Community law
- the clear differences of approach between the United Kingdom and other Member States and the Community
- the future approach of the Member States

The inadequacies of the Directive

An editorial in European Union News¹ highlighted the problem of the lack of quality in the drafting of Community legislation. The editorial quotes from the 21st edition of EC Law in Force (June 1993) to explain that there were now 843 pages of regulations and directives and decisions together with various other recommendations and notices.

The editorial then states

"EC legislation is neither clear nor consistent in far too many cases. The lack of quality in EC legislation undermines its effectiveness. While quality issues are not solely an EC issue, the Community's tendency to produce incomprehensible and often unworkable legislation is greater than that of any Member State".

The Community clearly has unique problems when it comes to producing legislation.

Some of these are

1. the need to reproduce it in eleven different languages
2. the varying interests of the different Member States
3. the consultation process that needs to be gone through which will, inevitably, produce conflicting advice.

Whilst it is possible to appreciate these problems, it is still difficult to understand why such an inadequate piece of legislation as the ARD should be approved. This one piece of legislation has resulted in:

1. Three of the original nine Member States who approved it having infraction proceedings against them for inadequate implementation
2. A total, to date, of twenty two cases before the European Court of Justice. Of these nineteen were Article 177 references from national courts asking for clarification. Cases on the subject still continue to be referred to the Court² in 1996.
3. Hundreds, if not thousands, of cases taking place within national jurisdictions throughout the Community.

The inadequacies in the Directive are firstly the lack of definition; secondly the exclusion of insolvency; thirdly the failure to foresee the consequences of the legislation.

The lack of definition has been dealt with as has the question of insolvency. This is legislation that was designed to deal with the problems caused by mergers and transfers which were likely to take place, partly as a result of progress on the single market. It has also applied, however, to situations consisting of one cleaner of a bank branch office (Schmidt³), the sale of a newsagent's shop (Wheeler v Patel⁴) and a quarryman in Cornwall (Berriman v Delabole Slate⁵). Not only has it applied to the field of international mergers, but it has applied to a much smaller scale of operation than was perhaps intended.

It may also be seen as surprising that the subject of insolvency was omitted from the Directive. Insolvency is inevitably a cause of transfers of undertakings and the Directive does not take into account the fact that it may well actually work against the interests of employees and discourage transfers. The partial resolution of this matter has been left to the European Court of Justice. It is, perhaps, not surprising that the subject of insolvency has been a significant item in the discussion concerning a revised Directive.

The inadequacies of the TUPE Regulations

The Government of the United Kingdom was unhappy at introducing these Regulations and, as has been shown by the decisions of the European Court of Justice, implemented them inadequately. The Government has made amendments on three different occasions; in 1987⁶, 1992⁷ and 1995⁸ and it is questionable as to whether the Directive has still been adequately implemented concerning consultation procedures.

The approach of the UK Government, since the implementation of the Directive, to industrial relations and collective bargaining has been different to other Member States within the Community. This has affected the implementation of the Directive in the United Kingdom. It is difficult to believe that the errors in the drafting of the TUPE Regulations were as a result of incompetency, although, without direct evidence to the contrary, this must be a possibility. The Regulations were criticised in the House of Lords at the time and some of the inadequacies were known, although the Government chose not to acknowledge their importance.

An alternative approach is to say that the Government knew that the TUPE Regulations were inadequate and that they were the minimum that was needed to be done to fulfil the UK's obligations to implement the ARD. In a debate in the House of Commons the Government's attitude is exemplified⁹. The Government spokesperson, Mr John Taylor MP, Minister for Competition and Commerce, said

"Conservative Members may like to be reassured that the measures are four times blessed. First, they are deregulatory. It is true that the infraction found against the Government by the European Court of Justice has provided the Government with an opportunity to take the gold plate off their response. Conservative Members are pleased to take the gold plate off regulations and directives"¹⁰.

In the same speech he also said

"When we framed the regulations, uppermost in our mind was the need to give proper effect to the directives in a way that gave employers flexibility in deciding how to meet

their obligations".

It is difficult not to conclude that the Government failed to adequately transpose the Directive as a result of its own deliberate attempt to weaken its effect, rather than as a result of some oversight or error.

Inadequate enforcement

Of concern, also, is the way that the Directive has been implemented. It is difficult to understand how it is possible that the United Kingdom was able to implement such an inadequate version of the Directive and not have infraction proceedings taken against it until 1992, some eleven years after it was implemented. It is not until 1996 that the United Kingdom's corrected version of consultation procedures¹¹ came into effect, some fifteen years after it was first transposed into UK law. Despite the Commission's view that "the implementation of directives is relatively satisfactory", the process of implementation of the ARD in the United Kingdom was clearly not satisfactory.

Different approaches

One view of the divide between the United Kingdom and other Member States is that

"On one side is the myopic, profit-driven, public interest denying culture of deregulation which has always been latent in British capitalism, and which has swept all before it in the last 15 years. On the other is the regulatory culture associated with the social capitalisms of mainland Europe. On one side, the right of the property owner

to do what he will with his own. On the other, conditional property, restrained by a web of reciprocal obligations"¹².

This is not the place to discuss the adjectives used in this statement, but there is an important truth which has wider implications. In the United Kingdom there has been the creation of a de-regulatory framework¹³ in contrast with the more regulatory framework within the Community and other Member States. This has been described in this thesis as the conflict between an ideological and a corporatist approach to industrial relations.

This has led to a conflict between a Community that wishes to approve legislation that will protect, for example, employee rights and a Member State which is opposed to such regulation. This is occurring with the United Kingdom at the present, but there is always a possibility that it may occur with one or more other Member States in the future, especially if the Community is to continue to increase its membership. It is, therefore, a problem that needs to be settled. It may be possible to conceive of a well run and ordered Community if all the Member States had the same approach to the role of law and the role of the state. This is not the case and the Community needs to take this into consideration when drafting potential legislation. The options are, perhaps, to allow a diversity in implementation or to be specific in the applicability of legislation in order to minimise the differences between Member States.

As well as an analysis of the introduction of the ARD in Member States, this thesis has been concerned with briefly studying the industrial relations background of each State. It is the 'formal' system¹⁴ that has been examined here and there has been no attempt

to reach judgments about the effectiveness of different or similar systems in differing countries. Nor is it suggested that the systems of industrial relations and collective bargaining are static systems. The role governments play and the amount to which they are involved in the system varies from time to time. In moments of economic crisis or economic stringencies, governments are likely to be more involved in trying to regulate the outcome of collective bargaining than at other times.

Despite this there are certain characteristics of the industrial relations systems elsewhere that differentiate them from that in the United Kingdom.

Trade unions

Throughout the Community membership of trade unions varies significantly. It ranges from the high figure of 85% of the workforce in Denmark to a low of less than 10% of the workforce in France. In all countries there has been a fall in membership. This will be for a variety of reasons; although, clearly the levels of unemployment and the decline of the traditional heavily unionised industries, such as coal mining and manufacturing, will be a reason. There are also other reasons which are peculiar to different countries. In Denmark the decline has been small because, perhaps, the Danish unions are actively involved in the social security system. In Spain there was a dramatic fall partly because the initial membership represented the significant role that Spanish trade unions had played in the opposition to the Franco regime.

In the United Kingdom union membership has also fallen, from its peak of 13.3 million in 1979 to a 1994 figure of 8.3 million¹⁵. The trade unions in the United Kingdom are

in a different position to trade unions in other Member States, however, as there is no express right to strike. There are immunities for acts that might otherwise be illegal, but these immunities have been qualified during the 1980s and the 1990s. The immunities exist provided strict rules are followed; on balloting, notice of intended action and picketing for example, and they only apply as between employer and employee, i.e. secondary picketing is not permitted. The actions of the UK Government have resulted in a tightly controlled process in order for a trade union to exercise a right to strike, to the extent that Jimmy Knapp, General Secretary of the Rail Maritime and Transport Workers Union is quoted as saying

"We are living in a legal nightmare, we are rapidly approaching the position in this country where it is not possible to call a strike and remain within the law"¹⁶.

In some other Member States the right to strike and to participate in trade union activities is guaranteed by their constitutions. This is the case in France, Italy and Germany. The contrast in approach, however, is really apparent when one considers the question of consultation.

Consultation

In the United Kingdom there have been periods of consultation at a national level but it is true to say that, in 1996, there is now less consultation on a bipartite or a tripartite national basis in the United Kingdom than in any other Member State considered here. The significant exceptions are perhaps the Health and Safety Commission and the Advisory, Conciliation and Arbitration Service, which have trade union and employer

representation.

Employers are free to de-recognise trade unions if they wish. There is no semblance of the dual representation of trade unions and works councils that exist in many other Member States. The only statutory requirements for consultation emanate from Community law, as in the case of collective redundancies and transfers of undertakings.

There is no comparable institution to the Belgian National Labour Council; the Danish Economic Council; the French National Collective Bargaining Board; the Greek Economic Commission; the Irish National Economic and Social Council; the Dutch Social and Economic Council; the Portuguese Permanent Council for Social Consultation or the Spanish Social and Economic Council. In those countries that do not have a formal consultation body such as Germany or Italy, there is much informal contact.

The lack of formal consultation in the United Kingdom does not, however, mean that there is no collective bargaining on a national or multi employer basis. Local Government, for example, despite the Government's encouragement to authorities to opt out, still maintains a national bargaining system between employers (represented by the Local Government Management Board) and employees (represented by trade unions, the biggest of which is Unison).

The Whitley¹⁷ council system still flourishes within the civil service, although it is being weakened by the progressive devolution of the civil service to executive agencies. Although the government has encouraged the devolution of pay bargaining to

departmental and executive agency level, this bargaining still takes place with trade union representatives. Collective bargaining has declined. In the period after the second world war the Ministry of Labour estimated that only 2 million of the 17.5 million workforce were not covered by voluntary or statutory negotiating machinery¹⁸. By 1990 only about one quarter of establishments were covered by multi employer bargaining.

There has been some de-regulation in other Member States, but not as in the United Kingdom. The de-regulation that has taken place has not been, as in Britain "...as part of a free market anti-union crusade, but as a tactical adaptation to changed economic circumstances to be accomplished as far as possible by consent"¹⁹.

There is a real difference in approach to trade unions and consultation between the United Kingdom and other Member States. This has had a significant effect upon the implementation of the ARD and will have a significant effect upon the revised Acquired Rights Directive.

Subsidiarity

Subsidiarity has meant for the UK Government the abandonment of the ARD. It is clear that the UK Government is opposed to any policy of achieving minimum standards in social policy through the use of Community legislation. It regards such policy as being in the competence of the Member State and not the Community, whereas the other Member States accept that there is, perhaps, a shared competence between the Community and the state. The result is a reluctance to implement

Community law such as the ARD and a wholly negative approach as exemplified in the wish to take the 'gold plate' off directives. One of the causes of this problem is the lack of clarity that exists within the Community, which has never defined precisely those areas which fall under its competence and which must be a question for the national state. It is unlikely that agreement could be reached on such a question, which results in continuing uncertainty.

Supremacy of Community law

The supremacy of Community law is an approach which the United Kingdom accepts with reluctance. In this there is a difference of approach between the judiciary and the Government. The courts have tried to approach legislation which is intended to implement Community law in a purposeful way and have shown a determination to make Community law effective. This has led to a contrast with the traditional view of the UK courts where there is a history of statutory intervention to protect workers rights from the effects of the common law as interpreted by those courts.

This is not the approach of the Government. This may be exemplified by the Francovich claims now being brought by trade unions against the Government for inadequately transposing the ARD into UK law. As a result of the European Court of Justice refusing to accept the doctrine of horizontal direct effect, the Government must take full responsibility for any damages resulting from the successful completion of these cases.

Compatibility with contracting out

The important point, made by Professor Paul Davies²⁰, concerning the question as to whether contracting out is compatible with the ARD might also pose the question as to whether the Directive is compatible at all with many transfers of undertakings. The situations in contracting out and insolvencies, for example, may require significant flexibility which is not offered by the Directive. The ARD offers a rigid solution which is the transfer of all contracts of employment. The European Court of Justice has made an exception in certain cases of insolvency and one might question whether there are other occasions when a different solution is required. The objective of protecting workers' rights in the event of a transfer of an undertaking may be better achieved by more flexible solutions. Alternatively more detailed legislation may be needed by different Member States to achieve the objectives of the Directive in particular circumstances.

Future approaches

The reality is that there is currently a divide between the approach of the United Kingdom and the rest of the Community in its approach to industrial relations and employee protection. This has not always been the case and there have been times when other Member States have been isolated²¹. It would clearly be incorrect to assume that the divide between the United Kingdom and the rest of the Community will continue. As the Community expands there must be a likelihood that other Member States will become isolated on a particular aspect of policy.

If the Community does not accept that there can be a diversity in approach of the Member States, then there will continue to be tensions with the possibility of more opt outs on particular issues being negotiated. There are two possible approaches to Community legislation which might assist in the reduction of such tensions.

One approach is that of the House of Lords Committee which suggested, for example, that there should be a specific list of acceptable insolvency procedures for each country for which the proposed ARD would be applicable. The intention is to apply a broad piece of legislation to specific and agreed areas in each Member State. There are significant problems with this approach. It is not clear who would specify the particular list for each Member State and who would settle disputes. It is also likely to be inflexible as the approach in Member States will change over a period of time and via general elections.

A second approach is to have only framework legislation and accept that there is going to be diversity in application. This appears to be the approach with the proposed ARD. There is wide flexibility and Member States have a number of choices as to their approach. This solution works, of course, when all the Member States have a commitment to a broadly similar policy. If there is one state, such as the United Kingdom, which is determined to take the "gold plate" off directives, then the diversity of approach is likely to become so large that it makes discussion of a common approach meaningless.

Role of the state and the Community

It is important not to exaggerate the importance of the European institutions. Much authority and decision making still rests with the Member States. Nor should the role of the social partners at Community level be exaggerated. In a context of speaking about the need for greater competitiveness in the Community, Mr Francois Perigot²² said

"But the social partners cannot supplant the role of national governments in dealing with such a vast diversity of conditions in each member state. And frankly I doubt that such meaningful agreements on employment can be negotiated at the European level²³".

The conclusion that one should, perhaps, reach is that, unless there is a willingness on the part of all Member States to agree the boundaries of Community and national law, fundamental conflict is inevitable. In areas where there is conflict, such as the role of the Community in setting standards and levels of protection in the field of employment, the result will continue to be a lack of harmony between different Member States. Different levels of protection will be offered to workers in different countries because Community legislation will lack sufficient definition or national legislation will inadequately implement those Community laws. The proposed ARD is likely to suffer from both faults.

1. European Union News November 1995: Issue 10 published by Sweet and Maxwell
2. For example, Case C-277/96 Hans-Jorg Dick v EB Schulings GmbH in liquidation
3. Schmidt v Spar und Leihkasse der Fruheren Amter Bordesholm, Kiel und Cronshagen (Case 392/92) (1994) ECR 1311 (1995) ICR 237
4. (1987) ICR 631
5. (1985) ICR 546
6. Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1987 SI 442
7. Trade Union Reform and Employment Rights Act 1992
8. Collective Redundancies and Transfers of Undertakings (Protection of Employment) (Amendment) Regulations 1995 SI 2587
9. Hansard HC 271 Col 197 February 6 1996. Debate on a Labour Party motion to revoke the CRTUPE Regulations
10. Hansard HC 271 col 204
11. CRTUPE Regulations 1995 SI 2587
12. David Marquand - Time to take sides - 'The Guardian' newspaper May 27 1996 p11
13. For example the Deregulation and Contracting Out Act 1994, which has the aim of removing 'unnecessary' regulations
14. The Donovan Commission in its report in 1968 distinguished between the formal system and the informal system when looking at UK collective bargaining
15. IRS Employment Review No 606 April 1996 IRS Employment Trends p1
16. Quoted in Hendy QC, John (1993) op.cit.
17. These derive from the work of the Whitley Committee in 1916 which recommended, amongst other points, the establishment of joint industrial councils, which became known as Whitley Councils
18. Jackson Michael, Leopold, John and Tuck, Kate (1993) Decentralisation and Collective Bargaining St Martin's Press
19. Hyman, Richard (1994) Industrial Relations in Western Europe: An Era of Ambiguity Industrial Relations vol 33 no 1 January
20. Davies op.cit.
21. For example, the dispute with France in the 1960s which resulted in the Luxembourg Compromise
22. President of UNICE
23. 'Financial Times' newspaper May 20 1996 p16

ACQUIRED RIGHTS DIRECTIVE - COMPARISON OF EXISTING TEXT WITH COMMISSION PROPOSAL (9141/94)

EXISTING DIRECTIVE

SECTION 1

Scope and definitions

Article 1

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

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

3. This Directive shall not apply to sea-going vessels.

Article 2

For the purposes of this Directive:

(a) "transferor" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business;

(b) "transferee" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the

PROPOSAL

SECTION 1

Scope and definitions

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer effected by contract or by some other disposition or operation of law, judicial decision or administrative measure.

The transfer of an activity which is accompanied by the transfer of an economic entity which retains its identity shall be deemed to be a transfer within the meaning of this Directive. The transfer of only an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly, does not in itself constitute a transfer within the meaning of the Directive.

2. unchanged

3. delete

3. This Directive shall apply to public or private undertakings engaged in economic activities whether or not they are operated for gain.

4. Member States need not apply Section III of this Directive to sea-going vessels.

5. The Member States need not apply Articles 3 (1, 2 and 3) and 4 (1 and 2) of this Directive in cases where the undertaking, business or part of a business being transferred is the subject of bankruptcy proceedings or any other analogous proceedings instituted with a view to the liquidation of the assets of a natural or legal person and under the supervision of a competent public authority.

Article 2

1. For the purposes of this Directive:

(a) unchanged

(b) unchanged

undertaking, business or part of the business;

(c) "representatives of the employees" means the representatives of the employees provided for by the laws or practice of the Member States, with the exception of members of administrative, governing or supervisory bodies of companies who represent employees on such bodies in certain Member States.

SECTION 11

Safeguarding of employees' rights

Article 3

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

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), 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.

(c) "representatives of the employees" means the representatives of the employees provided for by the laws or practice of the Member States.

2. This Directive is without prejudice to national law as regards the definition of contract of employment or employment relationship. However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

(i) of the number of working hours performed or to be performed, or

(ii) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC, aimed at encouraging improvements in the safety and health of workers with a fixed-duration employment relationship or a temporary employment relationship.

(iii) they are temporary employment relationships within the meaning of Article 1(2) of Council Directive 91/383/EEC.

SECTION 11

Safeguarding of employees' rights

Article 3

1. unchanged

Member States shall provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or employment relationship. However, in respect of obligations that fall due after the date of the transfer, the transferor shall be liable only to the extent corresponding to the portion of the relevant period which expired on the date of the transfer. Member States may limit the transferor's joint liability to those obligations which arose before the date of the transfer and fall due within the first year following that date.

2. unchanged

until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement

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

3 Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.

Article 4

1. The transfer of an undertaking, business or part of a 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.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

3. unchanged

4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the laws of the Member States may provide that the transferor's debts arising from a contract of employment or an employment relationship due before the transfer or before the opening of insolvency proceedings, shall not be transferred to the transferee in cases of transfers effected in the context of insolvency proceedings other than proceedings mentioned in Article 1(5), such as administration or judicial arrangements, compositions, suspension of payments, or other analogous non-liquidation proceedings, provided that such proceedings:

- (a) are conducted under the supervision of a competent public authority, which may be an insolvency practitioner authorised by a competent public authority, and
- (b) give rise, according to the legislation of the Member State in question, to the protection laid down by its national law, ensuring a level of protection at least equivalent to that provided for by Council Directive 80/987/EEC 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

Article 4

1. unchanged

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

Article 5

1. If the business preserves its autonomy, the status and function, as laid down by the laws, regulations or administrative provisions of the Member States, of the representatives or of the representation of the employees affected by the transfer within the meaning of Article 1(1) shall be preserved.

The first subparagraph shall not apply if, under the laws, regulations, administrative provisions or practice of the Member States, the conditions necessary for the re-appointment of the representatives of the employees or for the reconstruction of the representation of the employees are fulfilled.

2. unchanged

3. Notwithstanding Article 3 (1.2 and 3), the laws of the Member States may allow the employer or the person or persons exercising the employer's powers, on the one hand, and the employees' representatives, on the other hand, to change the terms and conditions of employment by an agreement concluded as a means of ensuring the survival of an undertaking, business or part of a business transferred in the context of the proceedings referred to in Article 3(4). Such an agreement may also determine whether and to what extent dismissals may take place for economic, technical or organisational reasons entailing changes in the workforce.

4. Without prejudice to paragraph 2 of this Article where the agreement referred to in paragraph 3 is concluded, it shall be presumed, unless proved to the contrary, that the alteration of the terms and conditions of employment is made as a means of ensuring the survival of the transferred undertaking, business or part of a business and that the dismissals concerned are effected for economic, technical and organisational reasons entailing changes in the workforce.

5. The Member States may confer on the competent judicial authorities the power to alter or (to) terminate contracts of employment or employment relationships existing on the date of a transfer effected in the framework of (the) insolvency proceedings referred to in Article 3(4), to ensure the survival of the undertaking, business or part of the business.

Article 5

1. If the business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by a transfer within the meaning of Article 1 shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employees' representation are fulfilled.

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

2. If the term of office of the representatives of the employees affected by a transfer within the meaning of Article 1(1) expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.

SECTION III

Information and consultation

Article 6

1. The transferor and the transferee shall be required to inform the representatives of their respective employees affected by a transfer within the meaning of Article 1(1) of the following:

the reasons for the transfer,

the legal, economic and social implications of the transfer for the employees,

measures envisaged in relation to the employees.

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

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

2. If the transferor or the transferee envisages measures in relation to his employees, he shall consult his representatives of the employees in good time on such measures with a view to seeking agreement.

3. Member States whose laws, regulations or administrative provisions provide that representatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees may limit the obligations laid down in paragraphs 1 and 2 to cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.

If the business does not preserve its autonomy, and provided that the conditions necessary for the constitution of the representation of the employees are fulfilled, the Member States shall take the necessary measures to ensure that the employees transferred, who were represented before the transfer, continue to be properly represented during the period prior to the reconstitution or reappointment of the representation of employees.

2. If the term of office of the representatives of the employees affected by a transfer within the meaning of Article 1(1) expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.

SECTION III

Information and consultation

Article 6

1. The transferor and the transferee shall be required to inform the representatives of their respective employees affected by a transfer within the meaning of Article 1(1) of the following:

the reasons for the transfer,

the legal, economic and social implications of the transfer for the employees,

any measures envisaged in relation to the employees.

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

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

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

3. unchanged

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

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

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

5. Member States may provide that where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed in advance when a transfer within the meaning of Article 1(1) is about to take place.

SECTION IV

Final provisions

Article 7

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions needed to comply with this Directive within two years of its notification and shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered

4. The obligations laid down in this Article shall apply irrespective of whether the decision leading the transfer is being taken by the employer or by an undertaking controlling the employer. In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such breach occurred because the information has not been provided by the undertaking which took the decision leading to the transfer shall not be accepted as an excuse.

5. The Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which normally employ 50 or more employees or which, if employing less than 50 employees, fulfil the workforce size thresholds for the election or nomination of a collegiate body representing the employees.

6. Member States shall provide that where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed in advance when a transfer within the meaning of Article 1(1) is about to take place.

SECTION IV

Final provisions

Article 7

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

Article 8

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive, to pursue their claims by judicial process after possible recourse to other competent authorities. This Article shall also apply to employees representatives in respect of their rights under Articles 4 (3, 4 and 5), 5 and 6.

by this Directive

Article 9

Within two years following expiry of the two-year period laid down in Article 8, Member States shall forward all relevant information to the Commission in order to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 10

This Directive is addressed to the Member States.

Article 9

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1996 at the latest or shall ensure, that at that date at the latest, the employers' and employees' representatives have introduced the required provisions by means of agreement, the Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive.

2. When Member States adopt the measures referred to in paragraph 1, such measures shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Member States shall inform the Commission immediately of the measures they take to implement this Directive.

Article 10

Directive 77/187/EEC is repealed with effect from the date of transposal of the present Directive, without prejudice to the Member States' obligations with regard to the deadline for transposal of Directive 77/187/EEC, indicated in Annex I.

Any references made to the repealed Directive are understood as being made to the present Directive within the meaning of Article 9(1) and are to be interpreted on the basis of the Comparative Table in Annex II.

Article 11

unchanged

This Directive shall enter into force 20 days after its publication in the Official Journal of the European Communities.

Appendix BComparison of the implementation of the proposed Directive by two Member StatesMember State A

1. Employees on sea going vessels are excluded from Section III concerning consultation.
2. Employees working for an undertaking, business or part of a business which is the subject of bankruptcy proceedings with a view to liquidation are excluded from the protection of the Directive.
3. No account is taken of the employment relationship and the dependency of the worker upon the acquirer of labour. A very limited definition of employee is used and confined to those people with a contract of service.
4. Joint liability is limited to obligations which arose before the date of transfer and fall due within one year.
5. The terms and conditions of transferred collective agreements apply for a maximum of one year.
6. In insolvency proceedings the transferor's debts arising from a contract of employment are not transferred.
7. In order to help the survival of the undertaking, business or part of business the employer, or the person carrying out that role, and the employee representatives may vary the terms and conditions of employment and agree on dismissals as a result of ETO reasons.
8. The judicial authorities may, without the agreement of the parties, alter or terminate

contracts of employment.

9. The consultation process is only required in undertakings, businesses or parts of businesses employing 50 people or more.

Member State B

1. All parts of the Directive apply to sea going vessels.
2. There are no exclusions from the Directive as a result of bankruptcy and insolvency proceedings, whether leading to liquidation or not.
3. There is a wide definition of employee and employment relationship.
4. There is no limit to joint liability.
5. The terms and conditions of collective agreements continue for their full duration.
6. All debts and liabilities towards employees are transferred to the transferee, even in insolvency proceedings.
7. Employees are not permitted to agree to alter their terms and conditions of employment as a result of a transfer under any circumstances including rescue situations.
8. The judicial authorities may not alter contracts of employment or terminate them in order to rescue an undertaking, business or part of a business.
9. There are no exclusions, based upon the size of the organisation, from the need for consultation with employees.

Appendix CComparison between the employer and trade union views on the proposedDirective**Transfer of an Undertaking**

CBI proposal:

"The transfer of an economic entity which retains its identity, taken to mean a self contained set of tangible and intangible elements, and whose function is effectively continued or resumed, shall be deemed to be a transfer within the meaning of this directive.

However the transfer of a mere activity, which is in the nature of a support or ancillary service to the trading objective of an undertaking, resulting from a contract whereby the undertaking entrusts to another undertaking on its behalf the performance of this activity, whether or not it was previously performed directly by the first undertaking, shall not in itself constitute a transfer within the meaning of the directive. Similarly, simple loss of such a contract to another undertaking or resumption of such an activity by the first undertaking shall not constitute a transfer within the meaning of this directive".

TUC proposal:

Retain the current definition in Article 1(1) as interpreted by the European Court of Justice.

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

Insolvency proceedings

CBI view:

The proposed distinction between liquidation and non liquidation proceedings is not helpful or clear. Would prefer to exclude all insolvency proceedings from the Directive. Proposed procedures may be long and cumbersome, especially the consultation process with employees.

TUC view:

The provisions of the proposed Directive will have a detrimental effect on workers' rights. They will be "unworkable and deeply damaging for employees". "A more sensible solution would be to provide that employment debts do not transfer in an insolvency situation, provided the protection under the Insolvency Directive is increased".

Do not accept judicial supervision. The court would only receive employer's side of the argument as the employees would not have sufficient information to argue against them.

The definition of employee

CBI view:

Concerned that the proposals do not clarify the situation. Content with all employees

benefiting from transfer rights or subject to national rules. Proposed Article 2.2 should be explicitly without prejudice to proposed Article 4(1).

TUC view:

Welcomes proposals - "It is what the central purpose of the Directive is about".

Joint liability

CBI view:

Completely opposed to proposals. They will cause more confusion.

TUC view:

Proposals are convoluted and difficult to apply.

General view

CBI:

"..the revision of the Directive is clearly an opportunity to seek to secure a text which is based on the current needs of business in a changing economic scene. In keeping with the principle of subsidiarity this will tend to point toward appropriate scope for national determination of relevant issues".

TUC:

"..in the TUC's view the revision of the directive is unnecessary and the protections of the existing text should remain unchanged".

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