

EUROPEAN UNION DEVELOPMENTS

European Labor Laws Relating to Business Restructuring

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The restructuring of businesses—and other organizations that employ people¹—has for decades been a central concern of the European project, as it is closely linked to the transformation of discrete, national markets into a single, European one.² Specific interest in the employment effects of business restructuring dates back to at least the early 1970s, and a wave of initiatives that started in the late 1990s has resulted in there having been several important developments in European labor law in recent years.³

This note will be divided into three sections. The first will consider briefly the reasons for the European Union's ongoing interest in this area, the second will describe the main developments

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1. Although for the sake of legibility I shall refer to “business restructuring,” the following applies to all private-sector organizations that employ people, and may apply to aspects of work in the public sector, depending on whether or not this is treated as employment.

2. Business restructuring is currently giving rise to serious concerns, not least because there have been high-profile cases of businesses relocating to take advantage of cheaper labor costs in the new Member States of Central and Eastern Europe, or indeed outside of the European Union (EU) altogether. See *Socially Responsible Enterprise Restructuring in Europe: Part One*, 361 EUR. INDUS. REL. REV. 13 (2004); *Socially Responsible Enterprise Restructuring in Europe: Part Two*, 362 EUR. INDUS. REL. REV. 18 (2004); *Socially Responsible Enterprise Restructuring in Europe: Part Three*, 363 EUR. INDUS. REL. REV. 16 (2004).

3. Probably the most significant of all recent developments for labor law (and indeed for all areas of EU policy and law) was the enlargement of the European Union in May 2004 to include ten new Member States, mostly countries that until a decade and a half ago were under communist government. The full impact of this change is only beginning to be felt, but as the Commission's High Level Group noted, the formal and practical implementation of European social law in these countries—that includes both the laws already in force and the developments described in this note—is a “great challenge” for the European Union. See Report of the High Level Group on the Future of Social Policy in an Enlarged European Union, European Commission, Directorate General for Employment and Social Affairs, May 2004, available at http://europa.eu.int/comm/employment_social/employment_strategy/enlargement_en.htm.

in the legislation in recent years, and the third will take a somewhat longer perspective in order to discuss the ongoing problems that have arisen in respect of one particular directive: that on Transfers of Undertakings.

I. THE REASONS BEHIND THE CREATION OF EUROPEAN LABOR LEGISLATION ON BUSINESS RESTRUCTURING

The creation of a single European market to replace the national markets of each Member State is probably the most important goal of the European Union (EU),⁴ so the European interest in business restructuring is easily explicable in terms of market-building: of encouraging and facilitating the development of businesses so that they operate within a European, rather than a national, framework. Perhaps somewhat less easy to explain is the reason behind the development of the European *labor law* related to restructuring: the divergence of opinions on the desirable extent of—and sometimes the very need for—labor legislation at the European level is reflected in the different perspectives on the purposes of such laws.⁵ One perspective, which is not uncommon within European institutions and many of the Member States, considers the protection of employees to be an important goal in itself. When, for example, the European Commission took stock of the Transfers Directive in 1994, it concluded: “The main purpose of the Directive is . . . to ensure that the restructuring of enterprises within the Common Market does not adversely affect the employees in the undertakings concerned.”⁶

However, this is probably a case of putting the cart before the horse. A strong case could be made that the purpose of this and the other directives is to ensure that the resistance of the employees (and

4. Certainly, this is the aspect of the EU where most advances have been made (for example, in respect of the development of the single European market; the structural funds; the limits on state aids to failing companies; the opening up of public sector tendering to Europe-wide competition; and the increasingly active competition policy at EU level). Other key goals of the European project, such as bringing peace and security to Europe and improving the living standards of its people, are also important but are to be achieved through the goal of economic integration.

5. This ambiguity may also be due to the nature of the law-making process within the European Union, for although the official, public face of this process is extremely well-documented (*see, e.g.*, the Prelex and Celex databases, *available at* <http://www.europa.eu.int>), the political negotiations within the Council—where the governments of the Member States get down to the real horse trading—take place behind closed doors. The legislation that emerges may have omissions and unclarity that are explicable in terms of the need to reach a political compromise (especially in an area such as social policy where not all of the Member State governments are agreed on the desirability of legislation) but that are not necessarily easily explicable in terms of the policy aims that the legislation is supposed to address.

6. COM (94) 300 final.

maybe public sympathy for such resistance) does not adversely affect the restructuring of enterprises. In this sense, the Commission was perhaps nearer the mark right back in 1972 when it presented its proposals for the first labor law directive in this area:

economic integration, and the accompanying progressive interdependence of national markets, together with increasingly tough competition at world level, the rate of technological progress and the changes (rationalization, cooperation, mergers) which firms undergo directly or indirectly as a result of the functioning of the Common Market, have profound repercussions on the security of employment for workers.

The economic changes and closures of undertakings which these can involve are however an integral part of a development towards more promising activities. It is therefore necessary not to hinder them, but to place this professional mobility within a framework of appropriate guarantees.⁷

That is, addressing the (negative) social consequences of business restructuring is a means of promoting it, and thus of encouraging its (positive) economic consequences. Of course, the decline in the strength of organized labor since the early 1970s probably means that worker resistance to change has long been less of an obstacle than it was, but there nevertheless remain important pressures to maintain and develop a social framework for change. First, the concept of a European social model based on employment protection continues to exert an important influence, and indeed the European Union has invested a great deal of political capital in the development of its social dimension. So even though social matters always seem in practice to come a poor second to economic ones, they are nonetheless given a high profile because they are seen as an important means of encouraging popular support for the development of the European project as a whole. Second, Member States with higher levels of employment protection may be anxious to promote the development of employment standards at a European level in order to prevent competition from businesses in Member States with less-demanding social laws resulting in pressure to deregulate, and possibly even to a labor law “race to the bottom.” And third, every so often a case of restructuring at the European level gives rise to significant political controversy, and thus to pressure for the development of new laws. Two particularly notorious cases during the 1990s are often cited as having had an important influence upon the present shape of the European labor law relating to business

7. COM (72) 1400.

restructuring: the *Hoover* case, which focused concern on “social dumping” (companies relocating to Member States with weaker social protection) and the *Renault Vilvoorde* case, which raised concerns about the effectiveness of laws on the information and consultation of workers.⁸

II. RECENT DEVELOPMENTS

Recent developments in this area may be divided into four main lines: the process of revising the three restructuring directives of the 1970s has neared completion; employees’ rights to information and consultation have been developed, *inter alia* in the context of business restructuring; the creation of a mechanism that respects different national traditions of worker involvement has meant that progress has at last been made on important aspects of European business law; and the European Commission’s initiatives on “Corporate Social Responsibility” have encouraged employers to consult with all parties who may be affected by business restructuring.

A. *Completing the Revision of the 1970s Restructuring Directives*

Three Directives on business restructuring were developed during the 1970s.⁹ As a rough summary, the *Redundancies Directive*

8. It is generally thought the *Hoover* case (Ross Tieman, *Cross-Channel Dust-up Over Jobs Clouds Market Realities*, TIMES (London), Feb. 2, 1993, at 25) was influential in the adoption of the European Works Council Directive, and the *Renault Vilvoorde* case, (*The Repercussions of the Vilvoorde Closure*, 289 EUR. INDUS. REL. REV. 22 (1998)), upon the Directive on Information and Consultation, and upon the initiatives relating to Corporate Social Responsibility. On these points, see Section II. ROGER BLANPAIN, EUROPEAN LABOUR LAW, ¶ 549 (6th ed. 1999) notes the influence of the *AKZO* case in 1973 upon the development of the Redundancies Directive (although his assertion that this case gave rise to the Directive is doubtful, as the Commission proposals date from at least the year before). See generally COM (72) 1400, *supra* note 7.

9. Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies; Directive 187/77/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses, or parts of businesses (also known as the “Business Transfers Directive” or the “Acquired Rights Directive”) and 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. For a good general discussion of all three Directives (as amended), see CATHERINE BARNARD, EC EMPLOYMENT LAW (2nd ed. 2000). Also included in this initial wave of labor legislation regarding business restructuring were the first proposals for directives on the European Company (on which see below) and on the use of “atypical work.” Although the Commission made formal proposals in respect of “atypical work” the early 1980s, (OJ Nos. C 62-7 (12 March 1982) and C 128/2 (19 May 1982)), agreement proved difficult to reach. The project has been resuscitated (and made less ambitious) several times, and three Directives have been adopted as a result (91/383/EEC on the health and safety of temporary workers, 97/81/EC on part-time work and 1999/70/EC on fixed-term work) but proposals for a Directive on agency

applies when an employer is considering the dismissal of a number of workers for reasons that are not related to those workers as individuals (that is, for example, where the reason for dismissal is not the capacity or behavior of the workers affected, but the reorganization of a business or the reduction in the size of the workforce). In such circumstances, the Directive requires employers to provide information both to the workers' representatives and to the competent national authority; it requires them to consult with the worker representatives on ways of avoiding the dismissals or of mitigating their consequences; and it requires a period of at least thirty days between the notification and the dismissals. The *Transfers Directive* applies when the whole or part of an organization that employs people is transferred from one employer to another. In such circumstances, the Directive guarantees a series of rights: before the transfer takes place, employees and their representatives must be informed and consulted; on the transfer, each employee's job, conditions and seniority are preserved by being automatically passed from the old employer to the new; and after the transfer, employees enjoy some protection against dismissal and changes in their conditions of employment if such dismissals or changes are related to the transfer.¹⁰ Last, the *Insolvency Directive* provides a number of guarantees for employees should their employer become insolvent: all Member States must ensure that a specific national institution (or institutions) guarantee the payment to employees of outstanding claims relating to their employment; that any failure by the employer to pay the employees' social security contributions does not affect their entitlements to benefits; and that protection is offered to former employees in respect of their actual or future entitlements under pension schemes that supplement the state social security scheme. The function of these Directives is thus not to prevent employers from reorganizing their businesses, but to establish some sort of procedural framework for them to follow when they do so. In all three, the substantive rules established by this framework are then subject to conditions that may reduce quite considerably the scope of the legislation; and all three allow Member States considerable margin for

temporary work (in their latest official formulation as COM (2002) 701 final) appear once more to have stalled.

10. This model is from Jo Hunt, *Success at Last? The Amendment of the Acquired Rights Directive*, 24 EUR. L. REV. 215 (1999).

determining the form of national laws and the extent of employers' liabilities.¹¹

The reform of European social legislation was one element in the debate on the European "Social Space" from the mid-1980s onward. It was argued that all such legislation should be kept under constant review "in order to adapt to a changing world."¹² Nonetheless, the reform process has in practice involved not only attempts to update and clarify the law, but also the incorporation into the legislation of the key legal concepts developed through the caselaw of the European Court of Justice (ECJ) (a reform which thus changes the form of the law without altering its content). All three of the 1970s Directives on business restructuring have now been reformed as part of this process. The first to be dealt with, the Redundancies Directive, was fairly straightforward: although certain of the Commission's proposals were dropped, the whole of the formal process—from the proposal to adoption of a new Directive—took only nine months. Later, and again as part of general drive toward clarity in the law, the two Directives were consolidated into a single text.¹³ The following reform, of the Transfers Directive, was much more complicated. As we shall see in Section III, the proposed reform became entangled in the controversy over the application of the Directive to changes in the provision of services, and as a result, the formal process took nearly four years. An amending directive was finally adopted in 1998, and the two were consolidated in 2001.¹⁴ The deadline for implementation of both these revised directives has expired, although some Member States have still to notify the Commission that they have adopted amending legislation at the national level.¹⁵

11. Indeed, the 2002 version of the Insolvency Directive drops from its title any pretence at the "approximation" of the law of the Member States (although this may also be because the European Community (EC) now has a specific power to create social legislation, so there is no longer any need to base the Directive on the powers to ensure the development and functioning of the Common Market. See Malcolm Sargeant, *Protecting Employees with Insolvent Employers*, 32 *INDUS. L.J.* 53 (2003)).

12. White Paper, *European Social Policy: A Way Forward for the Union*, COM(94) 333, § X. On the background to this, see JEFF KENNER, *EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND* (2003).

13. Directives 92/56/EEC and 98/56/EC. As a consequence of the 1992 Directive, the scope and content of the employers' obligations to inform and consult were widened in several areas. In particular, and in response to concerns about redundancies in multi-national organizations, the amending directive confirmed that the obligation on employers to provide full information about the reasons for the redundancy applies even when the decision was actually taken by a different undertaking which controls that employer (and which may be based in another country): thus, employers may not avoid the obligations under the Directive by arguing that they have not been provided with the information by the controlling undertaking.

14. Directives 98/50/EC and 2001/32/EC.

15. As of August 2004, of the pre-enlargement Member States, Denmark, France, Sweden, and the United Kingdom have not confirmed transposition of the amendments to the Transfers

This left the Insolvency Directive. Although plans for its reform were discussed at the same time as those relating to the Redundancy Directive, it was not until 2001 that the Commission adopted a formal proposal.¹⁶ The amending directive was agreed in well under two years¹⁷ and the Member States must now amend their national laws by October 2005. The new Directive does not alter the main lines of the existing law, but introduces many changes in the text, the principal effects of which are to widen the definition of insolvency in line with other Community legislation in this area,¹⁸ to simplify the framework of implementation options available to the Member States; to narrow the scope of the exceptions that Member States may make;¹⁹ and to clarify the law where the insolvent employer has activities in more than one Member State.²⁰ Given the experience of the other reforms, it would seem likely that a consolidating directive will be proposed before too long.²¹

B. *Employee Rights to Information and Consultation*

The second line of recent developments concerns the legal obligations upon employers to inform and consult with employees and/or their representatives. As we have seen, European law already created such an obligation, but only in the context of specific cases of business restructuring (those cases of redundancy, transfers, and insolvency that came within the scope of the 1970s directives). The creation of a *general* obligation—that is, a legal requirement to

Directive (due 2001), and Greece has not confirmed transposition of the amendments to the Redundancies Directive (due 1994).

16. COM (2000) 832 final; *see also* the reports on national laws COM (1995) 164 final and COM (1996) 696 final.

17. Directive 2002/74/EEC.

18. This was in particular a response to the narrow interpretation of the 1980 Directive taken by the Court in Case C-479/93 *Franovich 2*. The new definition is in line with that established in Regulation 1346/2000, under which fourteen of the then fifteen Member States agreed to coordinate (but not to harmonize) their national insolvency laws. *See Sargeant, supra* note 11.

19. This involved both limiting the specific exceptions permitted in the 1980 Directive and clarifying the scope of the law in areas where Member States might otherwise have created limits (for example, the new Directive specifies that part-time, temporary and agency temporary workers are covered).

20. This was done in order to avoid the potential confusion caused by the ECJ's rulings in cases C-198/98 *Everson* and C-117/96 *Mosboek*. Again, the new law is in line with that established in Regulation 1346/2000.

21. Such a directive would provide valuable clarification, since it was unfortunately decided to revert to the practice of presenting a complex list of replacements, insertions, and deletions (as was done with the amendment to the Redundancies Directive) rather than to follow the practice of replacing the whole of the substantive text as a single block (as was done with the amendment to the Transfers Directive).

establish an ongoing process of information and consultation, not limited to the occurrence of particular events—was a long-standing ambition of the Commission and was specifically intended to lead not just to information and consultation on day-to-day matters, but also to ensure that employers inform and consult their employees about all significant proposals relating to the restructuring of the business.²²

A first step in this direction was the Directive on European Works Councils of 1993.²³ This Directive aims to prevent the fragmentation of the processes of information and consultation in businesses established in more than one Member State, by facilitating the creation of a consultative body at European level. It seems probable that strategic questions, such as restructuring, will be dealt with at such a level. The scope of the legislation is however limited because it applies only to businesses with a thousand or more employees. In April 2004, the Commission took the first step toward a possible reform of the Directive by consulting the European Social Partners. At this stage, the question is the desirability of reform itself and we do not know whether there will be concrete proposals to widen the scope or alter the substantive contents of the Directive.²⁴

However, this question is perhaps now of somewhat less concern, following the adoption in 2002 of a Directive that will establish a general right to information and consultation to be enjoyed by all employees, even if the organization for which they work is established only in a single Member State.²⁵ Although the new, general right is subject to certain limitations established in the Directive itself, these are very much narrower than those of the European Works Council Directive.²⁶ The new legislation allows Member States considerable scope to decide the form that the national processes of information

22. See, e.g., The Council's Resolution of 1974 on the Social Action Programme: OJ C. 13/1 (12.2.74).

23. Directive 94/45/EC (extended to the United Kingdom by Directive 97/74/EC).

24. Commission Press Release, Commission Launches Consultation on European Works Council Directive, IP/04/494. Under Articles 137 to 139 of the EC Treaty (articles that govern the European law-making process for employment-related matters), the Commission is obliged to give the Social Partners the opportunity to reach a formal agreement on any given matter in the social policy field before it may itself submit a proposal for legislation. It has been suggested that the Commission would like to update the consultation procedures of this Directive in line with those that are now set out in the Directives on employee involvement in the European Company and European Cooperative Society. See *European Cooperative Society Adopted*, 358 EUR. INDUS. REL. REV. 35 (2003).

25. Directive 2002/14/EC. For a general discussion, see *New Working Time and Consultation Directives in Force*, 340 EUR. INDUS. REL. REV. 13 (2002); Brian Bercusson *The European Social Model Comes to Britain*, 31 INDUS. L.J. 209 (2002).

26. Article 3 establishes that the maximum threshold that Member States may impose is of between twenty and fifty employees; specific provisions may be made for certain types of employer, if such rules already exist in national legislation.

and consultation shall take, but requires that certain subject matter be covered by these processes: this specifically includes information and consultation on the probable development of the activity of the enterprise and how this development may affect employment. Such information must be given in time and a manner that allows employee representatives to prepare for the consultation, and all must be done in a “spirit of cooperation.” Thus, when the Directive is implemented into the national laws of the Member States, the employees of all larger businesses throughout the European Union should enjoy rights to be informed and consulted whenever a significant reorganization of their business is contemplated.²⁷ Moreover, these general rights are in addition to any other general or case-specific provisions on information, consultation, and participation that may exist in other European or national laws.²⁸

Specific references to employees’ rights to be informed and consulted were also included in the Directive on Takeover Bids, which was adopted in April 2004 after a long and complex gestation.²⁹ The focus of this Directive is on the “business” concerns related to this form of restructuring, but one of the reasons why the European Parliament rejected an earlier draft of the legislation in 2001 was precisely its belief that the proposal offered insufficient protection to the employees involved.³⁰ The Commission’s new draft of 2002 therefore proposed a number of provisions to address this question, and (as amended) these now appear in the Directive. First, both of the companies involved in the takeover bid must provide certain information to the employee representatives (or, in the absence of such representatives, to the employees themselves), albeit that this

27. The deadline for implementation is March 2005. However, Article 10 allows Member States that did not have any pre-existing national legislation in this area to phase in the new laws over a period that may last until March 2008 (a measure that was probably introduced to accommodate the United Kingdom and Irish governments). *Id.* at art. 10.

28. Article 9.

29. Directive 2004/25/EC, which must be implemented in the Member States by May 2006. Plans for a Directive on takeover bids were announced as early as 1985, as part of the move toward the completion of the single European Market; and in 1999 the European Council confirmed that the proposal was a priority in order to achieve the goal of fully integrating European financial markets by 2005. The first formal proposal for a Directive was made by the Commission in 1989; and throughout the 1990s there were continued attempts at law-making, which moved away from proposals to harmonize the laws of the Member States, and toward the easier goal of coordinating the different national systems. Nonetheless, serious difficulties were encountered in accommodating these different systems. See Jesper Lau Hansen, *When Less would be More*, 9 COLUM. J. EUR. L. 275 (2003); the Explanatory Memorandum to the 2002 proposal: COM (2002) 534 final.

30. The earlier draft merely required the party proposing the takeover to make public its intentions as regards the employees of the company to be taken over. See COM (1995) 655 final and European Parliament Session Document A5-0368/2000.

information will already have been made public.³¹ Second, the employee representatives of the company that is subject to the proposed takeover must have the opportunity to have their opinion of the bid appended to the official opinion published by that company.³² And third, the new legislation again makes it clear that it does not alter the existing national and European rules on information and consultation. That is, the Takeovers Directive does not create any new legal obligations in this respect, but instead makes it clear that the new legislation shall operate without prejudice to any national requirements relating to the information and consultation of employee representatives (or to any requirements on employee participation at board level, where these exist) in both of the companies involved in the takeover.³³

C. Employee Participation and European "Business" Legislation

In the same way that concerns about employees' rights related to information and consultation affected the development of the Takeovers Directive, concerns about employee involvement—and in particular, rights to participation on the board of companies—were for many years the main obstacle to the development of certain, fundamental aspects of European business law. Above all, there was strong opposition from Germany to any developments at the European level that might undermine their national system, in which there is a strong tradition of worker involvement. From the 1970s, this became the main impediment to the development of legislation that would have allowed companies to be constituted at the European level, rather than within one or other of the Member States. Germany could not accept the creation of a mechanism by which German-based companies could avoid their legal obligations in respect of employee involvement simply by re-constituting themselves at the European level; and Member States whose laws did not create any such

31. Article 6(1) & (2) requires the boards of both the companies involved to inform employee representatives (or, in the absence of representatives, the employees themselves) of the decision to make a bid and to give them a copy of the offer document, but only when these are made public. Similarly, Article 9(5) requires the company subject to the takeover bid to provide the representatives (or employees) with a copy of its opinion of the bid (which must include its view on the effects of the bid on employment and location).

32. Article 9(5).

33. Article 14. This stresses the importance of national requirements that arise from the European Directives on Redundancies, Insolvency, European Works Councils and Employee Involvement in companies constituted at EU level. Curiously, the draft version of this article stated that the Directives on Redundancies, Insolvency, European Works Councils should be applied without prejudice to the Takeovers Directive.

obligation could not accept that all European-level companies should be obliged to have German levels of worker involvement. Thus for many years a question of employment rights prevented the creation of a key aspect of European business law.

A solution was at last found, and in 2001 this finally permitted the adoption of the Regulation establishing the European Company Statute and of the accompanying Directive on the involvement of employees within the European company.³⁴ The Regulation sets out the procedure by which two or more companies in different Member States³⁵ may be transformed into a European-level company (which is called an SE).³⁶ Among the detailed provisions of company law, it states that no SE may be registered unless its arrangements for employee involvement have been resolved in line with the requirements of the Directive. These requirements then work in two phases. First, the Directive establishes rules for employee participation in the transformation process itself: where the managements of the existing companies plan to re-establish themselves as an SE, they must create a Special Negotiating Body in accordance with the detailed rules set out in the Directive, and must negotiate within that body in a “spirit of cooperation.” And second, in respect of practices once the SE is up and running, the Directive requires all SEs to establish procedures for the information and consultation—and in some circumstances board-level participation—of workers. A set of “standard rules” on information and consultation are set out in the Annex to the Directive, and these will apply to the SE, obliging it to create a Representative Body (similar to a European Works Council) unless the Special Negotiating Body agrees to an alternative mechanism. Any such agreement must be in writing and must cover a number of matters specified in the Directive. As for the thorny issue of employee participation at board level, the Directive sets out a complex body of rules that aims to ensure the simple principle that employees do not lose existing participation rights as a result of the transformation into an SE. Essentially, if none of the pre-existing companies has employee participation practices, then no such practices need be adopted within the SE; but if one or more of these companies does have such practices (whether these have been created as the result of a legal obligation or a free choice) then the

34. Council Regulation (EC) No. 2157/2001 (which, being a Regulation, will take effect without the need for further legislation at European or national level) and Directive 2001/86/EC.

35. The rules are quite complex, but in general there must be a coming together of companies from two or more Member States.

36. *Societas Europaea*.

Directive's "standard rules" requires the SE to adopt the highest level of employee participation that exists among those pre-existing companies. Again, this is a fallback position, and the Special Negotiating Body may, by written agreement, create alternative rules on employee participation in the SE, provided these cover matters specified in the Directive.

Member States were given until October 2004—the date of entry into force of the Regulation—to implement the requirements of the Directive into their national laws. Meanwhile, the procedure in respect of employee involvement created by the SE Directive has been adapted in order to permit the unblocking of other long-standing proposals in European business law. A Regulation and accompanying Directive on the creation of the European-level Cooperative Society (to be known as an SCE)³⁷ were adopted in 2003, and will come into effect in 2006.³⁸ This legislation is very similar to that on SEs, and the text relating to employee involvement closely follows that of the SE Regulation and Directive.³⁹ Also in 2003, the Commission adopted a new proposal for a directive on cross-border mergers within the EU (that is, where companies from different Member States come together but the result is a company incorporated within one of the Member States, rather than an SE).⁴⁰ Again, this proposal is almost wholly concerned with business law: differences between the laws of the Member States make mergers involving companies incorporated in certain countries prohibitively complicated and expensive, so the proposal aims to establish general principles and clarify which national law applies. And again, an earlier proposal floundered because of concerns that a company incorporated in a Member State that requires employee participation at board level would be able to circumvent the law by engineering a merger with a company in a Member State where no such requirement exists.⁴¹ In the hope that another outstanding item on the company law agenda may now be

37. Unlike the SE Directive, the SCE Directive leaves readers to figure out the Latin for themselves.

38. Council Regulation (EC) No. 1435/2003 and Directive 2003/73/EC.

39. The few differences relate to the different nature of a cooperative and a company; and there is also extra emphasis on achieving a gender balance within representative bodies, on "corporate social responsibility," and on the need to negotiate in cases of restructuring once the SCE has been created. See *European Cooperative Society Adopted*, *supra* note 24.

40. COM (2003) 703 final. It also seems that discussions have been reopened on the proposals for a European Association and a European Mutual Society, which are of the same vintage as the original proposals for the European Cooperative. See *European Cooperative Society Adopted*, *supra* note 24.

41. The Commission's first proposal on Cross Border Mergers was adopted in 1984 and published the following year at OJ C 23 (25.1.1985) 11.

resolved, the Commission's draft of 2003 therefore follows very closely the rules on board-level participation⁴² as established in the SE Regulation and Directive.⁴³

D. "Corporate Social Responsibility"

A last line of recent developments relates to a European-level debate, which the European Commission has been active in promoting since the late 1990s, on what it refers to as "Corporate Social Responsibility." This does not involve the creation of new legal obligations, but rather aims to encourage businesses voluntarily to consider the possible consequences of their actions within a wider social, economic, and environmental framework. In particular, businesses are encouraged to maintain dialogues with other parties whose interests may be affected by those actions. These parties are known as "stakeholders": an extensive concept that includes employees, consumers, supplier companies and subcontractors, and the wider community in the town or region where the business is located.⁴⁴ Specifically in terms of employees, the Commission has stressed that business restructuring is a key area for the application of Corporate Social Responsibility.⁴⁵ Accordingly, in 2002 the Commission invited the European Social Partners to consider the need for action at the European level on "socially intelligent

42. Information and consultation in the merged company will of course depend on the national laws of the Member State in which that company is incorporated (laws that, by the time the any directive on mergers enters into force, should implement the requirements of the Information and Consultation Directive).

43. Indeed, the proposal makes close reference to the large number of articles from the SE Regulation and Directive, when it would arguably have been much clearer to set out the proposed rules in a single text.

44. The Commission created an independent High-Level Group in 1998, and the recommendations of that Group led to the establishment of the European Monitoring Centre on Change (*see* <http://www.emcc.eurofound.eu.int>). Meanwhile, the Commission's rather glossy Green Paper "Promoting a European Framework for Corporate Social Responsibility" (based on COM (2001) 366 final), was followed by a Communication that set out proposals for an EU-level strategy (COM (2002) 347 final), which in turn resulted in the establishment of a Multi-Stakeholder Taskforce in 2002. Following the final report of this Taskforce in June 2004 (*available at* http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm), a further communication from the Commission is now expected. The European Council has given its support to the Commission's initiatives, (*see* OJ. C. 39/3 (18.2.2003)) as has the European Parliament (*see* Session Document A5-0133/2003).

45. In its Green Paper, the Commission cites just three areas of corporate social responsibility that directly involve employees: one is that businesses have an interest in "restructuring in a socially responsible manner" in order to prevent the workforce from becoming demotivated as a result of change. (The other two are training workers and treating them well so as to improve recruitment and retention; and the extension of health and safety protection beyond the minimum standards set out in national legislation.)

restructuring.”⁴⁶ Although in October 2003, the Social Partners did indeed make an agreement on this topic, they decided to do so in the form of a Joint Text: this sets out guidelines for best practice, but unlike several previous Agreements at this level, is not intended to have any binding effect. The Text, *Orientations for Reference in Managing Change and its Social Consequences*, talks of the importance of having a positive attitude to change, and of establishing a climate of confidence between management and workers. The Social Partners consider it essential that employers explain any proposed restructuring and the reasons behind it “in good time”; and they recommend that employers promote an open discussion with employees and/or their representatives on the matter. They note the importance not only of following legal obligations regarding information and consultation but also of ensuring a process of “continuous quality communication”; and they recommend that employers explore all possible alternatives to dismissal, and that employees accept the principle of change and are as adaptable as possible. Although the non-binding nature of this Joint Text is perhaps in line with the voluntary nature of Corporate Social Responsibility, it nevertheless remains to be seen just how far these pious good intentions will succeed in percolating down from EU level. As with all aspects of Corporate Social Responsibility, the main challenge must surely be how to translate the good intentions into practice.

III. THE ONGOING SAGA OF THE TRANSFERS DIRECTIVE

All of the European labor legislation relating to business restructuring has been the result of often difficult political debates on the desirability of greater or lesser regulation in this area; and indeed, when comparing the final text of a directive in this area with the original proposals, it can often be striking to see the extent to which the latter were watered down during the law-making process. In the case of the Transfers Directive, however, an important trend in business restructuring—the increase in the use of outsourcing—fell within the scope of a directive that already existed. For although the political debate that led to the adoption of the Transfers Directive focused on mergers and takeovers related to the development of the single European market, the wording of the Directive was deliberately

46. See the Commission’s consultation document: *Anticipating and Managing Change: A Dynamic Approach to the Social Aspects of Corporate Restructuring*, available at http://europa.eu.int/comm/employment_social/labour_law/index_en.htm.

set out in wider terms.⁴⁷ So when, in the mid-1980s, cases involving changes in the provision of services arrived at the European level, the ECJ confirmed that they were covered by the Directive.⁴⁸ Unfortunately, this area of law rapidly became both unclear and controversial. The ECJ has proved unable to develop a clear and consistent body of caselaw rules on the application of the Directive in this area;⁴⁹ and some Member State governments and business lobbies have argued strongly that it should not apply at all (although clarity of debate has hardly been helped by the frequent failure to distinguish legal arguments on the interpretation of the existing law from policy arguments about what the law should be).

These problems came to a head when the Commission's proposals to reform the Directive (which did not originally consider changes in the provision of services)⁵⁰ coincided with the *Schmidt* case of 1994, in which the ECJ gave a wide interpretation to the Directive in this area.⁵¹ Following another, apparently narrower, ruling of the ECJ in 1997 (the *Süzen* case⁵²), the controversy calmed sufficiently for the Member State governments to agree to the amending Directive of 1998. Nonetheless, the key questions were ducked rather than resolved: the ECJ has never clarified the extent to which *Süzen* altered the law as established in *Schmidt*; and the Member States gave such priority to reaching a political agreement on the new Directive that they accepted a text which clearly does not succeed in its stated

47. The title of the first draft of the Transfers Directive (OJ No. 104/1 (13.9.74)) referred only to the retention of employees' rights "in the case of mergers, takeovers and amalgamations" (COM (74) 351 final) but this was later changed to the present reference to the "transfers of undertakings, businesses or parts of businesses." (Paradoxically, this change may have been the result of a desire by the U.K. Government to limit the scope of the Directive: the reference to a change in employer, rather than a change in ownership, excludes transfers effected by the exchange of shares, which was and is the most common way in the United Kingdom for businesses to change owners. See *Final Approval for "Acquired Rights" Directive*, 36 EUR. INDUS. REL. REV. 19 (1976); B.A. Hepple, *European Economic Community*, 6 INDUS. L.J. 106 (1977)).

48. Given the following discussion, it is interesting to note that lawyers in some large firms are interested in seeing whether the Transfers Directive might also be extended to cover cases where business relocate to another country. See Edward Fennell, *Lawyers Smooth the Way as British Jobs Go Overseas*, TIMES (London), Dec. 9, 2003, at (Features) 9.

49. In her introduction to an extensive study that looked in depth at the caselaw on the Transfers Directive, Silvana Sciarra argued that courts are not the right body to make social law—legislators can take a broader view of needs and resources—but in the absence of strong and coherent law-making at European level, the ECJ has been obliged to develop EC labor law. See Silvana Sciarra, *Integration through Courts: Article 177 as a Pre-federal Device*, in LABOUR LAW IN THE COURTS 1 (Silvana Sciarra ed., 2001) [hereinafter LABOUR LAW].

50. See Hunt, *supra* note 10.

51. Case C-392/92 *Schmidt*.

52. Case C-13/95 *Süzen*.

aim of clarifying the scope of the law⁵³ (and that also fails to address other key areas where attention was needed).⁵⁴

Largely perhaps for these reasons, the “steady trickle”⁵⁵ of cases on the scope of the Transfers Directive⁵⁶ shows no signs of abating and has already made this one of the most-litigated areas of European social law. Recent decisions show two lines of developments. First, in the *Beckmann* and *Martin* cases, the Court confirmed once again the potential of the Transfers Directive to have a very significant impact upon employers (this time with the development of the law in respect of pension rights, one of the areas ducked by the 1998 reforms).⁵⁷ And second, in its decisions in *Temco* and *Abler*,⁵⁸ the Court has stuck to its guns over the unclear guidance it offers on the scope of the law: if anything, the law is getting even more confused. So these cases, while perhaps not being of extraordinary importance individually, are part of a longer trend which *is* important and which confirms a problem that neither the legislative nor the judicial processes at the European level have been able to resolve.⁵⁹ Given the importance of this question, both in its own right and as an extreme example of the problems that may arise with the application of the European labor law on business restructuring, the remainder of this note will look at the background to these cases and consider what they can tell us about the way in which the law is developing.

53. Recital 4 of the 1998 Directive stated that the legal concept of a transfer needed to be clarified “in the light of the case-law of the Court of Justice,” but insists that this clarification does not alter the scope of the 1977 Directive as interpreted by the Court. In other words, the “clarification” of the 1998 Directive consists only of restating the caselaw rules as legislation, without making those rules any clearer than they were before.

54. See Paul Davies, *Amendments to the Acquired Rights Directive*, 27 *INDUS. L.J.* 365 (1998); Hunt, *supra* note 10; Stephen T. Hardy & Richard W. Painter, *The New Acquired Rights Directive and its Implications for European Employee Relations in the Twenty-First Century*, 6 *MAASTRICHT J. EUR. & COMP. L.* 366 (1999). The 1998 Directive did introduce some significant changes in the law, for example in relation to insolvency, but did so by providing Member States with what Davies calls a “quite remarkable range of choices” in respect of the law which they must create.

55. Paul Davies, *Transfers: The UK Will Have to Make Up Its Own Mind*, 30 *INDUS. L.J.* 231 (2001).

56. Most references for clarification of the Directives have been on the question of its application to cases involving a change of contractor, although another important question (which has, however, not given rise to anything like the same level of accompanying political controversy) is that of the extent to which the law on transfers applies to undertakings that are covered by a special laws relating to businesses in difficulties.

57. Case C-164/00 *Beckmann* (decided in 2002); Case C-4/01 *Martin* (decided in 2003). These judgments have important implications in those Member States where it is common for employers to provide pension plans.

58. Case C-51/00 *Temco* (decided in 2003) and C-340/01 *Abler* (decided in 2003).

59. In addition to the reform of the Directive itself, the Commission even took the unusual step of publishing an official document in which it attempted (without notable success) to explain the existing caselaw in clearer terms. See COM (1997) 85 final.

The fundamental question raised in *Temco* and *Abler* is the nature of the test that must be applied to determine whether or not there has been a transfer for the purposes of the Directive. The Transfers Directive itself does not provide much guidance, perhaps because those who drew up the legislation in the 1970s thought that there would be no great difficulty in identifying the large-scale mergers and takeovers with which they were concerned. However, with the inclusion within this scope of cases involving changes in the provision of services, the definition of the scope of the Directive became a key question, and it is one to which there are still no easy answers.

The lack of clarity has in part arisen because the circumstances under debate are themselves not easy to define with any precision. The example that perhaps comes most readily to mind is that of a business which decides to outsource its activities related to cleaning, security, or catering; but in order to understand the law, it is important to stress that the debate in this area may cover a much wider range of circumstances. First, in terms of the services that may be provided, these may involve relatively unskilled tasks that are ancillary to the main activities of the user organization (such as cleaning and security) but equally they may involve skilled work and tasks that constitute a central part of the user's core activities. A narrower view of the use of service contracts has been defended, notably during the reform of the Transfers Directive when some parties argued that ancillary activities should be excluded altogether from the scope of the law, but the amending directive of 1998 took a much broader view and specifically confirms that such activities are covered.⁶⁰ Second, in terms of the parties involved, the user organization may be a business, but it may also be a public authority or other body; and likewise, the service provider may be a private company, but may also be a not-for-profit organization. The ECJ has repeatedly confirmed that the Transfers

60. Now Article 1(1)(b) of the 2001 Directive. Much of the controversy associated with the reform of the Transfers Directive centered on this question, although the terms of the debate were far from clear. Lobbying (among others by the U.K. Government, which considered its program of contracting-out from the public sector to have been adversely affected by the Transfers Directive) seems to have persuaded the Commission to alter its proposals for amendment so as to changes in the scope of the Directive. See Robert Taylor, *Tories Seek to Cut Job Protection*, FINANCIAL TIMES (London), Feb. 28, 1995, at 11. Indeed, an early draft of the amending directive (unpublished, on file with author) referred directly to the exclusion of subcontracting. The official proposal however (COM(94)300 final) referred only to "activities," which, although it might have been more acceptable in political terms, did little to promote a clear discussion of the proposal and its implications. Further confusion stemmed from the fact that in neither case was it clear from a legal point of view that the proposal would actually have the effect of limiting the application of the Transfers Directive in respect of subcontracting and other changes in the provision of services.

Directive covers this wide range of factual situations.⁶¹ Third, there are three possible types of change that may occur in the provision of services. These are: the initial *contracting out* or *outsourcing* of the service, where the user organization decides that it will not use its own employees to work directly on a particular task, but will instead make a contractual arrangement with another employer for the performance of that task; the *succession of service contracts*, where the service contract comes to an end and the user organization decides to make a new contract for the provision of the same service with a new service provider; and the *reversion in-house* of the task, where the service contract comes to an end and, instead of making a new service contract, the user organization decides to use its own employees to perform the task directly. Again, the ECJ has been called upon to confirm that the Directive covers each of these situations.⁶²

Fourth, there is a wide range of possible relationships between the outgoing and incoming service providers. At one extreme of this spectrum, the only point in common between these two may be that one provides and the other provided the same service to the same user: both may reshuffle their employees among the various contracts they have with different user companies, so as to adapt to the new situation without altering the size of their respective workforces. Toward the other end of the spectrum however, important links may exist between the two. For example, both may employ workers specifically to perform a given service for a particular user. Thus the outgoing service provider will no longer need these workers and may dismiss them; and the incoming service provider, once it has been assured that it will take over the task (and not before) will need to recruit new workers. Clearly, the new service provider may be interested in taking on the former employees of the old, because these people will have the professional qualifications and experience necessary for the task, and—having just lost their jobs—will be looking for work. Similarly, the new service provider may purchase the equipment needed to perform the task from the old service

61. The key is whether the person is an employee. Cases involving non-profit organizations are covered (case C-29/91 *Redmond Stichting*); and although the ECJ ruled in C-298/94 *Henke* that a reorganization wholly within the public sector and affecting only workers with civil servant status does not come within the scope of the Directive, it has insisted on several subsequent occasions that this is a narrow exception, and so the Directive does apply to cases involving privatization, the outsourcing of a service from the public sector and the reversion in-house of such services. See C-343/98 *Collino*; Joined Cases C-173 & 247/96 *Sánchez*; Case C-175/99 *Mayeur*; see also C-452/02 *Delahaye* (currently before the Court: AG's opinion June 17, 2004).

62. The application of the Directive to contracting out was confirmed in C-201/91 *Rask*; to the succession of service contracts in C-13/95 *Süzen*; and to reversions in-house in joined cases C-173 & 247/96 & 74/97 *Hernández*.

provider, now that the latter is no longer in need of it. Many other cases will fall between these two extremes.

Moreover, the different relationships between providers may to some extent be linked to the nature of the relationships between those service providers and the user company. In situations where the provision of a service does not result in a stable relationship between user and service provider, the latter will almost certainly have a number of different clients and will maintain its own procedures, equipment, and workers. The fact that a particular user does not ask for a service to be performed again will have little impact on the workers involved: the end user of their services may change, but their employer will not.⁶³ However, the more a service has been adapted to the needs of one particular user, as part of a more stable relationship between user and service provider, the less independent that service provider may be. Indeed, it may be that where the service provider has specific procedures, equipment, and workers for use in a contract with a particular user, it is less likely to retain them should its relationship with that user cease. Thus, when there is a change in service provision, the workers involved may be more likely to find that their employment with the old service provider finishes, and they may be given the option of performing the same task for a new employer.

From the employees' point of view, the upshot of all this is that, toward one extreme of the range of possible changes, their employer ceases to provide a service for a particular user but they stay with that employer and are deployed elsewhere; and toward the other extreme, they end up performing the same task in the same place with the same tools and for the benefit of the same user company. Employees affected by changes of this second type may thus not notice any significant differences in the nature of the work they do: their experience of change may be limited to a change in the identity of their employer (with perhaps a consequent change in the color of their uniform) and to a change in their terms and conditions of employment. And it is these changes that are the key to understanding the application of the Transfers Directive in this area. It is not infrequently suggested that the savings that user companies may make through changes in service provision are due to competitiveness, based on the efficiency and innovation that can be

63. This compares with the ruling in C-48/94 *Rygaard*, in which the ECJ held that cases where a stable relationship is not created will fall outside the scope of the Directive, even if the service provider ceases all operations (and thus the employees lose their jobs) once the contract has been performed.

achieved by service providers who are specialized in the services they offer; and this may be true in some cases. However, changes in the provision of service contracts may often be attractive to user companies simply because they allow for the reduction of labor costs. The wages of the workers who provide the service may be cut; or savings may be achieved in a more indirect fashion, for example by cutting non-wage benefits and by intensifying workloads. Moreover, a change of service provider may bring to an end any benefits linked to length of service; it may allow for the selective re-employment of the workforce of the former service provider (so getting rid of more expensive workers); and it may result in the application of a less-demanding collective agreement.⁶⁴ In this context, a perhaps understandable failure always to be frank about the basis on which savings are achieved has perhaps contributed to the confusion over the scope of application of the Transfers Directive in this area. For, while the Directive does not necessarily prevent employers from making savings that are genuinely based on efficiency and innovation,⁶⁵ situations where a change of employer results in the same workers doing much the same job but under worse conditions would seem to fall squarely within the scope of its prohibitions.

Given the large number of employers and employees who may be involved—and thus the financial and employment interests at stake—there is clearly a need for clarity in the law: above all, for a simple and unambiguous test for the application of the Transfers Directive in these circumstances. Unfortunately, as *Temco* and *Abler* have confirmed, establishing the scope of the Directive involves the application of a tangle of different tests of varying complexity, and it is to these that we must now turn.

The starting point for these tests is the definition of the scope of the law as set out in Article 1.1 of the Directive itself. The 1977 version of the text stated, “This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as

64. This is an important factor in countries with significant sectoral collective agreements. For example, cleaners and security guards employed directly by a user in a sector with a collective agreement that guarantees them relatively favorable terms (such as public-sector administration or the petro-chemical industry) may be considerably worse off when the service they provide is outsourced and they became employees of a service provider subject to the collective agreement applicable in the cleaning or security sector (if indeed there is one).

65. Under the Transfers Directive, new employers may alter the terms and conditions of employment, provided that such changes do not relate to the transfer (and to the extent that such changes are permitted under the general law of the Member State in question); and they may make dismissals that *are* related to the transfer provided that these are for “economic, technical or organisational” reasons. See Articles 3 and 4 of the 2004 Directive.

a result of a legal transfer or merger.”⁶⁶ There are thus two key elements in this definition: something must be transferred (an undertaking, business, or part thereof) and it must be transferred in a particular way (as the result of a legal transfer or merger). Although the second element has the potential to constitute a significant limit on the application of the Transfers Directive,⁶⁷ the ECJ has taken a very wide interpretation of what constitutes a legal transfer or merger, holding that the Directive applies “whenever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business and entering into the obligations of an employer towards employees of the undertaking.”⁶⁸ This is a very wide formula that focuses on the outcome of the transfer, rather than on the form it takes. It has long proved wide enough to bring many different forms of change within the scope of the Directive (as we noted above, the Court has specifically confirmed that the three possible forms of change in service contracts are covered). Some commentators have argued convincingly that the formula is so wide as to make the test virtually meaningless,⁶⁹ but that has not stopped parties from raising questions about whether certain forms of transfer are covered by the Directive, nor national courts from referring such questions to the ECJ. In *Temco*, for example, the parties had arranged the provision of a cleaning service in a very complex manner, possibly in a specific attempt to avoid the application of the Directive.⁷⁰ The ECJ gave the clearest and broadest

66. Article 1.1 of the 1977 Directive. The amending Directive of 1998 confirmed that this law applies to parts of undertakings as well as parts of businesses, but this was probably for the sake of completeness, as the question does not seem to have caused any problems in practice.

67. In one respect it already does: as we have seen, before the 1977 Directive was even adopted, definitions were changed so as to exclude share transfers.

68. This is the most recent formulation of the test, as set out in *Abler*, ¶ 39. (The original formulation—in case C-287/86 *Kro*—offered even less guidance as to form, as it simply referred back to the “legal merger” mentioned in the Directive.)

69. See C. de Groot, *The Council Directive on the Safeguarding of Employees’ Rights in the event of Transfers of Undertakings: An Overview of Recent Case Law*, 35 COMMON MKT. L. REV. 707 (1998); see also Sylvaine Laulom, *The European Court of Justice in the Dialogue on Transfers of Undertakings: A Fallible Interlocutor?*, in *LABOUR LAW*, *supra* note 49, at 145. The main justification for this wide interpretation would seem to be the general policy of not allowing the Member States or the parties involved the ability to define key concepts and thus decide for themselves the scope of EC law (an argument that is, of course, weakened both by the deliberate exclusion of share transfers from the Directive and by the second part of this test). It was also justified by a hiccup in the translation of the 1977 Directive, which meant that its scope was wider in some languages than in others. See Case C-135/85 *Abels*.

70. In *Temco*, the user company made a contract with a service provider that then subcontracted the work to a subsidiary company created specifically in order to perform that work. This subsidiary continued to exist—albeit without any activity—after the contract between the service provider and user had come to an end, and the user had contracted the service from a new provider. See also case C-234/98 *Allen*, in which the ECJ also gave a very clear statement on the application of this part of the test.

definition yet of the line it has adopted, holding that, in order for the Directive to apply, it is sufficient simply for a transfer to be part of the “web of contractual relations” involved. But even this broad definition did not prevent the Court from having to deal with the issue once again in *Abler*. One gets the impression that it is thought worthwhile to invite the Court to move away from its broad interpretation: a point of view that, given the Court’s track record on the other aspects of the tests, is perhaps understandable.

Because the second element of Article 1.1 has been interpreted so widely, the decisive factor has become the first element: the question of what must be transferred in order for the Directive to apply. The ECJ developed a definition for this purpose in the mid-1980s, and experimented with a variety of wording before coming up with a formula according to which the thing that must be transferred is “an economic entity which retains its identity.” This formula was then incorporated into the legislation itself by the 1998 Directive.⁷¹ Thus once again we are faced with a two-stage test: we need to know what is an “economic entity” and how to determine whether it retains its identity following a transfer. In respect of the first stage, as we have already noted, the ECJ has taken a broad approach to the parties who are covered by the Directive, thus the entities that are covered include employers in not-for-profit organizations and in the public sector.⁷² The 1998 Directive defines an economic entity as “an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”⁷³ This would, however, appear to be wider than the definition established by the ECJ in *Süzen* (and restated in subsequent cases, including *Abler*), which refers to “an organized grouping of *persons and assets* . . .” As we shall see, the significance of the ECJ’s choice of wording is directly related to the second stage of the test.⁷⁴

71. As first developed, the test referred to a “business” which retains its identity as a “going concern”: case C-24/85 *Spijkers*. The concept of a “going concern” was dropped after a few cases and that of “economic entity” was arrived at only gradually (in case C-13/95 *Süzen*), via the concepts of “undertakings” (in case C-101/87 *Bork*) and “entities” (in case C-29/91 *Redmond Stichting*) and back to “businesses” (in case C-392/92 *Schmidt*). It was then inserted into Article 1(1) of the 1977 Directive by Article 1(2) of the 1998 Directive.

72. *See supra* note 61.

73. This is now Article 1(1)(b) of the 2001 Directive. The ECJ test also requires that the economic activity pursue a specific objective, which again presumably means that it is narrower than the test in Article 1(1).

74. *See infra* note 80.

In order to assess the retention of identity as required by this second stage, the ECJ established a multi-factor test.⁷⁵ Courts in the Member States must make an overall assessment of all the facts surrounding a transfer. No single factor is conclusive, and the weight to be given to each depends on the type of business involved. As examples of the factors that should be considered, the Court has drawn up an open list: whether tangible assets are transferred; the value of the intangible assets; whether employees or customers are taken over; and the degree of continuity in the activities (in terms of the similarity of activities before and after the transfer, and of the duration of any suspension of activities). This test has become something of a mantra that the Court continues to recite in full in all of its decisions in this area. Nonetheless, the development of this area of EC law has also been influenced very strongly by the tests that already existed in those Member States that had transfer laws prior to the adoption of the Directive. There were two different tests, both of which focused on a single, key factor: whether there was a transfer of assets between one employer and the other, or whether the new employer performs essentially the same activity as the previous one.⁷⁶ Both tests pre-dated the widespread development of outsourcing, and clearly they have very different results if applied to cases involving changes in the provision of services. If an “activity” test is applied to such cases, then they will almost certainly come within the scope of the law on transfers. And if an “assets” test is used, then whether or not such cases come within the scope of the law will depend on what happened to the assets. This is surely a somewhat arbitrary factor, given that the parties are usually free to make whatever arrangements they like in this respect; that in some cases, although the same equipment is used by the old and new service providers, it belongs all along to the user organization; and that in other cases no significant assets may be required in order to perform the task.⁷⁷

Although the ECJ appeared to reject both of these single-factor tests by developing its own multi-factor test, in practice the Court has

75. As with the “economic entity” test, the ECJ has presented several variations on this theme. The list of factors was first set out in case C-24/85 *Spijkers*; a much more limited list was used in case C-101/87 *Bork*, but then the Court returned to something much nearer the *Spijkers* formula in case C-29/91 *Redmond Stichting*, and this has been used (with minor variations in the wording) ever since.

76. See Paul Davies, *Preliminary Remarks*, in *LABOUR LAW*, *supra* note 49, at 131. Davies also argues that, given the importance of the issue, it is surprising the 1977 Directive failed to address the existence of different tests in the Member States that already had laws on transfers.

77. For example, on-site catering facilities may be owned by the user company and put at the disposition of service providers; and cleaning and security services may not require any substantial assets.

vacillated between different tests. This was the question at the heart of the controversy in the 1990s: the Court's increasingly broad application of the multi-factor test (culminating in *Schmidt*) was seen by a significant number of employers, commentators, and Member State governments as the application of the "activity" test. Possibly as a result of the ensuing criticism and political pressure,⁷⁸ the Court explicitly rejected the "activity" test in *Süzen* and subsequent cases. The problem is that it has done so both by reaffirming the multi-factor test (insisting that the taking over of an activity is only one factor to be taken into account in the overall assessment required by that test),⁷⁹ and by applying a version of the "assets" test (insisting that there must be a transfer of significant tangible or intangible assets in order for the Directive to apply).

Perhaps in an attempt to square this circle, the Court has added that, in the case of enterprises and sectors where an "economic entity" may function without assets, the Directive will cover a situation where the new employer performs the same activity and takes over a significant part of the workforce.⁸⁰ Nonetheless, it is difficult to see how any single-factor test can be applied without making the multi-factor test redundant; and the combination of the two in the decisions of the Court makes for complicated reading. There may certainly be an argument that the single-factor test as defined in *Süzen* was not all that much narrower than the list of examples cited in the multi-factor test, but the application of a closed list rather than an open one may considerably reduce the room for maneuver by national courts. Moreover, the ECJ has now made its single-factor test significantly narrower—and very much more difficult to apply in practice—by ruling that where "tangible assets contribute significantly to the performance of the activity" there must be a transfer of such assets in

78. The Governments of the biggest Member States (Germany, France, and Britain) were critical of the *Schmidt* decision. Such criticism was not however universal: the European Parliament, for example, strongly resisted the attempts to narrow the scope of the law as it stood after that case (see its official opinion on the initial draft amending directive: OJ C/1997/33/_117); and some parties in the United Kingdom have argued in favor of a wide interpretation of the law, in line with the *Schmidt* decision, in order to promote legal certainty. See Davies, *supra* note 55.

79. Confusingly enough, in refuting the application of the "assets test" the Court produced yet another list of factors (the transfer of the activity itself and of the workforce, management staff, the way in which the work is organized, operational methods, and operational resources), which were presumably to be taken into account when assessing the continuity of the activity. This list has been used in some subsequent cases, including *Abler*.

80. The basis for the Court's decision is unclear, as the conclusion (Operative Part) of *Süzen* does not seem to follow from the discussion of the law (Grounds). Although it is not made clear, the only element that could support the conclusions is the ECJ's preferred definition of "economic entity," which, as we have seen, differs from the definition subsequently established by the 1998 Directive by being limited to persons and assets only.

order for the Directive to apply.⁸¹ In other words, the transfer of intangible assets and workers is never relevant in some sectors. The basis for this ruling was presumably to insist that the proper weight be given to the different factors involved in a transfer, but the need to weight factors had already been established very clearly in the Court's formulation of the multi-factor test and, by narrowing the single-factor test, the Court has now further complicated the process of defining the scope of the Directive. The ECJ now seems to require that industrial sectors be divided into two categories: those which are manpower-based (where the transfer of workers is a key factor) and those which are assets-based (where it is not). Although the Court has so far only made three such categorizations, it has already failed to produce clear and consistent guidelines.⁸²

All the indications are that the tests for the application of the Directive have served to increase rather than alleviate the confusion in this area. Certainly, the steady trickle of cases before the ECJ has not let up. Although the number of cases may be small, the confusion that they generate at the national level within the now twenty-five Member States is very considerable. However, far from addressing the problem, the Court does not seem even to accept the existence of the inconsistencies that are at its root, continuing to present its caselaw as if this formed a coherent and comprehensible whole.⁸³

And even if the ECJ were to decide unambiguously in favor of the use of one particular test (and then provide a clear definition of how that test should be applied) this would still be unlikely to end the difficulties. We have already seen some of the problems with the single-factor tests: the assets test may result in the application of the Transfers law being arbitrary and relatively easy for employers to avoid; and the activities test has been strongly criticized by some

81. Case C-172/99 *Oy Liikenne*.

82. The decisions in *Oy Liikenne* (that public bus services is a sector dependent on assets) and in *Abler* (that hospital catering is a sector based on equipment, not manpower) contrasts with the ruling in C-234/98 *Allen* (that cutting tunnels in a mine is an activity that can function without assets). Whatever the key to these decisions is, it would not appear to be the nature of the sector, and the fact that the Court fails to cite *Allen* and *Oy Liikenne* in *Abler* does nothing to help in the establishment of general guidance on the application of the law, nor indeed to dispel the unfortunate impression that the Court is using this test as a means of reaching the decision which it wants in each particular case. (Although for a much more forgiving assessment of the Court's caselaw, see Amandine Garde, *Recent Developments in the Law Relating to Transfers of Undertakings*, 39 COMMON MKT. L. REV. 523 (2002).)

83. A good example of this was given in *Temco*, where instead of taking the opportunity to address the source of the difficulty, the Court attempted to clarify the law simply by reciting once more its standard tests and phrases (it even went as far as to cite *Schmidt* and *Süzen* together as support for a particular point, rather to acknowledge and explain the differences between the cases).

businesses and Member State governments for being too broad in its scope. But we should also note that the ECJ's multi-factor test, were it applied as the sole test, would almost certainly give rise to considerable difficulties. This is because a full and objective evaluation of all of the circumstances surrounding a transfer may be a good way of reaching a just solution in an individual case, but in the context of the rights and duties surrounding a transfer of employment, a just solution may be of relatively little use if it takes years to reach. Moreover, there must be serious doubts as to whether there is in all cases a "right answer" that can be found through an objective and detailed assessment by a court: for example, on consideration of the same facts in the *Abler* case, the national court decided there had not been a transfer for the purposes of the Directive, the national appeal court decided that there had, and the ECJ decided that there had not. If experienced judges have difficulty in applying the law to particular facts, it is surely only to be expected that there will be considerable room for differences of opinion among the various parties to transfers: which, in the case of changes in service contracts, may include differences between employers and employees, between user companies and service providers, and between rival service providers.

This problem has been compounded by the fact that the ECJ has not infrequently sought to resolve the particular case before it, rather than sticking to its given role of clarifying the European law so that it may be applied by national courts. It is not always easy to identify the general rules on the interpretation of the law from such decisions, many of which turn on their facts and are based on an analysis of the law—and a discussion of tests for applying that law—that are not always entirely clear.⁸⁴ Businesses and workers alike would surely find it more useful if the law established clearly what their position was before the transfer ever took place, rather than providing a *post-facto* and unpredictable ruling on their situation some years after the event. Indeed, the high levels of uncertainty surrounding the application of the Transfers Directive surely undermine the creation of a clear

84. Under Article 234 of the EC Treaty, national courts may (and in some cases must) refer questions about the meaning of European law to the ECJ. See *supra* note 24. In practice, it may sometimes be very difficult for the Court to rule on how the law should be interpreted in a given situation without also giving a strong indication of how it thinks the national court should resolve the particular case where this situation arose. In order to make this distinction clear, the Court sometimes emphasizes the general nature of its ruling by stressing that in all cases such as the one under consideration, the law is to be interpreted in the manner indicated (recent examples of this approach include *Allen* and case C-175/99 *Mayeur*); however in others cases, the Court goes beyond generalization—and it would seem beyond its powers as defined by Article 234—by directly deciding the case itself (recent examples include *Oy Liikenne*, *Temco*, and *Abler*)

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framework for change that, as we have argued, is probably the main aim of all the European labor laws relating to business restructuring.

