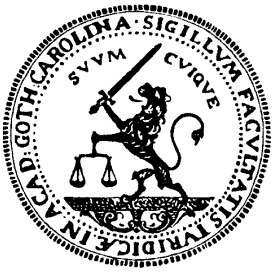

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Fiat Lex

Case study: comparing the process of implementation of the Acquired Rights Directive in the United Kingdom and in Sweden to examine the effect of legislative procedure on material law.

Master thesis
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Contents

Summary

This is a comparative study of legislative procedures of the United Kingdom and of Sweden. The aim of the thesis is to investigate if and how legislative procedure can affect legal material outcome. This is done through a comparative study of the implementative process of the Acquired Rights Directive, 77/187/EEC. Both *transposition*, the process of adopting the measures in directives into national law, and *application*, the administration of the transposition in concrete situations are studied.

When considering lawmaking in the United Kingdom, three aspects are described in the first part of the thesis: Statute Law, Case Law and implementation of EC directives. Statute Law can either be in the form of Acts of Parliament, which undergo extensive procedures in the hands of both governmental departments and the Houses of Parliament before they can come into force, or Statutory Instruments, which are delegated legislation made primarily by governmental departments but often subjected to lighter Parliamentary procedures. Case Law is important through its special standing founded in the traditions of Common Law and the doctrine of precedent. To understand Case Law it is necessary to consider Common Law elements, the rules of statutory interpretation, court hierarchy and how judgements are made. EC directives are normally implemented through statutory instruments in the frame of the European Communities Act 1972.

The Acquired Rights Directive was transposed in the United Kingdom through the Transfer of Undertakings (Employment Protection) Regulations 1981 made by the Under-Secretary of State in 1981 after having been approved by Parliament. In Sweden it was mainly transposed through additions and amendments to the Employment Protection Act and Employment (Co-Determination in the Work-place) Act passed by the Riksdag in 1994. Application took place in four cases in the UK House of Lords and 20 in the Swedish Labour Court and Supreme Court. The Material Law resulting from the implementation was in many ways similar, but there were noteworthy differences in the scope of the provisions, the rules regarding collective agreements, information and consultation, and the use of the optional articles of the Directive. There appear to be certain procedural features that affected the material result: how the transposition was integrated in existing law, the scope of power of the legislating body, the material produced in the process and available for application, the difference in time between the two transpositions, and the position of the courts and the types of cases they adjudged.

There are procedural aspects that have been identified for the Acquired Rights Directive, which can probably play an influential role in much directive implementation, and even in lawmaking in general. Legislative procedure appears to have some effect on its material result.

Sammanfattning

Detta är en komparativ studie av lagstiftningsprocesser i Storbritannien och i Sverige. Målet med denna uppsats är att undersöka hur strukturella sidor av lagstiftningsprocessen kan påverka den materiella rätten som den utlöper i. Detta görs genom att studera implementeringen av Övergångsdirektivet, 77/187/EEG. Både *överföringen*, dvs införandet av direktivets föreskrifter i nationell rätt och *tillämpningen*, dvs när de överförda reglerna nyttjas i konkreta situationer, har studerats.

Tre aspekter av lagstiftning i Storbritannien bör belysas inför denna studie: författad lag, prejudikaträtt, och implementering av EG-direktiv. Författad lag består av *Acts of Parliament*, som skapas av departement och genomgår utförlig granskning och bearbetning av Parlamentet innan detta fattar ett beslut därom och *Statutory Instruments*, som författas av departement utifrån ett delegerat mandat och ofta måste accepteras av Parlamentet för få effekt. Prejudikatsrätt är viktigt dels pga den *Common Law* tradition som finns, dels pga regler om bindande praxis. Prejudikatsrätt påverkas av Common Law regler, tolkningsregler, domstolarnas inbördes ställning och hur domar fälls. EG-direktiv implementeras vanligtvis genom Statutory Instruments inom ramen av European Communities Act 1972.

Övergångsdirektivet överfördes i Storbritannien genom Transfer of Undertakings (Employment Protection) Regulations 1981 som stiftades av arbetsmarknadsministern 1981 då förordningen godkänts av Parlamentet. I Sverige överfördes det främst genom ändringar och tillägg i Lagen om anställningsskydd och Medbestämmandelagen, som beslutades av Riksdagen 1994. Tillämpningen skedde i fyra fall i Storbritanniens högsta domstol, the House of Lords, och i 20 fall i Arbetsdomstolen och Högsta domstolen i Sverige. Den materiella rätt som implementeringen ledde till är lik på många sätt, men vissa beaktansvärda skillnader finns, bl a vilka fall som omfattas av reglerna, regleringen angående kollektivavtal och förhandling, samt utnyttjandet av de valfria föreskrifterna i Direktivet. Det tycks finnas vissa processuella drag som påverkat det materiella utfallet: hur överföringen integrerats i befintlig lag, de befogenheter som det lagstiftande organet har, materialet som tillkommer under processens gång och som kan nyttjas vid tillämpning, tidsskillnader mellan två överföringar, samt domstolarnas ställning i rättsystemet och den typ av fall de beslutar om.

Det har gått att urskilja vissa processuella särdrag som tycks ha påverkat implementeringen av Övergångsdirektivet. Dessa skulle antagligen kunna spela en viktig roll för direktivsimplementering generellt, och även lagstiftning i allmänhet. Lagstiftningsprocessen tycks kunna inverka på det materiella utfallet.

Preface

When starting to write this thesis I felt unsure I would be able to complete it in a satisfactory manner. Although there is always the feeling that one could have done more, I am very happy and proud to have finished this study. Above all, I feel that I have learnt much and developed my skills, which is one of the primary aims of writing such an essay.

I am very happy to have been able to write this on location in London, partly for personal reasons, partly because of the access it has given me to a new system of law and its materials. Having been able to visit Parliament in session and a hearing of the Appellate Committee of the House of Lords, make use of the resources at the London School of Economics library and the Parliamentary Archives has been essential for carrying out this study and I have enjoyed my first hand experiences immensely.

There are many who have helped me in this endeavour, some through practical help, some through their relentless support, and they all deserve my warmest thanks and acknowledgment:

The Hansard Society for enthusiastically and generously providing me with their report *The Legislative Process*, at no cost to me, when I could not find it anywhere else.

My tutor Bengt Lundell for giving me the input that pushed the thesis in a better direction.

My brother Anders who took time off from his busy life to supply me with SOU 1994:83 when it was not available to me and has been so enthusiastic about my work.

My father Karl-Anders who has always been interested in my academic work, and who read my thesis and gave me much constructive and important input regarding its content and language, just as he always has.

My friends Anna, Sian and Sofia for their support when I needed it the most. Lovisa for also taking the time to read what I had written and give me new perspectives. Linda for also giving me a home away from home. James who also double-checked my writing and language.

Last, but not least, Linus, my partner in life, who always believes in me, even when I am not sure he should, and who has shown interest in and support for the work I have done all the time. I would not have been able to do it without you.

Kristina Wollter
London, 4th November 2008.

Abbreviations

[ ]	Paragraph
art	Article
EC	European Community0
ECA 1972	European Communities Act 1972 (UK)
ECHR	European Convention on Human Rights
EEA	European Economic Area
EPA 1970	Employment Protection (Consolidation) Act 1970 (UK)
EU	European Union
FML	Förtroendemannalagen (SFS 1974:358) (SWE) (Trade Union Representatives (Status and Work-place) Act)
HMSO	Her Majesty's Stationery Service (UK)
HRA 1998	Human Rights Act 1998 (UK)
IA	Impact Assessment (UK)
LAS	Lag om anställningsskydd (SFS 1982:80) (SWE) (Employment Protection Act.)
MP	Member of Parliament
MBL	Lag om medbestämmande i arbetslivet (SFS 1976:580) (SWE) (Employment (Co-Determination in the Work-place) Act)
OPSI	Office of Public Sector Information (UK)
para/s	Paragraph/s
Prop.	Proposition (SWE) (Government Bill)
reg/regs	Regulation/s
RF	Regeringsformen (SFS 1974:1542) (SWE) (The Instrument of Government)
s/ss	Section/s
sch	Schedule
SFS	Svensk författningssamling (SWE) (Swedish Code of Statutes)
SIA 1946	Statutory Instruments Act 1946 (UK)
SOU	Statens offentliga utredningar (SWE) (Swedish Government Official Report)
TEC	Treaty establishing the European Communities
TSO	The Stationery Office (UK)
TUPE	The Transfer and Undertakings (Protection of Employment) Regulations 1981 (UK)

1 Introduction

> ‘Laws are like sausages. It is better not to see them being made.’
>
> *Otto von Bismarck*

Whilst Bismarck may have had a point and most definitely shows evidence of wit with this remark, I beg to disagree. Law influences our lives, in ways large and small, directly and indirectly, purposely and incidentally, whatever its subject matter. Even if the process of lawmaking can be complex, unattainable and messy it is important to try to discern and understand it, both in theory and practice. This is even more critical if the way we make law has a real effect on its content. This is the reason for choosing to study lawmaking processes and how they may influence substantive law.

1.1 Aim

The aim of this thesis is to consider if and to what extent the structure of the lawmaking process has an effect on the substance of material law. This will be done by studying the implementation of the Acquired Rights Directive[1] in the United Kingdom and in Sweden, and examining whether differences in the lawmaking processes in the two legal systems appear to have any substantive effects. As EC directives are to be implemented with mostly the same material result in all Member States a case study of such a process could give an insight to procedural effects. The United Kingdom and Sweden are traditionally classified as belonging to different legal families: Common and Civil Law. As such there should, at least superficially, exist sufficient procedural differences for a clearer comparison. An ancillary aim is to introduce the UK lawmaking process to predominantly Swedish readers in order to clarify and make accessible the main area of study.

1.2 Questions

Can structural differences in the legislative process or the procedural process have an effect on the substance of the law?

- How is the *transposition* of the directive handled in either system?
- Which are the main structural differences in the transposition of the directive?
- Can any material differences be discovered in the result of the transposition?
- Can the material differences be explained by the structural differences?

[1] Council Directive (EEC) 77/187 of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L061/26.

- How is the *application* of the directive handled in either system?
- Which are the main structural differences in the application of the directive-based law?
- Can any material differences be discovered in the result of application?
- Can the material differences be explained by the structural differences?

For the purpose of this thesis only the first two stages of the subdivision of directive implementation as described by S Prechal in *Directives in EC Law* are considered thus excluding *enforcement*. They are *transposition*, which refers to the process of adopting the measures in directives into national law, and *application*, which refers to the administration of the transposition in concrete cases.[2]

1.3 Selection

To answer the questions formulated for this thesis, a detailed study of one or more directives was to be used. Unfortunately the scope of the thesis, in time and size, only allowed for the study of one directive. The Acquired Rights Directive (hereafter 'the Directive') was chosen by the use of a set of criteria.

The first criterion was that the implementation of the Directive should have been considered and adjudged in the highest instance court available in each country. To find the directives that satisfied this a search was made in the British and Irish Legal Information Institute database for cases judged in the House of Lords in which 'EC' and 'Directive' could be found. The 23 directives that were primarily considered in the cases found were then cross-referenced with Swedish case law available in the Karnov and Zeteo databases, leaving 16 possible directives. The UK and Swedish case law of these Directives was then superficially reviewed to identify the type of problems handled by the courts. The type of case law interesting for the purpose of the thesis was the one dealing with the application and interpretation of the transposing provisions, not the one concerned with incompatibility with the directive, or where they were just mentioned in passing. Furthermore, it was desirable that there were more than one or two cases in each system dealing with a directive. Lastly, it was preferable that the provisions to be considered were not too technically complicated in themselves, as that would have taken too much time and focus away from the object of the study. Using this filter, the best suited directive was found to be the Acquired Rights Directive.

In hindsight, another set of criteria could have been more suitable for the purpose of the thesis. Additionally, it could have been preferable to limit the study to the transposing stage, have extended the study to more than one

[2] Prechal, *Directives in EC Law* (2 edn OUP, Oxford 2005) pp 5-6.

directive, and have found more corresponding and recent cases of transposition.

1.4 Method

The detailed study of the Directive was carried out in stages: identifying the processes involved, comparing these to each other and relating procedural features to material law while trying to understand cause and effect.

This was done by first tracing the process of transposition in each country in detail and analysing case law and the methods employed by the courts to understand the process of application. The material law produced, initially by transposition, sometimes modified through application, is then identified and compared, provision by provision, to find the differences and similarities. Secondly, the processes in each country are compared to each other, mainly with the view to finding differences that appear relevant in relation to the substantive law. Finally, considering the material gathered and aspects distinguished, an attempt to identify causes and effects was made. On the basis of the in depth study of the Directive, an analysis was effected to determine if the procedure of lawmaking has an effect on material law and what types of general aspects of the process have been seen to play a role in this.

Since presumptive readers, at a Swedish university, might not have sufficient insight in the UK legal system to fully appreciate the comparison and analysis, the UK lawmaking process, in general and regarding directives specifically, is first covered in an overview.

When referring to elements within the UK system, their proper names are used and described in the first part of the thesis. Elements in the Swedish system will be referred to in English, using the terminology adopted by the Swedish Parliament and Government. To assist a Swedish reader, these terms in English will be followed by the Swedish one in parentheses when introduced. The general principles of citation used in this thesis are those found in *The Oxford Standard for Citations of Legal Authorities*, 2006. Some modifications have, however, been made to meet the formal requirements for a Master Thesis at the Faculty of Law, University of Lund.

1.5 Material

No literature or other material has been found concerned specifically with the same subject matter as the thesis. The material used is therefore either a direct result of the lawmaking processes in the United Kingdom and in Sweden, or more general literature regarding lawmaking.

The material used in the study of the transposition and application in the United Kingdom is: a designation order, drafts and accompanying documents available in the Parliamentary Archives, Committee Reports,

parliamentary debates in both houses reported in the Hansard and the final instrument; cases reported or transcribed from the House of Lords, as well as one from the European Court of Justice (ECJ). This is the material that has proved available for this specific directive. An earlier draft and consultations on it have not been used as they did not lead to legislation.

The material used in the study of the transposition and application in the Sweden is: a Swedish Government Official Report (Statens Offentliga Utredningar, SOU), a Government Bill (Proposition), the statement from the Council on Legislation (Lagrådet), the report from the Parliamentary Committee (Utskottsbetänkande), the parliamentary debate and vote and the final instrument in form of a Law (Lag); cases from the Labour Court (Arbetsdomstolen) and the civil and criminal Supreme Court (Högsta domstolen). This is the material that has proved available.

For the more descriptive and explanatory part of the thesis, the material used is of another nature. The main source of information consists of English textbooks in Public, Constitutional and EC Law, and more precisely on lawmaking and legislation. These are complemented by more specific literature regarding EC directives, their implementation and legislation in the United Kingdom. One especially important book is Michael Zander's *The Law-Making Process* due to its extensive scope and detail and the authoritative position of the author. Great weight is also given to the writing of FAR Bennion, due to his exalted position in the field of Statutory Interpretation. Additionally, guides and manuals published by the Cabinet Office and Her Majesty's Stationery Office (HMSO), found on-line, which are mainly aimed for civil servants engaged in the lawmaking process are used as important sources of information.

1.6 Disposition

The thesis is made up out of three parts. It begins with background information, introducing the fundaments of the UK lawmaking process. This part includes an overview of the processes involved making primary and secondary legislation, of the judicial system, the role of the courts in making law, and of specific procedures concerned with the implementation of EC directives. Next, the implementation of the Directive is described for each system and comparisons are made, along with a comparative overview of the material law it resulted in. A section examining cause and effect concludes this part. Finally, there is a general analysis in which seemingly influential aspects of the procedure and other important factors are identified and generalised. This is rounded off by some concluding thoughts.

There are, in the appendix, reproductions of the UK transposing provisions, as well as a table cross-referencing the Directive with the transpositions of each country.

2 Making Law in the UK

This chapter is devoted to describing the fundamentals of statutory law and case law with a focus on how they are made.

2.1 Statute Law

The UK parliament at Westminster (hereafter 'the Parliament') passes statutes that have legal force in the whole territory of the United Kingdom. Statute Law emanating from Parliament is, today, supreme and can repeal and replace rules found in Common Law and Equity, but not itself be changed or challenged by either. Parliamentary sovereignty is such that one parliament cannot even be bound by another, making fundamental law, of the kind found in many other systems, impossible.[3]

Statute law is made either by Parliament directly (Acts of Parliament) or, by the Government or the Queen in Council through delegated power (Statutory Instruments). Whilst Acts of Parliament are truly supreme, Statutory Instruments are so extensively used that their role is of at least equal importance.

2.1.1 Acts of Parliament

2.1.1.1 Preparatory stages

A Bill, proposed legislation, may have several origins.[4] The process in which the Bill is prepared will vary slightly depending on source, but those proposed by the Government will follow a fairly distinct path. A vast majority of Bills are introduced by the Government. Their preparation will be described below.

With the exception of those responding to urgent needs, Bills are scheduled in for the parliamentary session by the Government. The schedule is continually revised and more or less complete at the start of each session and reflected in the Queen's Speech.[5]

The initial ideas for legislation are worked out, refined, developed and added to during a period of preparation in the hands of a Bill Team.[6] External consultation may also enter into the picture during this time.[7]

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[3] Barnett, *Constitutional & Administrative Law* (5 edn Cavendish Publishing, London 2004) p 190-191; Feldman, *English Public Law* (OXP, Oxford 2004) pp 112-113, 142-144.
[4] Barnett, 2004, p 393; The Hansard Society, *Making the Law* (The Hansard Society, London 1992) p 6.; Zander, *The Law-Making Process* (6 edn CUP, Cambridge 2004) pp 2-3.
[5] The Hansard Society, 1992, p 7; Zander, 2004, pp 10-13.
[6] The Hansard Society, 1992, p 7; Zander, 2004, pp 7-8.
[7] The Hansard Society, 1992, p 14 ; Zander, 2004, pp 8-9 .

Occasionally, formal consultations, in the form of a White or a Green Paper, may be used, but this is not mandatory.[8]

The work done by the Bill Team will eventually result in instructions to the Office of Parliamentary Counsel. Parliamentary Counsel will then draft the actual Bill in usable legal language to meet the aims and needs of the instructions, producing the legislative text to be introduced to Parliament.[9]

Beside the actual Bill, certain other documents must be produced to accompany it. Amongst these are: Explanatory Notes, that should clarify the intended effect and reasons for the legislation as well as impact, e.g., on public expenditure and environment; a memorandum on the proposed legislation's compatibility with the European Convention of Human Rights (ECHR) in accordance with the Human Rights Act 1998 (HRA 1998); and an Impact Assessment (IA) if the proposal will have an impact on businesses or charities.[10]

Once all the necessary documents have been produced satisfactorily, the Legislative Programme Committee must approve the Bill before it becomes ready for publication and to enter the legislative stages of the lawmaking process.[11]

2.1.1.2 Legislative stages

A Bill will be introduced in either the House of Commons or the House of Lords, but wherever it may start its journey, it will, in the end, have crossed the same hurdles. The manner of introduction depends on the type of bill being presented. For the purpose of this thesis, focus will be on Public Bills first introduced in the House of Commons.

The First Reading is the formal start of a Bill's passage through the legislative stages. The short title of the Bill is read out by a clerk and then a time for the Second Reading will be announced. Before this next reading, the Bill must be printed, together with its mandatory attachments.[12]

The Second Reading usually occurs a couple of weeks after the Bill's publication. This is the chance for those responsible to explain the ideas and reasons behind the Bill, and for other MPs to criticise, comment on and question the general principles of the Bill. When issues have been vented, a vote is held on whether 'the Bill be now read a second time' and consequently ready for the next step of the process. This is the most crucial time for the Bill, as most that pass the second reading will become law in one form or another. Care must be taken by those in the debate, especially

[8] The Hansard Society, 1992, p 7; Zander, 2004, pp 9-10.
[9] Cabinet Office, 'Guide to Legislative Procedure' (Guide) (October 2004) p 10; The Hansard Society, 1992, p 7; Zander, 2004, pp 14-15 .
[10] Cabinet Office, 2004, pp 36, 42-43, 49.
[11] Cabinet Office, 2004, pp 62-64; The Hansard Society, 1992, p 7; Zander, 2004, p 13.
[12] Cabinet Office, 2004, pp 77-81; Zander, 2004, p 53.

responsible ministers, as the Hansard notes may today be used as sources in statutory interpretation.[13]

Having passed its Second Reading, the Bill will be sent to a Standing Committee. Its members are selected after the Second Reading and its composition should reflect that of the House. In certain cases, this, the Committee Stage, may instead be handled by a committee of the whole house, a Select Committee or a Special Standing Committee for special consideration.[14] The Committee Stage means a thorough and clause-by-clause examination of the Bill. Amendments may be proposed and are allowed as long as they lie within the Bill's subject matter as set by the Second Reading. Each clause must be passed, in its amended or original form, to be included thenceforth.[15]

Then follows the Report Stage, when amendments are debated and voted on, before passing on to the Third Reading. Not all amendments will be brought to a vote; the Speaker of the House may deem some uncontroversial. Recommittal to Committee is possible at this stage.[16]

Usually, immediately after the Report Stage, a Third Reading will be held. Only the content of the Bill may be discussed at this stage; it is more a final agreement on the Bill than an opportunity to affect it in any way. It is even possible to take a Third Reading without any debate at all. After this formal last step in the House of Commons the Bill will be sent to the House of Lords for consideration.[17]

The Bill passes through a very similar procedure in the House of Lords, albeit with certain formal and substantial differences. Having passed through all stages in the House of Lords the Bill is returned to the House of Commons with any amendments made. The Commons will then have to consider the Lords' amendments. Mutual consideration continues until agreement is reached in both Houses and this process, called Ping-Pong, may go on for a while. If agreement is reached the Bill is ready for Royal Assent. If no agreement is reached before the end of session, or if the Houses cannot agree at all, the Bill is lost. This can, however, be prevented respectively by a motion to carry the Bill over to the next session, or the House of Commons evoking the Parliamentary Acts of 1911 and 1949 which allow a Bill to pass without the concurrence of the House of Lords.[18]

All needed now for the Bill to become an Act of Parliament is the Royal Assent, which is presented by either notification or commission in the name of the regent. Whilst it is within the royal prerogative for the monarch to refuse, assent is today more of a formality than a substantial hurdle. The Act

[13] Cabinet Office, 2004, pp 84-85; Zander, 2004, p 53.
[14] Cabinet Office, 2004, pp 99-100; Zander, 2004, p 54.
[15] Cabinet Office, 2004, pp 99-102; Zander, 2004, p 54.
[16] Cabinet Office, 2004, pp 113-115; Zander, 2004, p 55.
[17] Cabinet Office, 2004, p 115; Zander, 2004, p 55.
[18] Cabinet Office, 2004, pp 118-121, 138, 140; Zander, 2004, pp 55-56.

will come into force according to the commencement provisions in the Act. However, if no such provisions exist, it will come into force at the time of the Royal Assent. Once assent has been given, arrangements are made for the publication of the Act, both on paper and on-line, by HMSO.[19]

2.1.2 Statutory Instruments

There are several kinds of delegated legislation, but one subcategory is of special importance, because of its legal reach and use in directive implementation. Statutory Instruments, by legal definition, are subordinate legislation created by either the monarch, in the form of an Order in Council, or government Ministers as Regulations, Rules and Orders. Parliament endows legislative power through enabling provisions or acts, which specify the scope, subject matter and addressee of the delegation. A Statutory Instrument that does not stay within the given scope will be deemed ineffective when declared to be *ultra vires* by a court. The parent acts together with the Statutory Instruments Act 1946 (SIA 1946) give the framework for any Statutory Instrument. Whilst Statutory Instruments are by nature restricted, there are a number which are endowed with exceptional power. Parliament can enact enabling provisions which allow Statutory Instruments to amend and repeal Acts of Parliament. These are called Henry VIII-clauses after the high-handed monarch and have come to be used more and more frequently.[20]

First the preparatory and legislative stages of making Statutory Instruments are summarised below, followed by an identification of the differences in the making of Orders in Council.

2.1.2.1 Preparatory stage

As Statutory Instruments are based on provisions in Acts of Parliament, the initiative for them is to be found there, as well as their framework. The instruments will be prepared, policy-wise, by the departments responsible for the subject and usually drafted there as well, only making use of Parliamentary Counsel in more complicated cases. Consultation is more widely and easily used than in primary legislation, seemingly due to less need for secrecy. The parent act may even make consultation mandatory and it is also possible to publish the instruments in draft for the process. The consultation process is not otherwise formalised and will focus on practical implementation of the principles stated in the enabling act or similar.[21] Statutory Instruments should be accompanied by an Explanatory Note, of the type found in Bills. As with primary legislation, an IA must also be prepared in the case of financial effect. An Explanatory Memorandum, produced by the department explaining policy objectives and implications of the instrument, must in most cases also be laid with the instrument.

[19] Cabinet Office, 2004, pp 147-148; Zander, 2004, pp 56-57.
[20] Bennion, *Statutory Interpretation* (3 edn Butterworths, London 1997) p 183; Feldman, 2004, pp 115-117; HMSO, 'Statutory Instrument Practice' (Manual)(4 edn, November 2006) pp 1, 5; Zander, 2004, pp 108-109.
[21] Zander, 2004, pp 108-109.

Although not obligatory, it is considered proper to include a statement of compatibility with the ECHR in the case of an Affirmative Procedure.[22]

2.1.2.2 Legislative stage

Once the Statutory Instrument has been prepared in a satisfactory manner, and is ready to be made, it may have to be laid before parliament and go through certain procedures. How and where it must be laid is to be found in the enabling act.[23] A Statutory Instrument is laid with the deposit of copies of either the instrument itself or a draft to the Votes and Proceedings Office for the Commons and to the Clerk of Parliament for the Lords.[24]

There are three different kinds of procedures available: Affirmative, Parliament must approve the instrument; Negative, an instrument will fall if disapproved by Parliament; and Special, a particular procedure is specified. Additionally, an instrument might be laid without further procedures then needed, or not laid at all. This is quite common.[25]

An instrument laid under the Affirmative procedure must be approved in order to come into or remain in force, or to be made. The Affirmative procedure has not been standardised, but can be generally described. On receipt of copies of the instrument, the Leader of the House and the Chief Whips must decide whether it should be referred to Delegated Legislation Committee or the floor of the House of Commons for the mandatory debate. The House of Lords may not pass an affirmative resolution before receiving the report from the Joint Committee on Statutory Instruments or from the Delegated Legislation Committee, when applicable. When ready, a motion for affirmation is put to the Houses and either passed or not. This procedure is not very commonly used.[26]

Under the Negative procedure an instrument cannot be made or will be subject to annulment if it should be disapproved. Unlike the Affirmative procedure, this one has been standardised in SIA 1946. Within 40 days from the instrument being laid, a resolution can be passed with a 'prayer' to the monarch to revoke the instrument on the motion of an MP. The same period is valid for drafts. Debate on the laid instrument is not compulsory and will have to take place on the Opposition's own time if the Government does not provide any. Debates are therefore not very common. Amendments of the instrument are not possible. This procedure is the most common one.[27]

Instruments that has been laid, except those subject to Affirmative or Special procedure, must be registered with HMSO. Once laid, an instrument will also be printed and available for sale from The Stationery Office (TSO) as well as available on-line through the Office of Public Sector Information

[22] HMSO, 2006, pp 28-30, 72, 77.
[23] HMSO, 2006, pp 8-9; Zander, 2004, p 109.
[24] HMSO, 2006, pp 54-56.
[25] HMSO, 2006, pp 8-9; Zander, 2004, pp 110-11.
[26] HMSO, 2006, pp 61-63; Zander, 2004, p 110.
[27] HMSO, 2006, pp 63-66; Zander, 2004, p 110.

(OPSI).[28] The instrument will usually come into force, subject to the procedures described, at a time decided by the responsible department and stated on the instrument itself.[29]

There is an extensive process of scrutiny involved when making Statutory Instruments, mostly performed in different committees. Several of these will now be presented, specifying their points of focus.

The merits of an instrument are considered by the *House of Commons Delegated Legislation Committee* on referral from the House.[30] Furthermore, the *House of Lords Select Committee on the Merits of Statutory Instruments*, is responsible for examining all instruments laid before Parliament subject to either Negative or Affirmative procedure. This Select Committee is to especially consider, e.g., if the instrument is legally or politically important, inappropriately implements EC legislation or does not properly achieve its objectives. If reason is found to do so, attention will be drawn to such issues in the committee's regular reports.[31]

Technical scrutiny of an instrument is done in the *Joint Select Committee on Statutory Instruments*, which is made up of members from both houses. All instruments subject to proceedings, with negligible exceptions, must be looked over. There are nine points which should be especially considered. If the Committee finds reason to do so, it will draw attention to such matters in its reports to Parliament. Among these are: the imposition of tax, retrospective effect without leave from the parent act, and doubt of the instrument being *intra vires*, within the legal scope of the parent act. For this purpose the committee can gather both written and oral evidence and can expect to receive certain documentation *ex officio*. If an instrument is to be laid before the Commons only, the same work is done by the *House of Commons Select Committee on Statutory Instruments*.[32]

2.1.2.3 Orders in Council

Orders in Council are not as widely used, but are especially appropriate for matters of special importance and of constitutional weight, such as the implementation of international treaties, or less appropriate to be made by a minister, like those concerning ministerial functions. It is the Privy Council Office that takes care of the making of an order, its registration and printing, and, unless in draft, laying it before Parliament. The order is made through its signing by the Clerk of the Privy Council on behalf of the regent. However, ministerial departments are deeply involved as it is they who prepare and draft the order and follow it through any parliamentary procedure it might have to be subjected to. Even when the Privy Council

[28] HMSO, 2006, pp 44-49.
[29] HMSO, 2006, p 16.
[30] HMSO, 2006, p 79.
[31] HMSO, 2006, pp 86-87; Zander, 2004, pp 119-120.
[32] HMSO, 2006, pp 80-85; Zander, 2004, pp 111-112.

Office is in charge of the laying, all material will be supplied by the relevant department.[33]

2.2 Case Law

The debate on whether judges make or declare law within the frame of the English legal system, both in Common Law and Statute Law, is an old, and ongoing one. While at times, it was considered that the law could be but found and pointed out by the judiciary, at other times this has been dismissed as fiction, judicial decisions being seen as both creative and in practice changing rules. The dominant view today appears to be that of a grey-zone. Even if Case Law is not legislation through-and-through, it has such legislative effects that it must be considered when discussing the lawmaking process of the United Kingdom. The importance of Case Law here is especially strong considering the long history of Common Law. The effects of a Common Law tradition, with its doctrine of precedent, are likely to have a great impact also on statutory interpretation.[34] The role of a judge in the determination of what is law is paramount. As FAR Bennion, the great authority on interpretation, put it: 'Legislation is what the legislator says. The meaning is what the court says.' and 'The courts have sole authority to declare the legal meaning.'[35]

An overview of the framework for Case Law will now be presented. After that, several important and different elements of statutory interpretation will be described. Finally, there will be a closer look at the judgements themselves.

2.2.1 The Doctrine of Precedent

The principle of *stare decesis*, which is at the core of the principle of precedent, holds that a past decision is binding. A court's decision will consequently have an effect on others than those directly concerned. This is very strictly adhered to but depends very much on the hierarchy of the courts. Whether a court is bound by another and indeed by itself has been dealt with, to a great extent, in Case Law and is central to understanding and using the doctrine of precedent.[36] The following section will, briefly, consider the binding force of different courts' decisions, before mentioning some of the important elements of precedents.

2.2.1.1 Who binds whom?

The Appellate Committee of the House of Lords, consisting of the Law Lords, is the supreme court of the country, both as final instance of appeal

[33] HMSO, 2006, pp 6, 34-35; Horseford, 'The Order in Council' [1987] SJ 462.
[34] Geldart, *Introduction to English Law* (11 edn OUP, Oxford 1995) pp 10-11; Zander, 2004, pp 211-212, 298-300.
[35] Bennion, *Understanding Common Law Legislation – Drafting and Interpretation* (OUP, Oxford 2001) pp 15-16, 17-20.
[36] Feldman, 2004, p 91; Gillespie, *The English Legal System* (OUP, Oxford 2007) pp 73-74; Zander, 2004, pp 215-216.

in most cases and as the highest binding authority. All courts are bound by the decisions made in the House of Lords, even though the Court of Appeal has, at times, tried to shake its absolute authority. Additionally, some margin for disregarding a Law Lord decision by the lower courts now exists due to the provisions of the HRA 1998. The House of Lords, on the other hand, is not bound by any other national court and since 1966 it is no longer bound by its own decisions. This freedom to overrule its own decisions is used very infrequently and is subject to certain criteria announced in cases since then. Whilst being supreme nationally, the House of Lords is subject to the judgements of the ECJ in matters concerning the European Community and the European Court on Human Rights when dealing with questions on convention rights.[37]

The Court of Appeal consists of two divisions: one civil and one criminal. The Court of Appeal must follow decisions of the House of Lords. This was challenged several times during the 1970s but the House of Lords kept on reasserting its supremacy. The Civil Division is, furthermore, bound by its own decisions, with three restricted exceptions. Nevertheless, the Court of Appeal has tried to extend its power to depart from its own decisions but without success. The Criminal Division, on the other hand, enjoys more freedom, also being able to depart from its own decisions when obviously incorrect, but only in favour of the accused.[38]

In the High Court, the rules of precedent depend on its function at a given time. The sections of the High Court may act either in capacity of first instance, being a trial court, or as an instance of appeal or judicial review, a divisional court. Divisional courts are bound by the decisions of all higher courts, as well as having to follow their own decisions, subject to the same exceptions as the Court of Appeal.[39] As a simple trial court, it is bound by the higher courts, but not by itself. Decisions in the High Court are binding on the Crown Court, as well as the County Courts and Magistrates' Courts.[40]

The Crown Court, and the County and Magistrates' Courts do not have binding authority, on themselves or on others. They must, however, follow the decisions of the courts above them. Is it important to note that a superior court will never be bound by an inferior one. **T**he inferior may, however, have persuasive authority and its judgements used when solving cases.[41]

2.2.1.2 Elements of a precedent

A judgement is not binding in its entirety. The aspect of a decision that is an actual expression of law and embodies the deciding factors of a case is the *ratio decidendi*. Other legal reasoning and statements than those identified as the *ratio decidendi* are *obiter dictum* and are not binding but can be used as persuasive authorities. It is very important to identify these elements

[37] Feldman, 2004, p 94; Gillespie, 2007, pp 68, 74-75.; Zander, 2004, pp 215-223.
[38] Gillespie, 2007, pp 75-79; Zander, 2004, pp 225-249.
[39] Feldman, 2004, pp 94-95; Gillespie, 2007, pp 79-81; Zander, 2004, pp 249-251.
[40] Feldman, 2004, pp 94-95; Gillespie, 2007, p 80; Zander, 2004, pp 251-254.
[41] Feldman, 2004, pp 94-95; Gillespie, 2007, p 81; Zander, 2004, pp 251-254.

when precedents are use. However, this is no easy task. The main technique to void a precedent is to find arguably relevant facts that differ between cases. This is called *distinguishing*.[42]

2.2.2 Statutory Interpretation

Common Law aside, the legislative influence of the courts lies in their interpretation of statutes. Whatever Parliament has decreed, its meaning will *de facto*, be decided when applied by the courts. However, there are restraints. The first is the actual text of the Act or Instrument; the second are the rules and principles that have developed regarding interpretation of statutes. Only an incomplete introduction to these will be given here.

There has been and still is, a strong respect for the text itself in legislative interpretation in the United Kingdom. This has been somewhat relaxed of late, but should not be disregarded when trying to understand the process of interpretation. Traditionally, three rules of interpretation have been said to exist. Primary among these is the *Literal Rule*, which states that a statute must be construed after its plain, literal meaning, whichever the consequences may be. This rule has been somewhat mitigated by the *Golden Rule* where Parliament's purpose comes into action and absurd results, in the light of this, must be avoided. Consideration of Parliamentary intent is taken even further in the *Mischief Rule*. Here, interpretation depends on discerning the problem Parliament was trying to solve (the mischief) and how it was intending to do that (the remedy). All three rules are still cited in literature discussing statutory interpretation but a shift from literalism to purposiveness has definitely taken place.[43]

There is statutory help to be found when interpreting legislation. For one, there is the Interpretation Act 1978, which gives some general rules to follow, unless rebuked in the statute being interpreted. There is also the possibility of expressing interpretive rules in the statute itself. Additionally, HRA 1998, demands that statutes be interpreted, ‘as far as is possible’, to be compatible with and give effect to the ECHR. According to the European Communities Act 1972 (ECA 1972) legislation implementing directives and other community obligations, shall be construed in accordance with EC law and legal principles.[44]

Aids to finding the purpose and meaning of a statute can be found in material and principles. The materials that may be used to discern parliamentary intent have increased in the last decades, which has somewhat changed the character of statutory interpretation. Since 1999 the use of attached explanatory notes has been permissible and used. Following the judgement of *Pepper v Hart*, parliamentary debates, as reported by Hansard, have been allowed as help with certain restrictions. Moreover, it has become

[42] Feldman, 2004, pp 91-93; Gillespie, 2007, pp 69-70, 72-73; Zander, 2004, pp 268-278.
[43] Bennion, 2001, pp 40-43, 103; Gillespie, 2007, pp 36-40; Zander, 2004, pp 130-149.
[44] Bennion, 2001, pp 89-92, 158-163; Gillespie, 2007, pp 40-43, 49 119; Zander, 2004, pp 184-189.

possible to look at preparatory material, such as a White Paper or a report from the Law Commission but these should be used even more restrictively. As well as looking at explanatory and background material, the context of a provision has become more relevant. For this purpose, it is possible to turn to other statutes and consider these as a whole and to consider an uncertain provision in the light of the rest of the statute it appears in.[45] Additionally, there are presumptions available to help a court. These can pertain to a linguistic, contextual analysis, or more general judicial principles. These are voided if the contrary is expressed in the statute.[46]

2.2.3 Judgements

As judgements, especially from the higher courts, are a source of law, some words should be said on their structure and how they are made available to the law profession and the public.

For one and the same case in the House of Lords, several opinions will be given, making up the whole judgement. Sometimes one judge is assigned to write the leading opinion, to which the others can agree. This does not exclude the others from adding their own opinions, especially when they agree on the result but disagree on the reasoning. It is also possible to dissent. The opinions will be presented in order of seniority and none of them are, in themselves, superior to the others. It is therefore not enough only to read the leading opinion, in order to discern the *ratio decidendi*.[47]

To begin with, far from all cases were made available. A custom of reporting grew from the 13th century and has changed in quality and extent during the ages. Today, there are many recognised Law Reports that are published yearly as well as weekly, covering the whole spectrum of cases and also more specialised, focusing on certain areas of law. These reports do not, however, cover all the cases decided but are chosen at the discretion of each agency. They are neither necessarily verbatim nor approved by the courts as a fair recapitulation of the case or judgements. Things have changed in the last couple of decades with databases such as Lexis and that of the British and Irish Legal Information Institute which offer full-text versions of most reported cases, as well as full transcripts of unreported cases from the last couple of decades.[48]

2.3 Implementing EC Law

The main UK provisions regarding the relationship between UK and EC law is to be found in ECA 1972. Those sections most relevant for the implementation of directives are ss 2(2) and 2(4), as well as the additional provisions found in sch 2, mainly paras 1 and 2. The following section will

[45] Gillespie, 2007, pp 50-53; Zander, 2004, pp 157-182.
[46] Bennion, 2001, pp 107-112; Gillespie, 2007, pp 44-46, 54-57; Zander, 2004, pp 182-183.
[47] Feldman, 2004, p 93; Zander, 2004, pp 284-294.
[48] Gillespie, 2007, pp 61-67; Zander, 2004, pp 306-319.

give a brief overview of the framework for implementation, founded on the mentioned provisions and other relevant procedural details.

Whereas, it is always possible for Parliament to legislate the enactment of a directive, ECA 1972 makes it possible for implementation through Statutory Instruments. The Monarch or a Minister or Department has the power to legislate in this manner, under the condition that there exists a community obligation; that they have been designated by Order in Council for that purpose; and that none of the exceptions noted in sch 2 para 1(1) are brought into force. These exceptions are: taxation, retroactivity, further delegation and criminal offences of a certain degree. If the directive demands legislation of this kind it will have to be made by Parliament. However, the power delegated by the ECA 1972 is exceptional in that a Statutory Instrument made under it can amend or repeal provisions in Acts of Parliament, within the scope of the directive, i.e. a Henry VIII clause.[49]

Statutory Instruments made under ECA 1972 are subject either to Affirmative procedure, if laid before Parliament in draft, or Negative procedure, if laid already made. When laid before Parliament, the instrument's Explanatory Memorandum must, today, have Transposition Notes annexed to it. Transposition Notes should illustrate how the directive has been implemented, at least its main points, and cross-references between articles in the directive and the regulations in the Statutory Instrument are desirable. If implemented by an Act of Parliament, the Bill must also, today, be accompanied by Transposition Notes, whose existence should be noted in the Bill's Explanatory Note.[50]

[49] Dainith (ed), *Implementing EC Law in the UK* (Chancery Law, Chichester 1995) pp 93-94, 96-101; HMSO, 2006, p 35.
[50] Cabinet Office, 2004, pp 40, 80; Dainith, 1995, pp 97-101; HMSO, 2006, pp 71-72.

3 The Acquired Rights Directive 77/187/EEC

The Acquired Rights Directive (hereafter 'the Directive') was enacted in 1977 to protect employees when structural changes in undertakings take place and to secure even competition in the Community through legislative harmonisation. The main provisions of the Directive entailed an automatic transfer of employment rights and obligations when undertakings, or parts thereof, change hands, that employees cannot be permissibly dismissed due to such a transfer, and that information exchange and consultation, regarding a transfer, take place for the sake of the employees affected.

In order to understand the process of implementation of the Directive there are several aspects to study. Firstly, the transposition of the Directive has been examined, by looking at the legislative process in each country and the resulting material law. Secondly, the application of the transposition by the highest court in each country has been identified and analysed. In order to try to understand the effect of the process on the substantial law, a comparison is made of each aspect. This is concluded with a section looking at the cause and effect of the implementation.

3.1 Transposition

3.1.1 The Legislative Process

3.1.1.1 The United Kingdom

In the United Kingdom, the Directive was first and foremost transposed through a Statutory Instrument, The Transfer of Undertakings (Protection of Employment) Regulations 1981 (hereafter TUPE).[51] The regulations have been amended several times before being revoked and replaced in 2006, as a consequence of Council Directive 2001/23/EC,[52] which repealed and replaced the Directive from 1977. The most extensive earlier amendments were made through SI 1995/2587[53] due mainly to *Commission v United Kingdom*[54] decided by the ECJ in 1994. The following description will focus solely on TUPE 1981 in its original form.

[51] Transfer and Undertakings (Protection of Employment) Regulation 1981 SI 1981/1794.
[52] Council Directive (EC) 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16.
[53] The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 SI 1995/2587.
[54] Case C-382/92 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1994] ECR I-2435.

In accordance with the provisions of ECA 1972, an Order in Council was made in the autumn of 1977 designating 'The Secretary of State' to deal with the implementation of matters concerning 'Rights and obligations relating to employers and employees on the transfer or merger of undertakings, businesses or parts of businesses' and anything '…supplemental or incidental…' to these.[55] Without this designation order the Government would not have been able to propose a Statutory Instrument for the transposition of the Directive.

A first attempt to transpose the Directive was made in 1978, when a draft was published and consultations carried out by the Labour government of the day. The actual transposition was, however, delayed partly due to a General Election in 1979 when a Conservative government took over.[56] Finally, in 1981, the process was fully carried out resulting in TUPE.

Little information has been found about the preparatory stage. Judging from the debates in the Parliament no consultation was carried out regarding the new draft. Neither an Explanatory Memorandum, an Impact Assessment, nor Transposition Notes are available as these were not part of the process at that time. There is an Explanatory Note attached to the instrument that summarises the provisions within and connects them to the Directive.

As stipulated in ECA 1972 the draft Statutory Instrument prepared by the Government was laid before Parliament for approval.[57] The TUPE draft was first handed in to the Votes and Proceedings Office for the House of Commons in July 1981, and a report from the *Joint Committee on Statutory Instruments*, stating no need for special attention *vis-à-vis* the instrument, was produced.[58] This version of the draft was, however, later withdrawn and a second version, with minor formal amendments, was reintroduced the same day.[59] This merited a second report from the *Joint Committee on Statutory Instruments*, but with the same conclusion.[60] No other committee report has been found. Having gone through the necessary scrutiny, the draft instrument was ready to be laid before Parliament.

The draft was first debated in the Commons on 7th December. It was approved after division. The debate here was heated and many MPs, from all parties, were very critical of both its substance and the process leading up to it.[61] After a similar debate in the House of Lords, on 10th December, but ending in an approval by acclamation, the instrument was ready for

[55] The European Communities (Designation) (No. 2) Order 1977 SI 1977/1718.
[56] Hansard HC vol 14 cols 677, 685, 690 (7 December 1981); Hansard HL vol 425 cols 1485-86 (10 December 1981).
[57] European Communities Act 1972 Sch 2 para 2(2).
[58] Parliamentary Archives: Laying Paper for draft TUPE, 30th July 1981; Thirty-first Report from the Joint Committee on certain Statutory Instruments, 20th October 1981.
[59] Parliamentary Archives: Withdrawal paper, 26th November 1981; Laying paper for draft TUPE, 26th November 1981; Amended draft TUPE, 26th November 1981.
[60] Parliamentary Archives: 4th Report from Joint Committee on certain Statutory Instruments, 1st December 1981.
[61] Hansard HC vol 14 cols 697 (7 December 1981).

making.[62] The instrument was made on 14th December by the Under Secretary of State for the Department of Employment, and came into force the following year as specified in the instrument itself.[63]

Two clearly procedural points were illuminated in the debates which may be relevant here. Firstly, transposition through a Statutory Instrument means that all Parliament is able to do is either accept the instrument as it is, or reject it. No amendments can be made through parliamentary work, as compared to the different legislative stages in the case of Acts of Parliament. The preparatory stage, performed solely by the Government, alone decides the content of a Statutory Instrument.[64] This fact provoked many opinions amongst the MPs as to whether the legislation proposed was not of such importance that it should have been presented in a Bill instead and if, considering the dissatisfaction on both sides, it should not indeed be rejected, if the Government was not prepared to withdraw it for further consideration.[65] Secondly, transposition through Statutory Instruments is restricted to concern only 'obligations', which means that any provisions in a directive which are voluntary cannot be enforced. Going further than allowed by the enabling act, ECA 1972, would mean that the provisions affected would be *ultra vires*. In this case, this is the reason given for not transposing certain paragraphs such as art 7 which gives each country the leave to go further providing that it was favourable for employees.[66]

There was also much criticism of the manner in which the instrument had been prepared. The lack of new consultations was especially pointed out by Labour and Conservatives alike, who did not find that the consultations carried out for the first draft in 1978 were enough.[67]

Interesting hints were given about the legal system during the debates, especially in the House of Lords. The importance of the courts was emphasised when discussing the meaning and scope of 'undertaking': 'The Minister might … like to answer the question … Or do we have to wait for Lord Denning or the noble and learned Lords of the Appellate Committee to tell us?'.[68] This was also done when referring to a judgement by the Employment Appeal Tribunal, and the legislative suggestions made there.[69]

[62] Hansard HL vol 425 cols 1501 (10 December 1981).
[63] TUPE SI 1981/1794.
[64] Hansard HC vol 14 col 694 (7 December 1981); Hansard HL vol 425 cols 1490, 1494 (10 December 1981); see 2.2.2.2 above.
[65] Hansard HC vol 14 cols 679, 682, 690, 691-695 (7 December 1981); Hansard HL vol 425 cols 1490, 1494-95 (10 December 1981).
[66] Hansard HC vol 14 cols 686-687, 696 (7 December 1981); Hansard HL vol 425 cols 1494, 1497 (10 December 1981); see 2.4 above.
[67] Hansard HC vol 14 cols 685, 690 (7 December 1981); Hansard HL vol 425 col 1485 (10 December 1981).
[68] Hansard HL vol 425 col 1491 (10 December 1981) (Lord Wedderburn of Charlton).
[69] Hansard HL vol 425 col 1494 (10 December 1981).

3.1.1.2 Sweden

Transposition of the Directive in Sweden was made through Laws, primarily amendments and additions to the Employment Protection Act[70] (hereafter 'LAS') and the Employment (Co-Determination in the Workplace) Act[71] (hereafter 'MBL'). Subsequent changes had to be made in other legislation, but these are of no relevance to this study. Since the original transposition no substantive changes have been made to the sections amended and added in 1995, even after Directive 2001/23/EC had entered into force.

Sweden having first joined the European Economic Area (EEA) in 1994 and getting ready to join the EU in 1995, extensive work had to be done to implement the great amount of directives in force at the time, the Acquired Rights Directive being one of them. When preparing for EEA membership it had been deemed that no measures needed be taken for Swedish legislation to comply with the Directive.[72] A different conclusion was, however, reached by a Commission of Inquiry appointed in 1991 to look over labour legislation in general. One of the points specifically mentioned in the appointment directive was the imminent European integration, due to Sweden having applied for membership in the EC in 1991, and negotiations for the EEA having been completed that same year.[73] The response to this specific enquiry was a legislative proposal presented in a Swedish Government Official Report (hereafter 'the SOU'), SOU 1994:83, in June 1994. The SOU includes an overview of the Directive, with regard to the case law produced by the ECJ up to then, of the implementation in a number of other EU countries and a quick look at the newly decided case *Commission v United Kingdom*, and of relevant Swedish law at that time.[74] It is on this foundation that considerations then follow on needed measures for Swedish law to comply with the Directive and if and how the optional provisions, especially art 7, should be utilised. Reasoning here revolves around the analysis of the Directive and its case law as well as Swedish Labour Law principles.[75] The result of the considerations is proposed legislation in LAS and MBL.[76] Some of the decisions made by the majority of the committee are then questioned in the reserved opinions and minority reports that conclude the report.[77]

The SOU was then referred for consideration (remitterade) and 28 bodies representing academia, the judiciary, public agencies, and employer and employee representatives responded.[78] The submissions made by these were then duly considered by the Government when processing the Commission's report into a draft Government Bill. The draft was handed

[70] SFS 1982:80. Lag om anställningsskydd.
[71] SFS 1976:580. Lag om medbestämmande i arbetslivet.
[72] Prop. 1991/92:170, app. 9 pp 24, 27.
[73] Dir. 1991:118.
[74] SOU 1994:83, pp 46-73.
[75] SOU 1994:83, pp 74-110.
[76] SOU 1994:83, pp 135-160.
[77] SOU 1994:83, pp 171-193.
[78] Prop. 1994/95:102, app 3.

over to the Council on Legislation (Lagrådet) for consideration, which swiftly responded with comments on legal wording, lack of clarity and transitional provisions.[79] In the Government Bill there is, again, an overview of the Directive, where it is analysed and ECJ case law is presented.[80] This is followed by the proposed measures explained and related to the proposal in the SOU, the result from the referrals and, where relevant the comments by the Council on Legislation.[81] There is also a commentary referring to the precise provisions proposed.[82]

Changes had been made to the proposal presented in the SOU, some lexical, some substantive, some due to the minority reports and reserved opinions, some due to the responses by the bodies referred to or the Council on Legislation, and some due to the Government's own conclusions. In MBL s 13 the Council on Legislation suggested explicitly excluding, in the provision text, those only temporarily without a collective agreement, instead of indirectly through commentary in the *travaux préparatoires* (förarbete).[83] The protection offered by securing the application of the transferor's collective agreement during one year was strengthened by including cases where the transferee already had a collective agreement that would have been applicable on the new employees. This was something that had been recommended in the SOU minority reports and by many of the remittal bodies.[84] One considerable difference in the Government Bill compared to the SOU was the scope of the protection. In the SOU, the concept of 'transfer of an undertaking' had been solely linked to the Directive, with direct referrals in each relevant provision and with the restrictions to their application that would follow.[85] In the Government Bill, however, the concept was defined through LAS s 6b, which was based on and should equate that of the Directive and ECJ jurisprudence but was extended to explicitly include sea-going vessels and all public administration, and restricted to exclude bankruptcies. Additionally, in the first proposal by the Government that was handed over to the Council on Legislation, the term for transfer had been changed from 'övergång' in the SOU to 'överlåtelse'. The Council on Legislation reacted to this, as 'överlåtelse' has a more restricted legal meaning than 'transfer' in the Directive, only including transfers were there is a direct legal link between the relevant parties.[86] The reserved opinions and minority reports of the SOU warned for, in particular, one effect of the coordination of the term 'övergång', as a transfer in the meaning of the Directive.[87] This was the exclusion of right of priority re-employment in cases of bankruptcy. This effect was mitigated in the Government Bill by explicitly expanding LAS s

[79] Prop. 1994/95:102, app 5.
[80] Prop. 1994/95:102, pp 24-37.
[81] Prop. 1994/95:102, pp 38-66.
[82] Prop. 1994/95:102, pp 79-86.
[83] Prop. 1994/95:102, app 5, p 130; SOU 1994:83, p 137.
[84] Prop. 1994/95:102, pp 55-56.
[85] SOU 1994:83, pp 74-79, 150-155.
[86] Prop. 1994/95:102, pp 64-65, 80, app 5, pp 128-130.
[87] SOU 1994:83, pp 173-174, 180, 187.

25 to include such cases, in accordance with the wishes of several of the bodies of remittal.[88]

The final proposal, the Government Bill, Prop. 1994/95:102, was submitted to the Swedish parliament, the Riksdag, 31st October, 1994. Here starts the legislative process of the transposition. The Government Bill was consequently introduced to the Riksdag and sent off to be scrutinised and reworked by the Parliamentary Committee on the Labour Market (Arbetsmarknadsutskottet).[89] Once the Government Bill was introduced to the Riksdag, the opportunity was taken by members of parliament to have their say and propose changes to the Government Bill; four Private Members' Motions (Motioner) were submitted.[90] The Government Bill and the Private Members' Motions were considered by the Parliamentary Committee, presenting its conclusions and consequent proposals to the Riksdag in a Committee Report (Betänkande) and in the Chamber (Kammaren) where it was consequently debated by those present on 16th December 1994.[91] In the Committee Report some specific questions regarding the Government Bill were especially considered, mostly those raised by the Private Members' Motions. In some of the cases there had also been 'courting' by organisations with opinions on the proposal. The Committee focused on the extended application to sea-going vessels and public administration, the right to priority re-employment in the case of bankruptcy, the calculation of continuous employment, the right to reject transfer and stay with the transferor, and the application of the transferor's collective agreement. The Government Bill was accepted on all points except for LAS s 3, on the calculation of continuous employment, which was extended to apply to cases of bankruptcy.[92]

The motion put to the Riksdag in the report reflected the majority decision but also included reserved opinions by members of the committee, which the progenitors moved to be accepted.[93] The majority proposal in the Committee Report was passed by vote on 20th December.[94] Having received a written communication (Skrivelse) as to the decisions in the Riksdag, the Government then had to publish the Laws passed in the Swedish Code of Statutes (Svensk Författningssamling (SFS)) resulting in, amongst others, the Employment Protection Act (1982:80) Amendment Act (SFS 1994:1685) and the Employment (Co-Determination in the Workplace) Act (1976:580) Amendment Act (SFS 1994:1686).[95] These provisions came into force on 1st January 1995.

[88] Prop. 1994/95:102, pp 63-64, 82-83.
[89] Protokoll 1994/95:19.
[90] Motion 1994/95:A13-16.
[91] Betänkande 1994/95:AU4.; Protokoll 1994/95:44, 5§.
[92] Betänkande 1994/95:AU4, pp 35-41.
[93] Protokoll 1994/95:44, 4§.
[94] Protokoll 1994/95:46, 5§.
[95] Rskr 1994/95:124; Rskr 1994/95:123.

3.1.1.3 Comparison

There are difficulties in the comparison of the transposition process in the United Kingdom and in Sweden. Firstly, very different routes have been chosen or designated for the transposition of the Directive. The making of a regulation and the passing of an act of parliament are different in nature within a system; one process in one system, and another in another system are not quite comparable on a general level. However, the comparison is not irrelevant, when considering the process from a purely implementative view point. EC Directives are generally transposed by the means of regulations in the United Kingdom, even if Acts of Parliament are possible and made use of when necessary. The means of transposition in Sweden can be of different types: Laws, government-made regulations or provisions made by public bodies. The choice depends on what is deemed necessary in each situation. As only Laws have the power to amend and revoke provision thus made, it will be necessary, when such amendments seem unavoidable, to transpose through Laws. For any given directive, it is quite likely that these two processes would stand against each other in a comparison. Nevertheless, the fundamental difference in the chosen means of transposition in this case do, unfortunately, affect the comparison and the possible conclusion one could draw from it.

Secondly, there is a significant time difference between the two transpositions; the Swedish process has a thirteen year advantage. Being able to consider extensive case law from the ECJ, both specific cases of application and infraction proceedings, means that the lawmakers are faced with less uncertainties and interpretive challenges. The legislators having had the same information it is very unlikely that the UK regulations would have had the final form they did.

Despite these methodological hurdles, a comparison will be attempted, trying to identify the similarities and differences in the procedure and the approach to the transposition of the Directive that has been identified through this study.

Material

To begin with, an aspect that has affected the access to material for this study: making regulations in the United Kingdom does not, necessarily, produce much accessible material with evidence of how the process was carried out and of the considerations made along the way. The best source of information has turned out to be the debates in the Houses of Parliament. Once the designation order was made, the work on the transposition was carried out within a department with no officially available documentation until the draft bill was handed in to Parliament. In contrast, the Swedish transposition in this case and the different ideas that dominated the debate can be traced through extensive documentation, which is to be expected when legislating through a Law. From the SOU, through the remittal for consideration, the Government Bill, the statement by the Council of Legislation, the Private Members' Motions, to the Parliamentary Committee Report and the final debate, it is possible to follow the reasoning and

decisions of the involved bodies of both the majority and the minority. The legislative process in Sweden is much more transparent than in the United Kingdom in this case, especially the preparatory stage. The difference, however, would probably not have been as great without the initial difference in method of implementation.

Input

An important part of lawmaking is the possibility of input and debate during the process. Even though there had been an initial consultation for the UK transposing regulations, there were no new ones for the second attempt. There seems to have been some informal communication with the trade unions and the European Commission but nothing official or extensive.[96] As voiced in the Parliamentary debates, there was no room for effective input once it had reached the legislative stage. The MPs could criticise and suggest necessary changes but nothing substantial could have happened then, unless the Government had been inclined to withdraw the draft. Whatever was expressed stayed but words in the Hansard. The Swedish process on the other hand leaves a lot of room for input, adjustments and changes. Starting with a politically mixed Committee that created the fundaments for the process, the proposal was filtered through independent bodies, Governmental work groups, the Council on Legislation, the Parliamentary Committee and the final debate. Not until the final vote was cast could one be sure of the exact form that the transposition would take, even if certain results were markedly more likely than others. Not only had there been possibilities for input but new and minority opinions had been acted on.

Scope of power

Another difference lies in the scope of what can be done. Having concluded that the Directive warranted Laws, it was possible for the Swedish Government to propose legislation that made use of the optional provisions of the Directive and to go beyond the scope of the Directive. This was not only impossible in the United Kingdom, as the Government decided not to pursue the question by Act of Parliament but instead, as customary, by regulations but also a way to motivate not making use of optional rights without using political argumentation.

Integrated - separate

Another aspect of the transposition that is worth mentioning is the manner of legislating. In Sweden, the Directive's provisions were integrated into existing legislation as new sections or new or revised paragraphs within a Law, or declared already covered by current law. In the United Kingdom, on the other hand, a new and separate statute was created to meet the requirements of the Directive, with express references to existing legislation when necessary or convenient. This is not necessarily a consequence of set procedures, but a choice made by the legislators. It may however be that the methods chosen are inherent to the two systems of law.

[96] Hansard HC vol 14 cols 685, 688-89 (7 December 1981).

Debate

Even though the UK debate could not have had a substantial result except if the draft had been withdrawn or rejected, it was very energetic, critical and close to aggressive. It was clear that those present from either side did not think the regulations were good, and some were worried about how well they implemented the Directive. Although the regulations were approved with a safe margin in the Commons, the opinions of the MPs were unclear enough to warrant a division to decide the vote. The Swedish final debate could have, at least theoretically, had different substantial results regarding certain points of law, with reserved opinions being voted on in the same way as the Parliamentary Committee's final proposal. Nevertheless, the vote resulted in acceptance of the Committee's suggestions regarding the Government Bill. The debate, held two days before the vote was taken, was of another character than that in the United Kingdom. Firstly, there was no initial presentation of the Government Bill or of the Committee majority decision regarding it. The debate started off with different parties representing the reserved opinions stating their cases; it was only in the 21st address that the majority view was heard and a request to accept that motion was made. Secondly, there were responses made to speeches and opinions but these were mostly long-drawn and could not be made until the speaker had completed his speech. This creates a very different atmosphere to the adversarial one in the Houses of Parliament in the United Kingdom where a simple 'Why?' can interrupt an address.[97] The rules of debate and the layout of the chamber play a distinct role for this difference.

Second attempt

There is a similarity in the processes in that they were a second attempt at implementation in both countries. In the United Kingdom, there had been an earlier draft a couple of years previously, which, as far as can be discerned from the debates, was quite unlike the draft that became the transposing regulations. In Sweden, it had once been deemed that the Directive needed no implementation; existing legislation already corresponded. A very different conclusion was reached not long after and initiated the legislative process that resulted in the amendments discussed in this thesis. Although the attempts are different in their nature, this points to the complexity of implementation. The rules are already available; a transposition should in a way mostly be about legal technicalities but, in the end, is very much a question of politics.

These are the main features of the process that have been identified as characteristic and mostly contrasting. Many of these appear to be mainly a result of the different procedures chosen for the transposition, rather than differences in the very nature of corresponding procedures.

[97] Hansard HC vol 14 col 683 (7 December 1981)(Mr Taylor).

3.1.2 The Material Law

In the following section, the similarities and differences of the result of the transposition, the material law, in each country will be presented. It is necessary to have a clear picture of the outcome of the transposition in order to understand its application which is dealt with in the section 3.2. This overview is complemented by a cross-reference table in Appendix A. As TUPE from 1981 is no longer in force, it is not readily available outside the United Kingdom. A reproduction is therefore available in Appendix B.

Scope

The scope of the transposing provisions differs. Whereas the automatic transfer of rights is restricted, in the United Kingdom, to undertakings '…in the nature of a commercial venture', which was later found too restrictive by the ECJ, in Sweden, these rights have been extended to public administration, but explicitly excluded for cases of bankruptcy.[98] When it comes to sea-going vessels, employees are not protected in the United Kingdom if it is only a ship that is being transferred.[99] Employees on sea-going vessels are covered by the Swedish protection but subject to the transfer-tests developed by the ECJ.[100] In reality the different provisions on sea-vessels seem to lead to the same result.

The provisions that indicate on which cases the protection of the Directive applies are constructed differently. In the United Kingdom there is a specific provision stating what is to be considered a 'relevant transfer', while this information is, in the Swedish transposition, to be found together with the effect of automatic transfer of employment provisions and in the Government Bill, which refers directly to the Directive and ECJ case law on the subject.[101]

Securing the mandatory nature of the implementing provisions, there is a specific provision making it impossible to exclude or limit the operation of the key regulations in TUPE in a contract.[102] The same sort of safeguard was already available in LAS and MBL.[103]

Definitions

As is commonly done in UK legislation, there are provisions with definitions to assist in the interpretation of the statute, both covering the definitions expressed in the Directive and others for important terminology used in the instrument.[104] Some terminology is further defined with reference to other statutes.[105] No defining provisions were introduced through the Swedish transposition. 'Transferor' and 'transferee' are not

[98] TUPE SI 1981/1794, reg 2(1); *Commission v United Kingdom* [44-47]; LAS (1982:80), ss 1(1), 6b(1)(3), s 6b(2).
[99] TUPE SI 1981/1794 reg 2(2).
[100] LAS (1982:80), s 6b(1)(3); Betänkande 1994/95:AU4, pp 36-38.
[101] TUPE SI 1981/1794, reg 3; LAS (1982:80), s 6b(1)(1); Prop. 1994/95:102, pp 64-65, 80.
[102] TUPE SI 1981/1794, reg 12.
[103] LAS (1082:80), s 2(2); MBL (1976:580), s 4(1).
[104] TUPE SI 1981/1794, reg 2(1-3), 10(1).
[105] TUPE SI 1981/1794, reg 2(1), 4(2), 11(11).

used, and 'representatives of the employees', in accordance with the Directive, are defined though the Trade Union Representatives (Status at the Workplace) Act (SFS 1974:358) (hereafter 'FML').[106] However, some of the rights of the representatives have been extended to representatives falling outside the definition.[107]

Effects of transfers

The effect of the transfer on the employment conditions of the affected employees appears to have been provided for in different manners but probably with similar effect. In TUPE it is stated that contracts will not be terminated but continue as if originally made by the transferee, and that all rights, powers, duties and liabilities under or connected to a contract will be consequently transferred if employment existed immediately before the transfer.[108] In LAS, rights and obligations under contracts of employment, or employment relationships, existing at the time of the transfer, will be transferred to the new employer.[109] The fact that the employment itself is automatically transferred is certain after a look in the Government Bill.[110] The two main differences are that the implications of the provision are more immediately available in TUPE and that the provision there seems more exclusively linked to the existence of an actual contract.

Unlike the UK transposition, the Swedish one made use of the optional right to make the transferor jointly liable with the transferee. The transferor is liable for financial obligations arising in circumstances from before the transfer.[111]

In Sweden much effort and analysis went into legislating the effect of a transfer on collective agreements.[112] The application of the transferor's collective agreement is secured for up to one year if the transferor is bound by an applicable collective agreement that would otherwise take over, or until it expires or is renegotiated.[113] The optional provision of art 3(2) in the Directive has been utilised here. It is an interesting contrast to how the question was handled in the United Kingdom. The continued applicability of a transferor's collective agreement is regulated in TUPE in a manner similar to the Directive.[114] The big material difference, as is pointed out in the Parliamentary debate, is that collective agreements have no legally binding effect in the United Kingdom, except when explicitly stated so by the parties, something which is very rare.[115]

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[106] Prop. 1994/95:102, pp 59-60, 62.
[107] MBL (1976:580), s 13(2).
[108] TUPE SI 1981/1794, reg 5(1-3).
[109] LAS (1982:80), s 6b(1)(1).
[110] Prop. 1994/95:102, pp 40-41.
[111] LAS (1982:80), s 6b(1)(2).
[112] Betänkande 1994/95:AU4 p 40; Prop. 1994/95:102, pp 53-58; SOU 1994:83, pp 92-102.
[113] LAS (1982:80), s 28(1, 3).
[114] TUPE SI 1981/1794, reg 6.
[115] Hansard HC vol 14 col 679 (7 December 1981); Hansard HL vol 425 cols 1483, 1493 (10 December 1981).

According to art 3(3) in the Directive certain rights are not to be transferred but protection relating to these is to be secured by the Member States. This exception is expressed without much ado in both the UK and the Swedish provisions.[116] In the United Kingdom, the question of mandatory protective measures is referred to the Secretary of State for Social Services as his responsibility.[117] In the Swedish Government Bill it is stated that such protection is provided by the Securement of Pension Assurance etc. Act (SFS 1967:531).[118]

Termination of employment

To protect employees from dismissals due to transfers, the same basic approach has been used in both countries. In the United Kingdom dismissals, by either transferor or transferee, that are primarily connected with a transfer will be deemed unfair in accordance with the Employment Protection (Consolidation) Act 1978 unless it can be shown that there are economic, technical or organisational reasons that justify the dismissal.[119] In Sweden a transfer cannot constitute an objective ground for dismissal by any employer but this does not prevent there being, again, economic, organisational or technical reasons for well-grounded dismissals.[120]

The Directive makes it possible to exclude certain categories of employees from this protection. This has been made use of in both countries. In the case of the Swedish provisions, this is due to the exclusion of certain categories from LAS generally, such as employees in a managerial position.[121] The UK enactment makes a more active use of this permission, excluding employees whose dismissal was required by the Aliens Restriction (Amendment) Act 1919, employees ordinarily working outside the United Kingdom and dockworkers.[122]

Despite the automatic transfer of employment and rights from one employer to another, an employee, in the United Kingdom, will have the right to resign without notice if there are substantial changes to his working conditions to his detriment.[123] In Sweden, no legislative action was taken to implement art 4(2) as it was considered already provided for by the rules on provoked resignation, i.e. when an employer acts in such a way that a resignation is equated with a dismissal, with all the protection that entails.[124]

Representation

A trade union recognised by the transferor will, in the United Kingdom, be deemed likewise recognised by the transferee when the transferred undertaking maintains a distinct identity to that of the rest of the transferee's

[116] TUPE SI 1981/1794, reg 7; LAS (1982:80), s 6b(3).
[117] Hansard HC vol 14 col 680 (7 December 1981); Hansard HL vol 425 col 1483 (10 December 1981).
[118] Prop. 1994/95:102, p 47.
[119] TUPE SI 1981/1794, reg 8(1-3).
[120] LAS (1980:82), s 7(2).
[121] LAS (1980:82), s 1(2); Prop. 1994/95:102, p 41.
[122] TUPE SI 1981/1794, regs 8(4),13(1), 13(3).
[123] TUPE SI 1981/1794, reg 5(5).
[124] Prop. 1994/95:102, p 48; SOU 1994:83, p 67.

undertaking.[125] However, no specific provision has been made for continued protection of representatives whose term in office has expired due to the transfer. This might, nevertheless, be covered by the general transfer of right, reg 5. No legislative action was taken in Sweden to secure representation in the case of a transfer. Representation is, in the majority of cases, secured by the continued application of a transferor's collective agreement and later by collective agreements entered into with the transferee, as representation is linked to collective agreements. A representative will additionally keep the special conditions of employment he had once his appointment has come to an end, FML s 4.[126]

Information and consultation

The United Kingdom implemented the article regarding information and consultation in the following way: representatives of affected employees, both of the transferor and transferee, must be informed of the coming transfer, the reasons for it, the legal, economic and social implications, and measures envisaged, in writing, long enough before the transfer.[127] If any measures are envisaged, the employer must consult with representatives of recognised trade unions, consider representations made and explain any rejection of them.[128] Restricting this to only recognised trade unions was later found by the ECJ to be contrary to art 6 of the Directive.[129] In Sweden, only one addition to existing legislation was considered necessary. This was expanding the primary obligation to negotiate with organisations to which an employer is bound by collective agreement, in cases of significant changes to an undertaking's activities, to representatives of employees affected by an imminent transfer where no collective agreement exists.[130] This is to be done in good time before the transfer, and aiming to reach an agreement.[131] There is, an earlier provision regarding mandatory notifications in cases where there is an obligation to negotiate, which was considered sufficient to implement art 6(1). These must be made in writing, in good time before a transfer, and include information on the reasons for transfer, the amount and types of employees affected and a time-scheme for the transfer.[132] The main differences between the transpositions are the scope of the obligation, much more restricted in the United Kingdom than in Sweden, the aim of agreement, which is not present in the UK provisions and only through statements in Government Bills in Sweden and the type of mandatory information, which seems more precise and in accordance with the Directive in the UK transposition.

More favourable

The right to make the implementation more favourable for employees than the Directive itself has not at all been used in the United Kingdom. For the Swedish provisions, however, this has been utilised. Firstly, the right to

[125] TUPE SI 1981/1794, reg 9.
[126] MBL (1976:580), s 28(1); FML (1974:358), s 4; Prop. 1994/95:102, pp 61-63.
[127] TUPE SI 1981/1794, reg 10(1-2, 4).
[128] TUPE SI 1981/1794, reg 10(5-6).
[129] *Commission v United Kingdom* [15]-[30].
[130] MBL (1976:580), s 11, 13(2).
[131] Prop. 1994/95: 102, p 59.
[132] MBL (1976:580), s 15(1-2); Prop. 1994/95:102, p 59.

diverge from some of the applicable provisions in MBL and LAS in collective agreements, when more favourable for the employees, is an expression of this. Secondly, the extension of the scope to employees in public administration and on sea-going vessels seems permissible due to art 7. A Swedish provision which might be an expression of art 7, but which was founded in the *Katsikas* case, is the right of an employee to stay with the transferor.[133] No such provision can be found in TUPE.

Non-equivalent

There are some provisions in the transposing instruments of the two countries that are not equivalent and are not a direct implementation of the Directive. For example, a special case of transfer, hiving-down, was provided for in TUPE reg 4 and in Sweden there are subsequential amendments owing to the coordination of terminology, i.e. of 'övergång', transfer in LAS ss 3(1)(2), 25(2).

3.2 Application

Here follows an overview of the cases found that were decided in the highest instances of each system concerned with the application of the transposition of the Directive. The main points arising in these cases and how they were handled will be pointed out and discussed.

3.2.1 The United Kingdom

Only four cases were found that deal directly with the application of TUPE. As they all touch on different aspects of the regulations and the Directive, the principal points of law of every case and the manner in which they were handled will be described below.

3.2.1.1 Lister v Forth Dry Dock[134]

The main issues addressed in *Lister v Forth Dry Dock* were whether the employees were covered by TUPE reg 5, which depended on them being employed 'immediately before' the transfer and whether this consideration was affected by the fact that their dismissals, carried out one hour before the transfer, should be deemed unfair under TUPE reg 8. The answer to these questions depended, in the end, on the type of interpretation available when dealing with provisions implementing EC obligations.

It is implied by some of the Law Lords and directly expressed by Lord Oliver that the employees would have been found not to have been employed at the time of the transfer if normal rules of interpretation available when dealing with ordinary domestic legislation had been used, and consequently they would have been excluded from the protection of TUPE and the Directive. Nevertheless, TUPE is the transposition of an EC directive and cannot be handled in the ordinary manner. Courts in the

[133] LAS (1982:80), s 6b(4); Prop. 1994/95:102, pp 45-46.
[134] *Lister v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 (HL).

United Kingdom have a duty to apply EC law in full, in accordance with decision by the ECJ, both on the basis of art 10 TEC and ECA 1972 s 3. What remains is the question of how this is to be done within the interpretative framework in which the courts work and whether it is possible at all.

With the precedent set by *Pickstone v Freemans plc* the question of method was partly already answered. By implying certain words into a provision it can be brought into accord with a directive and ECJ case law. What remains to be considered in each case is how much can be implied and if the implication would be stretching the fabrics of the legislation too far. In the case of *Lister v Forth Dry Dock* it was generally concluded that implying a connection between reg 5(3) and reg 8, so that '…immediately before the transfer…' would be followed by e.g. '…or would have been so employed if he had not been unfairly dismissed in the circumstances described in regulation 8(1)' would be, in the words of Lord Oliver, '...entirely consistent with the general scheme of the regulations and ... necessary if they are effectively to fulfil the purpose for which they were made…'.[135] Due to this construction the workers had valid claims against the transferee regarding compensation for unfair dismissal.

This decision by the House of Lords, which concerns application and interpretation of statutory law, becomes an expression of the legislative powers of the courts. This precedent has filled out the text of TUPE in a manner which is, hopefully, consistent with its purpose, but not inherent to the text itself. Regulation 5(3) must, by consequence of the system, in future be read as including the implication of the Law Lords. The sources of this judicial legislation were the Directive and the extensive ECJ case law available.

3.2.1.2 British Fuels v Baxendale etc[136]

The main questions to be addressed in *British Fuels v Baxendale etc* were if the workers should retain the same benefits as earlier and if the dismissals by the transferor had been effective or were null and void. This involved certain reasoning similar to *Lister v Forth Dry Dock* in considering TUPE regs 5 and 8, but touched on a different aspect. Whereas, in *Lister v Forth Dry Dock* a resolution was needed on whether claims of redundancy could be made on the transferee in the case, here a question arose about the effects of the dismissal and what remedies were available to those unfairly dismissed.

Only one substantial opinion was given, by Lord Slynn, to which the other Law Lords concurred. Lord Slynn concluded that domestic law did not allow for forced re-employment as a remedy for unfair dismissals, but offered other ones, such as monetary compensation. A dismissal, even if

[135] *Lister v Forth Dry Dock*, p 577 (Lord Oliver).
[136] *British Fuels Ltd v Baxendale, Wilson v St Helens BC* [1998] UKHL 37 [1999] 2 AC 52 (HL).

legally unfair, is effective and not a nullity.[137] Lord Slynn went on to state that this was compatible with EC law, considering both the Directive and ECJ case law. Whilst it must be ensured that employees affected by a transfer retain their rights, the content of the actual rights, as well as legal consequences of an action, depend on domestic law.[138] This was reconciled with *Lister v Forth Dry Dock* by distinguishing the core question, as described in the previous paragraph, and by interpreting the decision such that *de facto* continued employment was never meant, but that for the purposes of claiming remedial rights, an unfairly dismissed employee should be treated as if employed at the time of the transfer.[139]

One result of this case is the specification of the consequences of an unfair dismissal according to TUPE. Remedies may be sought against both transferor and transferee but they do not include forced employment, except on very rare occasions, all in accordance to national rules concerning employment contracts. Although not an equally obvious case of legislation as *Lister v Forth Dry Dock*, the decision lays down the law and fills the regulation with meaning that would not automatically have been there just considering the text. This in particular as it limits the consequences of *Lister v Forth Dry Dock.*

3.2.1.3 Powerhouse Retail v Burroughs[140]

The question arising in *Powerhouse Retail v Burroughs*, with respect to TUPE, was if the employment, for the purpose of making claims under the Equal Pay Act 1970 (hereafter 'EPA 1970'), ended through the transfer or if it continued with the transferee. The claims concerned occupational pension schemes, which are not transferred by the application of TUPE reg 7 and could therefore not be made against the transferee. However, focus in the case is on the interpretation of EPA 1970, were the time limit for complaint is connected to the end of 'employment'. Lord Hope, who gives the only substantial judgement, the other judges agreeing with him, concludes that 'employment' in EPA 1970 is not the same as the 'contract of employment' in TUPE. Consequently, time started running at the point of the transfer, when the employment, to which the claims pertained, was terminated and thus no claims could be made.[141]

While treating another question, it could be argued that TUPE has been affected by the decision. Ultimately, a transferred contract is not a transferred employment, at least when it comes to rights excluded by TUPE. What is unsure is whether this specification would have repercussions in other cases of transfer when the definition of someone's employment is decisive and whether the conclusions reached regarding TUPE might have been said in *obiter* rather than being part of the *ratio decidendi*. These

[137] *British Fuels v Baxendale* pp 77-78 (Lord Slynn).
[138] *British Fuels v Baxendale* pp 83-85 (Lord Slynn).
[139] *British Fuels v Baxendale* pp 86-87 (Lord Slynn).
[140] *Powerhouse Retail Ltd v Burroughs* [2006] UKHL 13 [2006] 3 All ER 193 (HL) [2007] 2 CMLR 38 (HL).
[141] *Powerhouse Retail Ltd v Burroughs* [22]-[26] (Lord Hope).

uncertainties are fundamental for the extent in which the decision can be viewed as legislative with regards to TUPE.

3.2.1.4 Newtec v Astley[142]

In *Newtec v Astley* one question arose regarding the applicability of TUPE for undertakings in the public sector. The original TUPE of 1981 was restricted to undertakings in the nature of commercial ventures, which would have excluded the undertaking in question. However, amendments were made in 1993 making TUPE applicable in the case of one of the employees. The rest of the employees were, nevertheless, likewise protected through the direct effect of the Acquired Rights Directive, as Newtec was to be considered an emanation of the state.[143]

The main issue of the case was the determination of continuous employment for civil servants who had initially only been lent to the transferee and had not accepted direct employment there until around three years later. The relevant question to be answered by the House of Lords to determine this was when the transfer had occurred. To answer this it was deemed necessary to refer questions to the ECJ, namely if the 'date of the transfer' must be understood as one certain point in time or if it could be understood as taking place over a long period of time. The ECJ responded that a transfer takes place at a particular point in time, which does not depend on the will of the parties, but is the date when employer responsibility for an undertaking is transferred, whatever has been agreed between the parties.[144]

The response from the ECJ gave ground for new arguments from the respondents i.e. the employees. This gave rise to yet another consideration by the House of Lords: whether the arguments should be heard at all, and if so, whether they could be heard directly or should be remitted to the employment tribunal. The opinions on this varied but a majority (3 to 2) found that it could and should be decided in the House of Lords.[145]

The decision regarding the question of continuous employment was not unanimous. While four of the Law Lords came to the conclusion that employment was continuous from the beginning of the employees' time with the Civil Service, Lord Rodger reached this conclusion by clearly different reasoning. The majority concluded that, considering the ECJ's response and earlier jurisprudence regarding the only exception to automatic transfer, the employees right to refuse employment with the transferor, the transfer had occurred in 1990 and that the respondents had, *de facto*, become employees of the transferee at that date, whatever they or the employers involved had thought. This resulted in continuous employment.[146] However, Lord Rodger proclaimed the date of the transfer to be in 1993 when the

[142] *North Wales Training and Enterprise Council Ltd v Astley* [2006] UKHL 29 [2006] 4 All ER 27 (HL).
[143] *Newtec v Astley* [18], [65]-[66].
[144] *Newtec v Astley* [26]-[28].
[145] *Newtec v Astley* [77], [90], [114]-[115].
[146] *Newtec v Astley* [54]-[58], [61](Lord Hope) [92](Lord Craswell).

transferee took over employer responsibility. He interpreted ECJ jurisprudence so that a transfer was not completed until the transferee took over the undertaking 'as employer'. Although he would have preferred remittal of the case, that not being the case, he found that there had been continuous employment.[147] Lord Mance, on the other hand, firstly did not think the House of Lords should judge the new arguments presented and secondly did not think that majority's reasoning was correct, especially about the repercussions of the ECJ cases considered.[148]

The *ratio decidendi* of this judgement is not very accessible. However, a majority follow more or less the same reasoning and reach the same conclusion. Their opinions must be considered to contain the fragments of the law proclaimed or made in this case. The stability and the usefulness in future cases seem less impressive. Nevertheless, according to the majority, TUPE and the Directive are to be understood to mean so that employment is transferred at the time that the undertaking is transferred, if the employees continue to work within the undertaking, whatever has been decided separately, if there has not been an explicit refusal of employment with the transferee. The decision fills out TUPE reg 5 with content not apparently there and recognises a directive right of refusal of transfer, stated by the ECJ, primarily in *Katsikas*, and not specifically expressed in TUPE.

3.2.2 Sweden

When it comes to Swedish case law regarding the implementing provisions in LAS and MBL, there are many decisions to be found made by The Labour Court (Arbetsdomstolen), the highest instance regarding labour disputes. The amount of cases, compared to those in the United Kingdom where the matter has been regulated 13 years longer than Sweden reflects the specialisation of the court. There are 20 cases, all but one decided in the Labour Court. Many of the cases available are quite similar technically. Instead of presenting each and every one, they have been categorised and an overview of each category with reference to the relevant cases will follow.

3.2.2.1 Has a transfer of an undertaking occurred?

The great bulk of the cases deals with, solely or partly, if a transfer of an undertaking has taken place so as to activate the protection found in LAS and MBL. Six cases consider transfers related to contracting out, three to transfers where public administration is concerned and the remaining six different, but more traditional, commercial undertakings.

Each case is fundamentally handled in the same manner; it almost appears as if a template was used. Having established that LAS s 6b is applicable and must be interpreted in the light of and in accordance with ECJ case law, the court goes on to decide if a legal transfer of an undertaking has occurred. Firstly, the court accepts that 'legal transfer' in this context has an extensive

[147] *Newtec v Astley* [83], [89]-[90](Lord Rodger).
[148] *Newtec v Astley* [109], [114]-[115](Lord Mance).

meaning, including e.g. 'contracting out'. Secondly, the court judges whether, in accordance with ECJ case law, especially *Spijker*, the undertaking has kept its identity and is a 'going concern'. This is done by taking all factual elements into account as a whole while especially considering seven aspects: the type of undertaking; the assets both tangible and intangible, transferred; the number of employees transferred; the customers or clients taken over; and the period of time, if any, that the undertaking has been inactive.[149]

When considering a case of contracting out the procedure is slightly modified with reference to other ECJ case law, e.g. *Süzen*, *Schmidt* and *Rask*. The same criteria are used but assets having changes hands, or employees having been taken on by the new contractors, are necessary for a relevant transfer to have had occurred. Furthermore, a reference is often made to *AD 1995 nr 163* where a change of contractors was to be judged a transfer of an undertaking only if an organised entity, which could continue to function stably, carrying out the transferors activities, had been taken over, as judged in *Rygaard*. [150]

When contemplating public administration, another variation has been made on the fundamental technique. It is pointed out that LAS has a wider application than the Directive, as it covers all employees in public service. Nevertheless, a transfer should be judged by the same fundamentals but taking the difference in scope into account. The criteria that are more clearly linked to commercial activity should be given less weight.[151]

The cases discussed above are, in many ways, pure application of the implemented Directive as interpreted and applied by the ECJ. Rather than filling out the law, the cases reinforce the manner in which a possible transfer should be evaluated. The area where some creativity can be discerned is when dealing with possible transfers in public administration. These being excluded from the Directive, gives more leeway to the Labour Court. The court is not really bound by the jurisprudence of the ECJ in such cases but decides to adhere to it anyway, with modification.

3.2.2.2 Applicability

A few cases[152] were brought before the court early on and a central question was whether the implementing provisions were applicable at all or whether the Directive was directly applicable as an effect of the EEA Act[153] and the EEA treaty. The conclusion reached was that the transposed provisions were not applicable on situations occurring before January 1 1995.[154] As to the

[149] AD 1995 nr 96; AD 1995 nr 163; AD 1997 nr 67; AD 1997 nr 81; AD1998 nr 44; AD 1998 nr 121; AD 1998 nr 124; AD 1998 nr 144; AD 1999 nr 21; AD 2001 nr 101; AD 2002 nr 63; AD 2007 nr 92; AD 2008 nr 51; AD 2008 nr 64.
[150] AD 1995 nr 96; AD 1995 nr 163; AD 1997 nr 67; AD 1997 nr 81; AD1998 nr 44; AD 2008 nr 64.
[151] AD 1998 nr 121; AD 1998 nr 124; AD 1999 nr 21.
[152] AD 1995 nr 60; AD 1995 nr 97; AD 1995 nr 134.
[153] Lag om ett europeiskt ekonomiskt samarbetsområde (EES) (SFS 1992:1317).
[154] AD 1995 nr 97.

question of the Directive having been incorporated through the EEA Act, the answer was negative, with the first ruling on the question, *AD 1995 nr 97*, being authoritative.

3.2.2.3 The Directive amended and replaced

Some of the cases regarded activities taking place after the amending directive of 1998 and the replacing one of 2001.[155] No legislative action was taken in Sweden because of these. There is, however, a slight difference in procedure as the Labour Court, in its interpretation and application of the provisions, makes reference to the new directives where 'transfer' has been more precisely defined. As the new definition is consistent with ECJ case law up to then and the preamble states that it does not change the law substantially but is there to clarify, in the light of existing jurisprudence, the court comfortably continues its reasoning in the same way as before. This type of reference, however, seems to be the only acknowledgment made of the new directives in Swedish legal material, except for appearances in footnotes of Government Bills and confirming the public sectors exclusion in *AD 1999 nr 21*.[156]

3.2.2.4 Other questions

In *AD 2008 nr 61* the question arising regarded MBL s 28(1), securing the application of a transferred employees' collective agreement for at least one year. The collective agreement existing between the transferee and his original employees was more favourable than the one between the transferor and the affected employees. Was the provision to be applied unconditionally, despite this fact? The Court concluded that there was no room in the Swedish provisions for making an exception, nor was there any case law to support such an interpretation. The Court then considered the Directive directly and relevant ECJ case law and inferred that neither supported such a claim. The provisions are there to protect employees from a less favourable situation than prior to the transfer and cannot provide this further protection if not explicitly expressed in law.

The calculation of continuous employment came up in *NJA 2002 s 572*, where LAS s 3 was relevant. However, due to having a managerial position in the transferring undertaking, the claimant was excluded from the application of LAS and consequently the protection of the Directive.

After deciding that a transfer had occurred between the police and the State Immigrant Authority (Statens Invandrarverk) in *AD 1999 nr 21*, the Court went on to consider whether the dismissals in question could be deemed fair, according to LAS s 7(3), because of organisational, technical or economical reasons. Reference to both the Government Bill, prop. 1994/95:102, and the Directive are made in the discussion. The State

[155] AD 2001 nr 101; AD 2007 nr 92; AD 2008 nr 51; AD 2008 nr 61; AD 2008 nr 64.
[156] Prop. 2004/05:148, p 37.

Immigrant Authority was found to have executed permissible dismissals but not to have respected the statutory order of dismissal.

Having reached the conclusion, in *AD 1998 nr 144*, that a transfer had taken place, the Court had to review if the employees had rejected continued employment in accordance with LAS s 6b(4). The Court stated that the rejection of transferred employment could only be made by the employees themselves to the transferor. Yet, it is possible to do this both expressly and tacitly. The employees had not rejected continued employment.

One of the cases dealing with the implementing provisions, *AD 1995 nr 60*, contemplates the effect of a dismissal which might be deemed unfair according to LAS s 7(3). As with dismissals which are unfair for other reasons, the Court states that the dismissals in this case are not necessarily without effect.

Finally, in *AD 1995 nr 134*, an application for referral to the ECJ is made as to the manner of evaluating whether a transfer has occurred or not. The Court found that this was unnecessary as enough guidance was available.

3.2.3 Comparison

Judicial organisation

An important difference between the application in the two systems is the organisation of the judiciary and the courts available. There is, in the United Kingdom, only one domestic highest instance, the House of Lords. This means that there is a lot of competition to be heard there and that many cases will be filtered out and never reach the Law Lords. This is quite well illustrated by the fact that there are only four cases available dealing with TUPE. When it comes to labour disputes there is, in Sweden, a special court that functions as highest instance, the Labour Court. Having this specialisation and not having to deal with any other types of cases, the Labour Court can afford to be more generous in the amount of cases it takes on. Having decided 16 more cases, despite the provisions being in force 13 years less than in the United Kingdom, seems to demonstrate this.

Types of cases

There is also a difference in the type of cases, the type of principles, that are judged and reflected on by the two courts. Naturally, all cases centre around a real and factual situation which needs to be resolved and points of law that need to be considered carefully. However, there appears to be more of a focus on specific, unresolved, points of law in the House of Lords than in the Labour Court. The Law Lords need to find answers to: the procedure of interpretation as well as actually interpreting the provisions; the legal effects of actions; the scope of central concepts within the regulations; and when crucial actions have taken place. The Labour Court does answer questions of principle but many of the cases are more about applying these principles than expressing them for the first time. There is a need to establish a method for evaluation if a transfer according to the Directive has taken place, generally and in special cases such as contracting out. However, there are

several cases which mostly repeat what has already been said and then apply this on concrete facts.

Material

One difference is the material used and available to solve the problems at hand. The Labour Court uses and reuses a certain amount of ECJ cases for instructions on how to solve problems, refers lightly to earlier case law of its own to confirm a method or conclusion and finds answers to interpretive questions in *travaux préparatoires*. There is also usually a statement in the judgements about the relevant legislation being an implementation of the Directive and that it must be understood and interpreted in the light of this. The House of Lords also makes use of a great amount of ECJ jurisprudence, and a point is made out of expressing the relevant regulations' connection to the Directive and the implications of this. Besides this, domestic case law is used, when possible, both from the House itself and from the lower courts. The actual legal text is also an important, if not the foremost, source. It is also worth mentioning that the answers to an ECJ referral became decisive in one case. The ECJ cases which are most well used in each country do not seem to be the same. Whereas, *Spijker*, *Süzen* and *Schmidt* recur in Swedish case law, it is *Daddy's Dance Hall*, *Danmols Inventar*, *Bork*, i.a., that appear repeatedly in UK jurisprudence.

Structure of judgements

It is always clear what had been decided for the parties in UK case law. What can be difficult is to be sure which principles were decisive and can be used authoratively in future cases. The many opinions that make up a judgement can be very detailed and sophisticated in their reasoning but the fact that no opinion has more authority than another can lead to lack of clarity, especially in cases such as *Newtec v Astley* were the decision was not unanimous and the majority decision not reached in the same way by all. Although only really of persuasive nature, Swedish case law is easier to read and more unambiguous with its composite decisions, even when there are reserved opinions. For the case law regarding the transpositions of the Directive, this has the effect that although creative and declaring law, it can be difficult to correctly identify the core, the *ratio decidendi* of the UK decisions. At a first glance *Lister v Forth Dry Dock* and *British Fuels v Baxendale etc* seem at odds with each other. For this to work out, distinguishing seems to have been used but the result is not very predictable. The Swedish jurisprudence, on the other hand, is not very surprising and many cases are simply formulaic. The distinguishing features always appear to be the facts of each case.

Unfair dismissal

There is a point of law that is handled in both UK and Swedish case law. It is not a question of direct application of the transposing measures, but an auxiliary question: the effect of an unfair dismissal. In *British Fuels v Baxendale etc* general principles of English Law dictate that the remedy for unfair dismissal is not forced re-engagement, except exceptionally. Furthermore, this principle is not contrary to the Directive. Although not as central, or as thoroughly considered, the same question arose in *AD 1995 nr 60*. There was a claim to revoke unfair dismissal, which happened to have

passed its statutory limitation. Nevertheless, the Labour Court expressed that an unfair dismissal was not necessarily without effect and that nothing in the applicable provisions indicated that this would be the case.

Public administration

The applicability of the provisions on the public sector had been quite conclusively decided already by the legislation itself in Sweden. In the United Kingdom an amendment was made that expanded the applicability of TUPE. This was of use in those cases arising after the amendment. In *Newtec v Astley* it was, however, made clear that the Directive itself was applicable on certain types of enterprises in the public sector. As the respondent was an emanation of the state it was possible to apply the Directive through its direct effect. Consequently, the House of Lords judged with an expanded scope of application, contrary to the regulations.

Rejection of transfer

An aspect of the Directive, which was legislated in Sweden as the founding case had already been decided by the ECJ at the time of the legislative process, was the right of an employee to reject transferral. This feature came to play an important role in *Newtec v Astley*. Although not provided for in TUPE, the 'fundamental right' to be free to chose one's employer was supported, not restricted, by EC law, mainly through reference to the *Katsikas* case. Unlike the Swedish legislation, this did not mean the right to stay with the transferor.

Having considered the application of the Directive, the process and the material result, it seems that this stage of the implementation, in the United Kingdom, is very important for full grasp. Compared to Swedish case law, the Law Lords' decisions have a much stronger legislative effect, changing and filling in the written regulations. Swedish case law gives some answers to how the law should be applied but does not differ much from what could have been expected with the legislative material already available.

3.3 Cause and Effect

Thus far the process of transposition in the United Kingdom and in Sweden, has been traced, the application of its material result has been considered, and differences and some similarities have been identified. The following section is devoted to trying to understand which primarily procedural aspects have influenced substantive law.

Scope

The scope of the transposing provisions is quite different in the two countries. In the United Kingdom it has been restricted beyond what the ECJ found acceptable, whilst in Sweden it covers more than demanded by the Directive. One of the reasons why it was more natural to expand the scope of the provisions in Sweden was that the transposition was fitted into LAS which in itself has that wide an application. The fact that the transposition was made within an existing system of labour laws was not, in itself, sufficient for this outcome. The main reason for going further seems

to be the political principles that initially lead LAS to be so widely applicable: the aim for universal labour regulation, that an employee is not less worthy of protection because it works within the public sector.[157] How can the scope of the UK regulations be explained then? To begin with, it would not have been procedurally possible to extend the scope in the same way as in Sweden, since that would have meant going beyond the obligations of the Directive. This does not however mean that there was a political will to do so. Yet, the regulations are more restrictive than, it is later proven in *Commission v United Kingdom* in 1994, was allowable in defining 'undertaking' to only include commercial activity. Except for political will, there is an explanation in the process of legislation. The definition of 'undertaking', it appears in the Parliamentary debate, is based on the understanding of what 'undertaking' correctly means in EC law of a UK expert, James Cunningham, in *The Competition Law of the EEC*.[158] It is clear, though, that this is not generally accepted as completely correct.[159] Political dislike of the Directive seems an unavoidable reason for the final provisions. Nevertheless, it should be noted that the UK scope was extended by direct application of the Directive. It should also be noted that the final scope of the Swedish transposition changed during the process due to input by different bodies regarding the extent of the protection.

The manner in which provisions based on the Directive are protected from divergences in contracts is an example of how the transposition in each country differs due to integration versus independent and new legislation. A provision has been inserted in TUPE that proclaims such contracts null and void, while such a provision already existed in LAS and MBL.

Definitions

The difference in defining key terminology explicitly in the provisions, as in the United Kingdom, and indirectly through mainly references in *travaux préparatoires*, as in Sweden can probably be explained by the manner in which the provisions were made and general drafting principles in each country. In the United Kingdom there has not been a tradition of looking to other material than the statutes themselves, nor of looking to the purpose of legislation, and finding evidence of the considerations made is not an easy or clear task. This in itself explains TUPE reg 2. In Sweden, in contrast, the normal way of legislating leaves much room for nuanced and extensive explanations in other sources than in the statutes.

Effects of transfers

The UK regulations describing the effects of a transfer are very precise, detailed and complex, and cover most points made in the Directive. The Swedish provisions are more generally phrased. Again, this could be explained by the material produced in the legislative process and available to the courts at application. Reading the correct passages of the Swedish Government Bill leaves no doubt that the provisions mean for an automatic

[157] Prop. 1994/95:102, p 49.
[158] Hansard HC vol 14 cols 683-683 (7 December 1981).
[159] Hansard HC vol 14 col 686 (7 December 1981); Hansard HL vol 425 col 1491 (10 December 1981).

transfer of employment. This information is more immediately available in the UK regulations.

Transposing through regulations makes it impossible for joint liability to be included in the United Kingdom. The Swedish transposition is not similarly restricted. The main reason for introducing joint liability there appears to be political and practical.[160]

While it may, at first sight, seem like TUPE and MBL are quite similar in their implications on the application of collective agreements, the simple fact is that these will very rarely be applied by a transferee by virtue of the provisions in TUPE. The reason for this is the standing of collective agreements in the United Kingdom. Here the provisions are affected by existing political and legal structures.

There is no great difference in how pensionery rights are excluded from a transfer but the protection of employees that must be secured by the Member States does differ in its method. The Secretary of State making the regulations in the United Kingdom has no power to do anything about it; it is not within the scope of his designation. Therefore, the responsibility is forwarded to the Secretary of State for Social Services. In Sweden, on the other hand, there would have been a procedural possibility to propose measures to that purpose. This is, however, not done since it is deemed already satisfied by prior legislation.[161]

Termination of employment

The question of dismissals due to transfers is handled in very similar ways in both countries, by connecting such dismissals to an already existing system for unacceptable dismissals. Doing it this way is consistent of the Swedish transposition in general, as it is handled by fitting the Directive into LAS. It is, in a way, more unusual for how the United Kingdom transposed the Directive. Instead of regulating independently an interaction with other labour provisions occurs. Nevertheless, the provision is not juxtapositioned into the relevant statutes, but receives a regulation of its own, albeit with references to these other statutes. This is consistent of the UK method for the transposition of the Directive.

Another similarity connected to dismissals is the incorporation of ‘organisational, technical and economic’ reasons that may validate a dismissal. The Directive concept is new or sufficiently different to existing accepted reasons for dismissal not to be deemed already satisfied and the exact phrase is reproduced in both countries’ legislation. This is more noteworthy in the Swedish case, as there was a stronger tendency there to use what already existed, than in the United Kingdom.

[160] Prop. 1994/95:102, p 47; SOU 1994:83, pp 89-90.
[161] Prop. 1994/95:102, p 47.

An unfair dismissal not necessarily being ineffective was decreed in the same manner in both countries. This is done in case law by reference to already established legal principles.

The manner in which certain categories of employees are excluded from the protection from dismissal because of a transfer again follows the integrative-separate method of transposition. In Sweden, the restriction is a result of the general exclusion of LAS and happens to be acceptable by the Directive. In the United Kingdom, specific exceptions have been made in the regulations, just as has been done in other provisions. What might appear surprising though, is that excluding employees is not an obligation. Is it correct that supplementary employee protection cannot be made, but restrictions are possible?

The employer being responsible for resignation in certain circumstances is handled differently. Part of the difference rests on the same fundament as many others: integrated or separate legislation. In Sweden provisions existed, though not necessarily primarily in statute. In the United Kingdom an employee would, by orders of a specific regulation, under circumstances as described in the Directive, be allowed to resign without fulfilling his obligations and without liability.

Representation

The provisions made for securing representation at the time of the transfer are very different in one country to the other. Although probably not the primary explanation for this, the integrative Swedish method versus the UK method of separate and new provisions can account somewhat for the material result. In Sweden the implementation relies on existing rules about trade union representation. In the United Kingdom it is established in an individual regulation about continued recognition of trade unions. The fundamental reason, however, for the content of the transposing legislation, whether new or old, seems to lie in the very different positions of the trade unions in labour law and practical situations in each country. The position of the trade unions in Sweden is so strong that the protection in the Directive has already been envisaged. Furthermore, the reigning political principles do not appear to support a change of this. Trade unions apparently have a less secure standing in the United Kingdom. It should be mentioned that the Swedish existing provisions do not link the continued representation to the identity of the transferred undertaking, as the Directive and TUPE do, but to the collective agreements that are or will be applicable. This will probably cover all the Directive situations and, at least in the short term, more. This difference is connected to making use of existing legislation to fulfil the Directive obligations. Again, going further than is necessary by the Directive, is procedurally impossible in the United Kingdom, even if there had been a political will.

Information and consultation

The Parliamentary debates point towards the fact that statutory consultation and information, especially in cases of transfer, are not already legally established within the United Kingdom. This concept is given its own place

in TUPE. Consultation and information are, however, well established in Swedish labour law through MBL and making use of what is available is again the natural way to go. While consultation and information, in the United Kingdom, is restricted to recognised trade unions, which is systematic in respect to the rest of the regulations, in Sweden the obligation has been extended beyond official representation. At least superficially, the Swedish provisions seem to go further than necessary. Interestingly the UK provisions, which turned out to be insufficient according to the ECJ, could probably not have been taken further due to the limitations in making regulations.

There is a superficial similarity, which in reality is a difference, in the absence of "in view to seek an agreement" in the statutory text. This is however covered by the Swedish provisions through the existence of the *travaux préparatoires*, a construction that hinges on the way Swedish law is produced and the material that is used by the courts. The absence in the UK provisions is, however, real. This was explained, in the House of Lords by Lord Lyell, by referring to how a directive, making use of a similar phrase, was implemented in UK law without a corresponding expression and how this appears to have been satisfactory.[162]

More favourable

Article 7 of the Directive gives leave to be more favourable towards employees. This is taken advantage of in Sweden where it is possible to do so. Furthermore, integrating the provisions into existing statutes would demand extensive amendments had this possibility not existed. The political ideas of the majority are however of great importance here. In most of the instances in which the Swedish transposition has gone beyond the Directive, protests have been voiced by the parliamentary opposition. Even if the political will had existed in the United Kingdom to make use of art 7, it would have been impossible in regulations, as it does not express an obligation.

Rejection of transfer

There is a Swedish provision which has no equivalent in TUPE but which proves to be law, albeit in a different form, in the United Kingdom, in its application. This is the right of an employee not to be transferred, which in Sweden goes as far as allowing an employee to choose to stay with the transferor. The reason for this rule in both systems is ECJ case law, primarily the *Katsikas* case. The difference in the material law created by the transposition stage, is quite understandable, as this principle had not yet been expressed by the ECJ at the time TUPE was made, but was fully considered by the Swedish legislators. The principle, which might always have existed in UK law through other legislation but was not acknowledged in relation to TUPE initially, has been clearly declared law through *Newtec v Astley*.

[162] Hansard HL vol 425 col 1497 (10 December 1981).

Case law

An effect of the differences of the structure for application in each country is that UK case law has, to a greater extent than Swedish, altered the transposition. The decisions of the Law Lords have added unwritten words to the regulations and introduced new implications not available in the original regulations. This is not a dominant effect of Swedish case law, partly because of its status in the legal system, partly because of the type of cases it has dealt with. There are certain aspects which have been clarified or expanded, such as the effect of an unfair dismissal which is paralleled in UK jurisprudence and the criteria for when a transfer has occurred within public administration. UK case law for TUPE would be necessary to access in order to understand the regulations fully. This could be easily managed for the Swedish transposition without reading the many Labour Court cases.

The fact that the Directive had existed for almost 20 years before its Swedish transposition came into force makes it possible for the Swedish Labour Court to find such a great amount of established guidance as many questions regarding the Directive had already been dealt with.

One may very well wonder, when looking at the differences between the material law of each system, if some of the mistakes made by the United Kingdom and the clarification of the Directive available through ECJ case law, did not influence the choices made in the Swedish legislation. It would have been very strange indeed, if this supplementary information did not have any effect at all.

4 ANALYSIS

4.1 Influential Features

After having analysed and reflected on the differences and similarities in the legislative process, in the structure of application and the types of considerations taken in the implementation of the Acquired Rights Directive, certain features, which alone or combined seem to explain parts of the end result, have been identified. Some of these have to do with the legislative process, if not in general then specifically for directive implementation, others are more socio-political. These features are not necessarily connected to the particular directive studied but could play a role in the implementation of other directives and in legislating in general.

Integrated - Separated

Deciding to transpose a Directive within a system of existing legislation can have a significant effect. For each provision that needs to be transposed an effort must be made to find an existing legal twin or close relative to accept as sufficient, adjust for fulfilment, amend extensively or connect to when creating a wholly new rule. Thus identifying a transposing provision becomes less apparent, room is left for possible compromise but the Directive is also integrated in a more seamless and natural way. Starting from scratch and isolating the transposition in a separate set of statutes has an equally significant effect. At times this means more verbatim adherence to the Directive. It also means a necessity to be creative and cover all gaps. Identifying the transposition is easy, and any anomalies stand out very clearly. It is also probable that similar effects would apply to non-implementing legislation.

Scope of power

An important procedural aspect is the type of instrument chosen or mandatory for implementation, or even legislation in general. This determines the scope of powers of the institution enacting the laws, how far provisions can go, the legislative material available and how this can be used to fill any gaps in the future.

Time frame

The time difference between transpositions can have a definitive effect. Questions which were unanswered and questions which had not even been identified to begin with and therefore of no help to the first legislators, can be responded to by those carrying out transpositions at a later date. Wisdom of hindsight can prevent mistakes being made.

Judicial organisation

The difference in judicial systems and the role played by courts traditionally seems to have a possible impact on the application stage of implementation. This can affect the amount of cases available to analyse, and also their character.

Interpretive material

There is a connection between the applicatory stage and the legislative stage which may affect the form of material law. Being bound by the actual statutory text and not having access to much other material makes certain demands on the courts and on the clarity and detail of the legislative text. Being able to make use of many other sources of law, on the other hand, makes it common and simple for legislators to clarify the legislative text through e.g. *travaux préparatoires* instead.

Legislative material

Another factor, closely linked to the above, is the fact that the legislative process itself makes different material available. A court cannot make use of *travaux préparatoires* if these do not exist or have a natural place in the legislative process.

Set structures

There are also set social and legal structures in a country, which might not be directly touched upon in a Directive, and that can greatly affect implementation. This can mean that superficially similar provisions have very different implications. These fundamental differences also create very different starting positions for each transposition as well as different expectations and necessities.

Political principles

Finally, it is almost impossible to look at a legislative process and the resulting material law without giving a thought to politics and reigning political principles.

4.2 Concluding Thoughts

It has been possible to answer the questions set for this thesis:

- How is the transposition and application of the directive handled in either system?
- Which are the main structural differences?
- Are there any material differences in the result of the implementation?
- Can they be explained by the structural differences?
- Can structural differences in the lawmaking process or the procedural process have an effect on the substance of the law?

The process of transposition and application of the Acquired Rights Directive has been described. Differences in how each stage was handled in either system have likewise been identified, similarly formal and substantial differences in the material law resulting from each stage have been found. There has even been some advance in trying to explain the dissimilarities with the differences in the process, although these explanations have not been principal nor sufficient.

There is consequently some indication that structural differences can affect the substance of the law. Yet, the conclusions that can be drawn are neither

conclusive nor general. Much of the problem lies in the objects of the comparison; they carry within themselves reasons for divergence. As only one directive has been studied the observations are not very representative. The discoveries of this case may very well not be useful in any other.

Nevertheless, at least for the Acquired Rights Directive, it can be claimed that certain features of the legislative process and the application stage had influential parts to play: the scope of power, the choice of integration or separate and new, the role of different legislative material both in the transposition and the application, and the position of the courts in the judicial system. Even if these structural features of lawmaking do not always influence the resulting material law, they cannot be disregarded and could very well be generally applicable when analysing a lawmaking process.

Appendix A: Cross-reference

Cross-reference of the Directive, art 1-7, and the transpositions in the United Kingdom and in Sweden.

EC Directive 77/187/EEC	**United Kingdom TUPE SI 1981/1794**	**Sweden LAS (1982:80) MBL (1976:580)**
Application		
Art 1(1) to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.	**Reg 3(1-2)** Applies to the transfer, from one person to another, of an undertaking, or part thereof, situated in the UK effected by an operation of law. **Reg 2(1)** Applies only to commercial ventures.	**LAS s 1(1)** Applies to both private and public employees **s 6b(1)** in conjunction with the transfer of an undertaking, a business or a part of a business from one employer to another.
Art 1(2) within the territorial scope of the treaty.	**Reg 1(3)** Applies, with some exceptions, to Northern Ireland also.	
Art 1(3) see-going vessels are excluded.	**Reg 2(2)** Does not apply to transfer of a ship only. **Reg 3(5)** Does not exclude applicability of Merchants Shipping Act 1970.	**LAS s 6b(1)(3)** Applies to employees in the public sector and on sea-going vessels but **(2)** not to bankruptcies.
Definitions		
Art 2(1) transferor.	**Reg 2(1)** In accordance with an applicable transfer.	
Art 2(2) transferee.	**Reg 2(1)** In accordance with an applicable transfer.	
Art 2(3) representatives of the employees.	**Reg 2(3)** A trade union representative recognised by an employer.	Trade union representatives according to **FML (1974:358)** in case of existing collective agreements. **MBL s 13(2)** Representatives of affected trade unions in the case of transfer of undertaking.[163]

[163] Prop. 194:96/102 pp 59-62.

EC Directive	United Kingdom	Sweden
Transfer of rights		
Art 3(1) Rights and obligations founded in employment contract or relationship, on the date of transfer, shall be transferred to the transferee.	**Reg 5(1)** A contract will not be terminated but have effect as if originally made by employee and transferee, **(2)** all rights, powers, duties and liabilities there from will be transferred and actions in relation to transferor will be deemed done to transferee, **(3)** if the employee was thus employed immediately before the transfer. **(4)** This does not affect criminal liability.	**LAS s 6b(1)(1)** Rights and obligations under contracts of employment and employment relationships existing at the time of a transfer shall be transferred
Optional: Certain continuous liability for transferor.	No action taken.[164]	**LAS s 6b(1)(2)** The previous employer is jointly liable for any financial obligations related to the period prior to the transfer.
Art 3(2) The terms of a collective agreement shall be observed by the transferee in the same way until the date of termination or expiry of the agreement or the entry into force of another.	**Reg 6** In the case of a collective agreement recognised by the transferor, its effects shall continue to apply to the employee, as if made by the transferee, and so shall any orders made in respect of it.	**MBL s 28(1)** When a transferring employer is bound by a collective agreement, that agreement shall also apply to the new employer, except when he is already bound by another applicable agreement.
Optional: The observation of a collective agreement may be limited to no less than a year.	No action taken.	**MBL s 28(3)** The new employer is obligated to apply the conditions of a collective agreement during one year, except if has expired or another applicable agreement has entered into force. [165]

[164] ECA 1972 s 2(2); Hansard HC vol 14 cols 686, 696 (7 December 1981); Hansard HL vol 425 col 1497 (10 December 1981).
[165] Prop. 1994/95:102, pp 53-58.

Dir. 77/187/EEC	United Kingdom	Sweden
Art 3(3) Old-age, invalidity, or survivor's benefits under company pension schemes, outside statutory schemes are excluded. Measures shall, however, be adopted by Member States to protect the interests.	**Reg 7** Occupational pensions schemes and any rights, powers, duties and liabilities connected to such a scheme, are excluded.	**LAS s 6b(3)** Old-age, invalidity, or survivor benefits are excluded.
Termination of employment		
Art 4(1) A transfer does not constitute ground for termination, either by transferor or transferee. This does not exclude termination on economic, technical or organisational grounds (OTE).	**Reg 8(1)** A dismissal mainly due to a transfer shall be treated as unfair in accordance to the EPA 1978. **(2)** This does not apply if the dismissals due to OTE-reasons, which must also meet other statutory requisites for fair dismissal.	**LAS s 7(3)** A transfer does not, *per se*, constitute objective grounds for termination. This does not exclude termination due to OTE-reasons.
Optional: Exclusion of certain specific categories from protection against dismissal.	Dismissals **Reg 8(4)** required by the ARA 1919.[166] **Reg 13(1)** of employees ordinarily working outside the UK, or **(2)** on UK ships if working wholly outside the UK or not ordinary UK residents, or **(3)** who are registered dockworkers, are not thus prohibited.	**LAS s 1(2)** Employees that may be deemed to occupy a managerial position, who are the members of the employer's family or who are employed for work in the employer's household are not thus protected as they are excluded from the application of LAS in general.[167]
(2) If the reason for termination involves substantial changes to working conditions to the detriment of an employee, the employer is to be regarded as responsible.	**Reg 5(5)** An employee retains the right to terminate his contract without notice if the transfer should entail substantial change in his working conditions to his detriment.	A termination by the employee provoked by unsuitable action by the employer is to be considered a dismissal by the employer.[168]

[166] Aliens Restriction (Amendment) Act 1919.
[167] Prop. 1994/95:102, p 41.
[168] Prop 1994/95:102, p 48.

Dir. 77/187/EEC	United Kingdom	Sweden
Representatives		
Art 5(1) The status and function of representatives of those affected by a transfer shall be preserved, if a business preserves its autonomy. This does not apply if there are legal provisions, in a Member State, which fulfil the necessary conditions for re-appointment of the representatives.	**Reg 9(1)** If the transferred undertaking maintains a distinct identity, a trade union recognised by the transferor in respect of the transferred employees, shall be deemed recognised by the transferee also.	The status of a trade union representative according to **FML (1974:358)** is not affected by a transfer.[169]
Art 5(2) If the term of office, of a representative, expires as a consequence of the transfer, he should continue to enjoy the existing statutory protection in the Member State.		**FML (1974:358) s 4** When an appointment ends, the ex-representative shall be ensured the same, or equivalent, working conditions and terms of employment as before.
Information and consultation		
Art 6(1) Transferors and transferees must, in good time before the transfer, inform the representatives of the affected employees of the reasons for the transfer, its legal, economic and social implications and any envisaged measures.	**Reg 10(2)** An employer shall, long enough before the transfer, inform the representatives of the employees affected, of the transfer, the tine and reasons for it, the legal, economic and social implications of it, and the measures envisaged in connection with it.	**MBL s 15(2)** When consultations according to MBL s 11 and 13 are activated, the employer shall, in good time, notify the other party, in writing, of the reason for, the employers affected by and the time frame for the transfer.

[169] Prop. 1994/95:102, p 61.

Dir. 77/187/EEC	United Kingdom	Sweden
Art 6(2) If any measures are envisaged, the transferor or transferee must consult with the representatives in view of seeking an agreement.	**Reg 10(5)** When measures are envisaged concerning the affected employees, an employer shall consult with the representatives of recognised trade unions. **(6)** The employer shall consider representations by the representatives and give reason for rejecting them if such is the case.	**MBL s 11** Before making decisions regarding significant changes in its activities, an employer shall, on his own initiative, enter into negotiation with the employee organisations to which he is bound by collective agreement. **s 13 sub-s 2** Where an employer is not bound by a collective agreement, he shall be obliged to negotiate, in accordance with s 11, with all affected employees' organisations in the case of a transfer of an undertaking subject to LAS s 6b.
Art 6(3) Optional: Limit the obligations of consultation to very serious cases if there are, in the Member State, provisions making arbitration proceedings available to the representatives.		[170]
Art 6(4) Optional: Limit the obligations of consultation for undertakings where the number of employees is such that they qualify for a collegiate body of representation.		[171]

[170] Prop. 1994:95 p 61.
[171] Prop. 1994:95 p 61.

Dir. 77/187/EEC	United Kingdom	Sweden
Minimum		
Art 7 Member States may introduce legislation that is more favourable to employees.		**LAS s 2(2)** Collective agreements may diverge from certain provisions in LAS only in such a way of being more favourable to employees. **S 6b(4)** A transfer of employment contract and conditions will not be transferred in the case when an employee should protest. **MBL s 4(2)** Collective agreements may diverge from certain provisions in MBL only in such a way of being more favourable to employees.[172]

[172] Prop. 1994/95:102, pp 55-56.

Appendix B: TUPE 1981

Statutory Instruments 1981 No. 1794
Terms and conditions of employment
The Transfer of Undertakings (Protection of Employment) Regulations 1981

Laid before Parliament in draft

Made	*14th December 1981*
Coming into Operation	
Regulations 1 to 3 and 10 to 13	*1st February 1982*
Regulations 4 to 9 and 14	*1st of May 1982*

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 Community Act 1972:
Now, therefore, the Secretary of State, being a Minister designated for the purpose of section 2(2) of that Act in relation to rights and obligations relating to employers and employees on the transfer or merger of undertakings, businesses or parts of businesses, in exercise of the powers conferred by that section, hereby makes the following Regulations—

Citation, commencement and extent

1.—(1) These regulations may be cited as the Transfer of Undertakings (Protection and Employment) Regulations 1981.

(2) These Regulations, except Regulations 4 to 9 and 14, shall come into operation on 1st February 1982 and Regulations 4 to 9 and 14 shall come into operation on 1st May 1982.

(3) These Regulations, except Regulations 11(10) and 13(3) and (4), extend to Northern Ireland.

Interpretation

2.—(1) In these Regulations—

"collective agreement", "employers' association", and "trade union" have the same meanings respectively as in the 1974 Act or, in Northern Ireland, the 1976 Order ;

"collective bargaining" has the same meaning as it has in the 1975 Act or, in Northern Ireland, the 1976 Order ;

"contract of employment" means any agreement between an employee and his employer determining the terms and conditions of his employment ;

"employee" means any individual who works for another person whether under a contact of service or apprenticeship or otherwise but does not, include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly ;

"the 1974 Act", "the 1975 Act", "the 1078 Act" and "the 1976 Order" mean, respectively, the Trade Union and Labour Relations Act 1974, the Employment Protection Act 1975, the Employment Protection (Consolidation) Act 1878 and the Industrial Relations (Northern Ireland) Order 1976 ;

"recognised", in relation to a trade union, means recognised to any extent by an employer, or two or more associated employers, (within the meaning of the 1978 Act, or, in Northern Ireland, the 1976 Order), for the purpose of collective bargaining ;

"relevant transfer" means a transfer to which these Regulations apply and "transferor" and "transferee" shall be construed accordingly ; and

"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.

(2) References in these Regulations to the transfer of a part of an undertaking are references to a part which is being transferred as a business and, accordingly, do not include references to a transfer of a ship without more.

(3) For the purpose of these Regulations the representative of a trade union recognised by an employer is an official or other person authorised to carry on collective bargaining with that employer by that union.

A relevant transfer

3.—(1) Subject to the provisions of these Regulations, these Regulations apply to a 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 to aforesaid, these Regulations so apply whether the transfer is effected by sale or by some other disposition of law..

(3) Subject to 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 persons employed in the undertaking or part transferred ordinarily work outside the United Kingdom ;

(c) that the employment of any of those persons is governed by any 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, but in determining whether or not such a series constitutes a single transfer regard shall be had to the extent to which the undertaking or part was controlled by the transferor and transferee respectively before the last transaction, to the lapse of time between each of the transactions, to the intention of the parties and to all other circumstances.

(5) Where, in consequence (whether directly or indirectly) of the transfer of an undertaking or part of one which was situated immediately before the transfer in the United Kingdom, a ship within the meaning of the Merchant Shipping Act 1894 registered in the United Kingdom ceases to be so registered, these Regulations shall not affect the right conferred by section 5 of the Merchant Shipping Act 1970 (right of seamen to be discharged when ship ceases to be registered in the United kingdom) on a seaman employed in the ship.

Transfers by receivers and liquidators

4.—(1) Where the receiver of the property or part of the property of a company or, in the case of a creditors' voluntary winding up, the liquidator of a company transfers the company's undertaking, or part of the company's undertaking (the "relevant undertaking") to a wholly owned subsidiary of the company, the transfer shall for the purpose of these Regulations be deemed not to have been effected until immediately before—

(a) the transferee company ceases (otherwise than by reason of its being wound up) to be a wholly owned subsidiary of the transferor company ; or

(b) the relevant undertaking is transferred by the transferee company to another person ;

whichever first occurs, and, for the purpose of these Regulations, the transfer of the relevant undertaking shall be taken to have been effected immediately before that date by one transaction only

(2) In this Regulation—

"creditors' voluntary winding up" has the same meaning as in the Companies Act 1948 or, in Northern Ireland, the Companies Act (Northern Ireland) 1960 ; and

"wholly owned subsidiary" has the same meaning as it has for the purposes of section 150 of the Companies Act 1948 or, in Northern Ireland, the Companies Act (Northern Ireland) 1960.

Effect of relevant transfer on contracts of employment, etc.

5.—(1) A relevant transfer shall not operate as to terminate the contract of employment of any person employed by 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 made 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 such a contract, 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.

(3) Any reference in paragraph (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is in 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 employed 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) above is without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice if a substantial change is made in his working conditions to his detriment : but no such right shall arise by reason only that, under that paragraph, 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.

Effect of 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 section 18 of the 1974 Act or Article 63 of the 1976 Order (collective agreements presumed to be unenforceable in specified circumstances) 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 party to the agreement.

Exclusion of occupational pension schemes

7. Regulations 5 and 6 above shall not apply—

(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 the Social Security Pensions (Northern Ireland) Order 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.

Dismissal of employee because of 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 V of the 1978 Act and Articles 20 to 41 of the 1976 Order (unfair dismissal) 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 the relevant transfer is the reason or principal reason for dismissing an employee—

(a) paragraph (1) above shall not apply to his dismissal ; but

(b) without prejudice to the application of section 57(3) of the 1978 Act or Article 22(10) of the 1976 Order (test of fair dismissal), the dismissal shall for the purposes of section 57(1)(b) of that Act and Article 22(1)(b) of that Order (substantial reason for dismissal) 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 to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919 to his employment.

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 to employees of any description who in consequence of the transfer become employees of the transferee, the, 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 accordingly.

Duty to inform and consult trade union representatives

10.—(1) In this Regulation and Regulation 11 below "an affected employee" means, in relation to a relevant transfer, any employee 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 consultations to take place between the employer and any affected employees of a description in respect of which an independent trade union is recognised by him and that union's representatives, 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 he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be 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) 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.

(4) The information which is to be given to the representatives of the trade union under this Regulation shall be delivered to them, or sent by post to an address notified by them to the employer, or sent by post to the union at the address of its head office.

(5) Where an employer of any affected employees envisages that he will, in connection with the transfer, be taking measures in relation to any such employees of a description in respect of which an independent trade union is recognised by him, he shall enter into consultations with the representatives of that union.

(6) In the course of those consultations the employer shall—

(a) consider any representations made by the trade union representatives ; and

(b) reply to those representatives and, if he rejects any of those representations, state his reasons.

(7) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform s duty imposed on him by any of the foregoing paragraphs, he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

Failure to inform or consult

11.—(1) A complaint that an employer has failed to inform or consult a representative of a trade union in accordance with Regulation 10 above may be presented to an industrial tribunal by that union.

(2) If on complaint under paragraph (1) above a question arises whether or not it was reasonably practicable for an employer 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 for him to perform the duty ; and

(b) that he took all such steps towards his 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 (7) of Regulation 10 above, he may nit 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(3) above unless he gives the transferee notice of his intention to show that fact ; and giving of the notice shall make the transferee party to the proceedings.

(4) Where the tribunal finds the 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 awards ; 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 that 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 the tribunal finds a complaint under paragraph (5) above well-founded it shall order the employer to pay the complainant the amount of compensation which he finds is due him.

(7) Where an employer, in failing to perform a duty under Regulation 10 above, also fails to comply with the requirements of section 99 of the 1975 Act or Article 49 of the 1976 Order (duty of employer to consult trade union representatives on redundancy)—

(a) any compensation awarded to an employee under this Regulation shall go to reduce the amount of remuneration payable to him under a protective award subsequently made under Part IV of that Act or Part IV of that Order and shall also go towards discharging any liability of the employer under, or in respect of a period falling within the protected period under that award ; and

(b) conversely any remuneration so payable and any payment made to the employee by the employer under, or by way of damages of breach of, that contract in respect of a period falling within the protected period shall go to reduce the amount of any compensation which may be subsequently awarded under this Regulation.

but this paragraph shall be without prejudice to section 102(3) of that Act and Article 52(3) of that Order (avoidance of duplication of contractual payments and remuneration under protective awards).

(8) 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 the period of three months.

(9) Section 129 of the 1978 Act (complaint to be sole remedy for breach of relevant rights) and section 133 of that Act (functions of conciliation officer) and Articles 58(2) and 62 of the 1976 Order (which make corresponding provision for Northern Ireland) shall apply to the rights by this Regulation and to the proceedings under this Regulation as they apply to the rights conferred by that Act and that Order and the industrial tribunal proceeding mentioned therein.

(10) 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 ; and section 13(1) of the Tribunals and Inquiries Act 1971 (appeal from certain tribunals to the High Court) shall not apply in relation to any such proceedings.

(11) In this Regulation "appropriate compensation" means such as sum not exceeding two 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.

(12) Schedule 14 to the 1978 Act or, in Northern Ireland, Schedule 2 to the 1976 Order shall apply for calculating the amount of a week's pay for any employee for the purpose of paragraph (11) above ; and, for the purposes of the calculation the calculation date shall be—

(a) in the case of an employee who is dismissed by reason of redundancy (within the meaning of section 81 of the 1978 Act or, in Northern Ireland, section 11 of the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965 the date which is the calculation date for the purpose of any entitlement of his to a redundancy payment (within the meaning of that section) or which would be that calculation date if he were so entitled ;

(b) in the case of an employee dismissed for any other reason, the effective date of termination (within the meaning of section 55 of the 1978 Act or, in Northern Ireland, Article 21 of the 1976 Order) of his contract of employment ;

(c) in any other case, the date of the transfer in question.

Restriction 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 Regulation 5, 8 or 10 above or to preclude any person from presenting a complaint to an industrial tribunal under Regulation 11 above.

Exclusion of employment abroad or as a dock worker

13.—(1) Regulations 8, 10 and 11 of these Regulations do not apply to employment where under his contract of employment the employer ordinarily works outside the United Kingdom.

(2) For the purpose of this Regulation a person employed to work on board a ship registered in the United Kingdom shall, unless—

(a) the employer is wholly outside the United Kingdom, or

(b) he is not ordinarily resident in the United Kingdom,

be regarded as a person who under his contract ordinarily works in the United Kingdom.

(3) Nothing in these Regulations applies in relation to any person employed as a registered dock worker unless he is wholly or mainly engaged in work which is not dock work.

(4) Paragraph (3) above shall be construed as if it were contained in section 145 of the 1978 Act.

Consequential amendments

14.—(1) In section 4(4) of the 1978 Act (written statement to be given to employee on change of his employer), in paragraph (b), the reference to paragraph 17 of Schedule 13 to

that Act (continuity of employment where change of employer) shall include a reference to these Regulations..

(2) In section 4(6A) of the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965, in paragraph (b), the reference to paragraph 10 of Schedule 1 to that Act shall include a reference to these Regulations.

Signed by order of the Secretary of State.
14th December 1981.

David Waddington
Joint Parliamentary Under Secretary of State,
Department of Employment.

EXPLANATORY NOTE

(This Note is not part of the Regulations.)

These Regulations implement Council Directive No. 77/187/EEC.

Regulations 1 to 3 and 10 to 13 come into operation on 1st February 1982 and Regulations 4 to 9 and 14 on 1st May 1982. The principal provisions of the Regulations are as follows:—

(a) The Regulations apply where a person transfers a commercial undertaking or part thereof to another person (Regulation 3).

(b) Such a transfer will not operate to terminate the employees' contracts of employment but any such contract which would otherwise have been terminated by the transfer will continue as if made between the transferee and the employees (Regulation 5). Provision is made for the continuance of collective agreements (Regulation 6). Regulations 5 and 6 do not apply to occupational pension schemes (Regulation 7).

(c) Provision is made for the application of the remedies of unfair dismissal contained in existing law where an employee of the transferor or transferee is dismissed by reason of the transfer (Regulation 8).

(d) A trade union recognised by the transferor is deemed after a transfer to be similarly recognised by the transferee (Regulation 9).

(e) The representatives of the employees who may be affected by the transfer are to be informed by the transferor and the transferee of the date of and the reason for the transfer and its implications for them. Where the transferor or the transferee envisages that he will be taking measures in relation to the affected employees, he must enter into consultation with the said representatives (Regulation 10). A complaint may be presented to an industrial tribunal that these duties have not been performed and the tribunal may award compensation (Regulation 11).

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