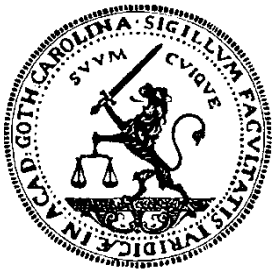

FACULTY OF LAW
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The term "Employee" as interpreted by the national courts in Sweden and England for the purpose of eligibility in respect of an Unfair Dismissal Claim

- A discussion on whether different national interpretations sit comfortably with the rationale for the uniform Court of Justice term "worker" and whether this situation can be justified in the light of the potential unlevelling of the internal market and Article 30 of the Charter of Fundamental Rights

Master Thesis
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Professor Birgitta Nyström

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Content

Summary

As already given away by the title, the purpose of this thesis is to discuss whether different national interpretations of the term “employee” in the context of the national concept of unfair dismissal sit comfortably with the rationale for the Union concept of “worker” (in the context of free movement) developed by the Court of Justice and whether different national interpretations can be justified in the light of the potential unlevelling of the internal market and Article 30 of the Charter of Fundamental Rights, (“the CFR”).

To answer the above question the thesis starts by exploring the way that the social dimension and in particular EU employment law has developed since the Treaty of Rome in 1957. In the pursuit of creating an internal market free of distortions a uniform EU concept of the term ”worker” was developed by the Court of Justice. Consequently, the concept of worker (in the context of free movement) has been interpreted extensively to in some circumstances even include EU citizens. It will be seen that the Court of Justice’s willingness to extend the scope of the term has varied depending on the legal context. The rationale relied on by the Court in its interpretations has also varied, sometimes it has relied on an economic integrationist rationale to justify the need for a uniform Union term and other times it has explained its reasoning for a Union term by reference to a social rationale.

The term “employee” as defined by the courts in Sweden and England for the purpose of the national concept of unfair dismissal is then considered. It is my contention that different national interpretations of the term “employee” (amongst other national factors) can operate to create disharmony in the internal market and thereby delay the realisation of a level playing field where businesses in the EU can compete on equal terms. In particular, I will argue for a common EU concept of the term “employee” in the context of the Acquired Rights Directive (which presently makes reference to definitions in accordance with national law) as the present situation may operate to grant the Member States an unacceptable discretion over the directive’s application in a way that hardly could have been the purpose of the protection that the directive sought to afford the Union’s workers in the 1970’s.

The potential impact that the CFR may have on the Member States’ national employment protection relating to unfair dismissal is also considered and in particular whether the right not to be unjustified dismissed, (conferred on all ”workers” by Article 30 of the CFR), introduces a minimum floor of employment protection or a universally applicable concept which, (in accordance with the rationale adopted by the Court of Justice in Levin), would appear to require a Union definition. Although not intended to introduce any additional rights, it has been suggested that the Court of Justice may be influenced or find support in the CFR to expand the EU’s

competences and that some of the rights under the CFR may be sufficiently clear and precise to create direct effect. If Article 30 is sufficiently clear and precise it will be interesting to consider how the right to protection against unjustified dismissal may come to be interpreted and what role that would leave the national concepts of unfair dismissal. The EU's competence in the field of employment is also considered.

Sammanfattning

Som titeln avslöjar är syftet med uppsatsen att diskutera om olika medlemsstatliga tolkningar av begreppet ”arbetstagare” (såsom begreppet tolkats i medlemsstaternas nationella reglering av osakliga uppsägningar) kan rättfärdigas mot bakgrund av de av EU domstolen uttalade motiv som har åberopats för en unionstolkning av begreppet ”arbetare” inom EU rätten. Det ifrågasätts om olika nationella tolkningar är acceptabla med tanke på den obalans som enligt författarens uppfattning olika tolkningar av begreppet kan leda till på den interna marknaden samt mot bakgrund av artikel 30 i rättighetsstadgan.

I syfte att försöka besvara frågeställningen ovan inleder uppsatsen med att utforska hur den sociala dimensionen, och särskilt arbetsrätten, har utvecklats sedan Romfördraget 1957. I syfte att skapa en intern marknad fri från konkurrenshinder kom EU domstolen att utveckla begreppet ”arbetare” till ett uniformt vidsträckt EU koncept. Begreppet ”arbetare” har tolkats extensivt och har ibland utvidgats till att inkludera EU medborgare. EU domstolens vilja att utvidga begreppet har också varierat beroende på vilket lagområde som berörts. De motiv som EU domstolen åberopat har också varierat. Ibland har domstolen uttalat att ett ekonomiskt motiv (i integreringssyfte) har kunnat rättfärdiga en EU konform tolkning av begreppet arbetstagare medan ett socialt motiv andra gånger har förklarats ligga bakom domstolens extensiva tolkning.

Vidare utreds begreppet arbetstagare (såsom det tolkats av de svenska och engelska domstolarna i de båda ländernas nationella reglering av osakliga uppsägningar). Det är författarens uppfattning att olika nationella tolkningar av arbetstagarbegreppet (i kombination med andra nationella skillnader) kan leda till att skapa en obalans på den interna marknaden och därmed hindra förverkligandet av ett jämnt spelfält där företag kan konkurrera på lika villkor. Författaren argumenterar framförallt för en EU konform tolkning av begreppet arbetstagare i företagsöverlåtelse direktivet som för tillfället hänvisar till medlemsstaternas nationella tolkningar av arbetstagarbegreppet istället för en EU konform tolkning. Författaren menar att den nuvarande situation kan leda till att medlemsstaterna ges kontroll över direktivets tillämpningsområde på ett sätt som inte kan anses vara förenligt med dess skyddssyfte.

Uppsatsen diskuterar vidare om rättighetsstadgan kan antas få någon påverkan på medlemsstaternas nationella reglering av osakliga uppsägningar och ifrågasätter om skyddet i artikel 30 av rättighetsstadgan som sträcker sig till alla ”arbetare” ska ses som ett minimiskydd eller ett universellt EU koncept som (i linje med EU domstolens tolkning i Levin) torde kräva en EU konform unions tolkning. Trots att rättighetsstadgan uttryckligen inte medfört några utvidgade rättigheter har det uttalats viss oro för att EU domstolen i framtiden kan komma att använda sig av rättighetsstadgan för

att söka expandera EU’s kompetens områden. Det har också spekulerats över att några av rättigheterna i rättighetsstadgan kan vara tillräckligt tydliga och precisa för att kunna skapa direkt effect. Om detta är korrekt ifråga om artikel 30 kan man fundera över hur rätten mot godtyckliga uppsägningar kan komma att tolkas samt vilken roll det nationella konceptet av skydd mot osakliga uppsägningar kan tänkas få. EU’s kompetens inom arbetsrättens område diskuteras också.

Preface

This thesis marks the end of my studies at Lund University but also the end of my further studies and the subsequent legal training that I have undertaken in the UK since I left for what initially was planned to be an abroad year in 2007. Five years later and I am still here and due to qualify as a solicitor in England & Wales in a few weeks time.

It has been an exciting but sometimes also challenging journey and I would like to take this opportunity to thank my family and friends for their endless encouragement and support. I could never have done this without you.

A special thank you is also directed to my supervisor, Professor Birgitta Nyström for her constructive feedback and ongoing support throughout the composition of this thesis.

Dorchester, March 2013

Abbrevations

AD	Arbetsdomstolen
CA	The Court of Appeal
CFR	The Charter of Fundamental Rights of the European Union
EAT	The Employment Appeal Tribunal
EC	The European Community
EEC	The European Economic Community
EES	The European Employment Strategy
ECHR	The European Court of Human Rights
EMU	The European Monetary Union
ERA	The Employment Rights Act 1996
ESC	The European Social Charter
EU	The European Union
HD	Högsta Domstolen
ILO	The International Labour Organization
LAS	Lag (1982:80) om anställningsskydd
MBL	Lag (1976:580) om medbestämmande i arbetslivet
NJA	Nytt Juridiskt Arkiv
OECD	The Organisation for Economic Co-operation and Development
OMC	The Open Method of Coordination
TEU	The Treaty on European Union

TFEU	The Treaty on the Functioning of the European Union
SEA	The Single European Act

1 Introduction

The EU has long been characterised by a somewhat unsteady compromise between the economic forces and the social, between free market principles on the one hand - in particular the completion of the EU internal market where competition must not be "distorted" - and on the other, support for national employment law and social welfare.
EU employment law can be described as attempting to bridge these two competing dimensions. Similar contradictions are also encountered when trying to reconcile the EU concept "worker" and the national concept "employee" in the context of EU employment law. More recently, through the Treaty of Lisbon and the Charter of Fundamental Rights, ("the CFR"), certain employment rights, (which never had been considered to fall within the EU's competence sphere), were also given an elevated status as legally binding fundamental rights and thereby adding to the complexity over the EU's future role in EU employment law.

1.1 The EU concept "worker"

In the pursuit of creating an internal market free of distortions and in the context of free movement the uniform EU concept "worker" developed. As one of the four freedoms forming the foundations of the internal market, Article 45 TFEU and the Court of Justice's definition of "worker" has been interpreted widely and objectively.[1] The term worker, which initially applied mainly to the category of workers generally classed as employees has since been extended to, in some circumstances, include other persons engaged in economic activity and sometimes even those without a contract of employment, such as students in vocational training[2] and unemployed persons looking for work[3] and (more recently) EU citizens in general.[4] The underlying rationales for the Court's extensive interpretation will be considered further in the following chapter.

The Community Charter of Fundamental Social Rights of Workers 1989, (the predecessor to the CFR), which included fundamental rights of individual employment has also assisted in strengthening the conception of the citizen-worker further[5], (although there has not to my knowledge been any direct claims that the "worker" referred to in the CFR should be defined in the same way as the concept "worker" developed by the Court of Justice in the context of free movement). Despite this, Article 45 TFEU has not been considered an autonomous right but rather an ancillary, purposeful

[1] Barnard, (2006), p. 172.
[2] Case 39/86 Lair [1988] ECR 3161
[3] Case C-292/89 Antonissen [1991] ECR I-745
[4] Nyström, (2011), p. 123 and Bercusson, (2009), p. 370 ff.
[5] Bercusson, (2009), p. 376.

right within the framework of the economic objectives of the Union – a right conferred for reasons of the performing of an economic activity or as described by Blainpain: *"a contribution to the economic needs of the Member States"*.[6]

At this stage, it should be remembered that the EU's primary aim always was economic and that the social dimension and national employment laws were not considered to be areas in need of harmonisation. Any necessary convergence in the field of national labour laws and practice (and hence costs) was expected to follow from the creation of the internal market. In fact, the decision by the Member States to leave the areas of social policy and labour law in the hands of the Member States was a conscious decision based on recommendations in the Ohlin Report[7], commissioned from the International Labour Organization, ("ILO"), before the Treaty of Rome was signed on 25 March 1957. The Ohlin Report had suggested that strong national labour law systems would be necessary in order to counterweight the consequences of market integration.[8]

1.2 Social dumping concerns

Already before the EU's expansions to the east in 2004 and 2007 increased concerns about social dumping were often raised by the Member States in the west. The term social dumping is often referring to the situation where workers from certain countries are competing for employment by offering cheaper labour to employers in countries where salaries in general are higher. Social dumping does however also encompass the situation where companies move their production to countries where labour costs are lower and thus gaining a competitive advantage.[9]

It is important to appreciate that labour costs in this context refer not only to direct costs such as wages but to the employer's total expense in relation to the employees. The term labour costs therefore include additional costs, often referred to as indirect costs that are imposed on the employer by national systems of labour law and social protection. These include the employer's contributions to social security funds, sick pay together with other social payments and not least the costs of complying with labour law standards.[10] Labour costs have been estimated to account for two thirds of the production costs of goods and services and as such it is evident that they will have a considerable influence on political, economic and social decision makers.[11] For multinational enterprises it will therefore be tempting to

[6] Blainpain, R, ELL – Suppl. 335 (March 2008), p. 2.
[7] Ohlin Report (1956)
[8] Bruun/Lörcher/Schömann, (2012), p. 22.
[9] Nyström, (2011), p. 108.
[10] Bercusson, (2009), p. 133.
[11] Eurostat, EU labour costs 1999, Statistics in focus, Population and social conditions, 3, 3/2001

relocate their current establishments to countries where labour costs are lower.[12]

That differences between the Member States' national labour law system and labour costs would have an impact on competition between companies operating in the internal market did soon become clear to the European Commission which already in 1990 suggested that harmonisation of indirect costs, such as costs of dismissal protection, social security contributions and other forms of taxation should be considered.[13] The reason for this suggestion was to prevent a situation where the Member States are forced to deregulate and reduce their labour standards in order to attract new business investments, a scenario often described as a *"race to the bottom"*.[14]

Lack of political consensus between the Member States coupled with insufficient EU competence in the social field did however mean that the European Commission's suggestion was not taken up. The Court of Justice's more recent and highly debated decisions in Viking[15] and Laval[16] have however refuelled the concerns of social dumping[17] and with the UK conservative led government recently raising the bar for employment protection against unfair dismissal by increasing the required years of service from one to two years it now appears that the scenario which the European Commission had foreseen might become reality. The recent legislative changes, which were criticised by the trade unions for opening up for what could become a *"hire and fire culture",* became effective on 6 April 2012. [18]

1.3 Problem

For the most part, the Member States' labour law systems tend to address a common set of problems. One can therefore be forgiven for thinking that any national differences between the Member States' labour law systems will be marginal and have limited effect on competition between enterprises in the internal market.

The Member States' labour law traditions do however have very dissimilar origins as a result of their different legal heritages.[19]In addition, even

[12] Bercusson, (2009), p.134.
[13] COM(90)228
[14] Barnard, (2006), p. 51.
[15] C-438/05 Viking [2007] ECR I-10779
[16] C-341/05 Laval [2007] ECR I-11767
[17] Barnard, *"Social dumping or dumping socialism?"*, Cambridge Law Journal, Volume 67, Issue 02, July 2008, p. 262 ff.
[18] http://www.guardian.co.uk/money/2012/apr/06/unfair-dismissal-reform
[19] The EU's Member States can very broadly be divided into three groups of legal systems. The Swedish legal system, together with the Danish and Finnish legal systems, fall into the Nordic group. The English legal system, together with the Irish forms part of the Anglo-Saxon group and the French legal system (together with Austria, Germany, France,

Member States with similar legal origins and formally similar legal provisions and concepts can often be distinguished by different national interpretations and thereby emerge as very different in their practical operation, with the potential effect of disharmony in (or even distortion of) the internal market.[20] An illustrative example of this is the discussion that followed from the Commission allowing different national interpretations of the concept *"pressing business reasons"* which justified dismissal under a draft of the Acquired Rights Directive[21]. Despite recognising the "elastic definition of this concept" the Commission refused to define the concept – an approach criticised by the European Parliament in the European Industrial Relations Review.[22]

The criticism from the European Parliament is easy to understand. The consequence of the applicability of an EU directive (aimed towards harmonisation) being determined at Member State level, will doubtless have the effect of creating different practical applications of the directive in question (now potentially by 27 different interpretations) and thereby potentially also undesirable competition between enterprises in the internal market.

In a similar fashion, the directive also left the interpretation of the term "employee" to the Member States' national courts with no guidance from the Court of Justice. By way of comparison, the EU definition "worker" (in the context of free movement) has been given a wide and purposive interpretation which also has been extended to other areas of EU law.

Despite the fact that the Acquired Rights Directive only had intended to achieve partial harmonisation rather than a uniform level of protection for all EU workers affected by the economic effects of the internal market, this is, (in my view), far from satisfying as it gives the Member States a discretion as to which categories of workers who will enjoy the additional dismissal protection under the directive. By employing a more restrictive definition of the term "employee" the Member States can also reduce the scope of the directive as it is inevitable that a less extensive definition of the term will result in fewer workers being covered by the protection under the directive. Such a discretion as to the definition of the term will also have the inevitable effect of the scope of the directive being applied differently in the EU's 27 different Member States.

The case of AKZO provides an illustrative example of the potential effects of different levels of protection in national labour laws. AKZO concerned a multinational company with subsidiaries in different Member States. Prior to

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Belgium, Holland, Luxembourg, Spain, Portugal, Italy and Greece) forms part of the Romano-Germanic group.

[20] Bercusson, (2009), p. 112.

[21] Directive 77/187/EEC as amended by Directive 98/50/EC and consolidated in Council Directive 2001/23/EC 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

[22] EIRR, No. 5 (May 1974), p. 9 at p. 13 and No. 13, (January 1975), p. 6.

undergoing a restructuring programme, AKZO compared the costs of dismissal in the different Member States where its subsidiaries were based and proceeded to dismiss in the Member State where the costs of doing so were the lowest.[23] With the Acquired Rights Directive only providing for partial harmonisation there are no guarantees that the scenario in the AKZO case will not be repeated although, ironically, the upshot of that case was reverse to what normally happens where the forces of the internal market meet with social policy initiatives in that the employees in the Member State with the higher dismissal protection were spared. Whether the labour costs in that Member State also were higher can however only be speculated over – but it would seem unlikely.

In times of recession and financial austerity the temptation for the Member States' governments to operate deregulation policies to compete with other Member States is greater than ever. As seen in 1.1 above, the European Commission had already in its proposal from 1990 suggested that harmonisation of indirect wage costs such as dismissal protection should take place, in an attempt to prevent a downward spiral in respect of employment rights in the Member States.[24]

1.4 Aim and Limitation

As perhaps already given away by the title, the aim of this thesis is threefold in that it sets out to explore:

1) How the national courts in Sweden and England have interpreted the term "employee" in the context of their national concepts of protection against unfair dismissal;

2) Whether different national interpretations of the term "employee" sit comfortably with the rationale for the EU term "worker" which has been given a wide and uniform interpretation by the Court of Justice in order to facilitate the realisation of an internal market free from distortions; and

3) The potential impact that the right not to be unjustified dismissed in Article 30 of the CFR may have on the Member States national concepts of unfair dismissal.

The starting point for the discussion is my contention that different national interpretations of the term "employee" in the context of unfair dismissal regulations (amongst other national factors) can operate to create disharmony in the internal market and thereby delay the realisation of a level playing field where businesses in the EU can compete on equal terms. It is my disputation that the present situation grants the Member States an

[23] Barnard, (2006), p. 672.
[24] COM(90)228

unacceptable discretion over the directive's application in a way that hardly could have been the purpose of the protection that it sought to afford the Union's workers in the 1970's. Accordingly, I will argue for a common Union definition of the term "employee" for the purpose of the application of the Acquired Rights Directive. In doing so I will also consider any potential limits placed on the EU's competence in this field and, (in light of Article 30 of the CFR), the possibility of the Court of Justice developing a common EU concept of unfair or unjustified dismissal extended to the CFR "worker".

The answer to the first limb is based on the comparative study undertaken of two of the Member States' laws relating to unfair dismissal. The countries that have been chosen for this comparison are Sweden and England. The most important reason for my decision to choose these countries for the comparison was the fact that the legal systems and the approach to employment law in these two countries traditionally and historically are very different. The fact that I currently practice law in England and have done so since 2008, when the recession started, did undeniably also play a significant part in terms of my choice of subject. It should also be noted that the comparison (which is found in chapter 3) is focusing on the eligibility criteria and the definition of the term "employee". Although a brief overview of the two Member States' unfair dismissal systems is provided the chapter does not set out to make a full comparison of every differentiating aspect of the two Member States' national laws on unfair dismissal.

The discussion flowing from the second limb is largely influenced by the rationale given by the Court of Justice when interpreting the term "worker" (in the context of free movement) and also by the Court's approach to the term "employee" in the context of the Acquired Rights Directive, (which, having been implemented at national level, forms part of the Member States' national concepts of unfair dismissal).

The third limb finally explores the potential effect of Article 30 of the CFR. Since the CFR became legally binding concerns have been raised, (in particular from the UK), that Article 30 which provides that *"Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices"* could operate to provide UK workers with an additional (and perhaps extended) layer of employment protection rights, resulting in unjustified dismissal becoming a Union concept.[25]

[25] Barnard, *"The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?"*, Trinity College Cambridge, (published in Griller, S and Ziller, J, The Lisbon Treaty, Schriftenreihe der Österreichischen Gesellschaft für Europaforschung (ECSA Austria)/European Community Studies Association of Austria Publication Series, Volume 11, 2008, p 258 ff.)

1.5 Method and Material

Different research methods have been employed to write this thesis. In respect of the initial, descriptive part dealing with the development of European Labour Law and the rationale for the EU term "worker" I have primarily been assisted by legal doctrine in the form of Bercusson's *European Labour Law*, Nyström's *EU och arbetsrätten* and Barnard's *EC Employment Law*. Bruun Lörcher and Schömann's *The Lisbon Treaty and Social Europe* has also been a great source of inspiration for the chapters dealing with the potential impact of Article 30 CFR and the EU's competence to legislate in this field of employment. Doctrine consisting of various legal articles and the work of leading academics has also been used as a compliment to the legal sources throughout the thesis.

The comparative part of this thesis which deals with the national definitions of the term employee has been pursued through traditional legal method. An analysis based on Swedish and English statutes governing unfair dismissal and the nationally implemented Acquired Rights Directive as well as significant case law has been carried out in order to reach a conclusion about the present legal situation in Sweden and England. In a comparative exercise like this, where two national definitions developed independently in two different languages are analysed and compared in one language only, there will always be a certain risk that some of the nuances of the original language gets lost in translation even if one is ever so careful. In this thesis, the importance of getting the translation right is however fundamental as the very core of the discussion focuses on the potential consequences of national differences between the Member States' definitions of the term "employee".

Finally, I fully appreciate that a comparison like this which places its emphasis on limited aspects of the object for comparison does not come without difficulties. The risk that inaccurate conclusions are drawn about the effect that national differences may have on competition will for example be significantly increased where the employment protection systems of the two Member States are not examined in their entirety.[26]

1.6 Disposition

The disposition adopted can be said to consist of three parts, (albeit intrinsically linked). The first part of the thesis, *chapter two* is of a more descriptive nature and designed to provide the reader with a good understanding of the way European Labour law and Union competence in this field has developed over the last few decades. It also serves to explore

[26] Rather than expanding this thesis into a fully encompassing comparison of Sweden and England's different national systems of employment protection, I would instead like to refer the reader to already existing comparative literature in this area, such as the working papers of the OECD which can be found at www.oecd.org/els/workingpapers.

the rationale behind the more extended definition of the Union term "worker".

The second part of the thesis, *chapter three* is of a more comparative nature and serves to compare and analyse the different methods of interpretation applied by the national courts in two of the Member States, (Sweden and England) when defining the term "employee" for the purpose of each of the Member States' national unfair dismissal legislation. The national definition of the term employee is very important as it assists determining the scope of eligibility for an unfair dismissal claim. As shall be seen below the techniques employed by the different Member States to determine whether a contract of employment exists are relatively similar. There is however no guarantee that two identical situations in two different Member States will be treated in the same way. The chapter will also discuss to what extent, if at all, dissimilar national interpretations of the term employee and hence a differing scope of protection can be justified as this will have the potential of creating a competitive advantage to companies situated in countries where the term employee has been interpreted less widely, and thus offering less protection to employees of those Member States which may result in less costly dismissals for companies situated in those Member States.

Chapter four is also of a more comparative nature in that it outlines the national employment protection legislation relating to business transfers in Sweden and the UK, (as affected by the Directive). It seeks to highlight the potential results of different national interpretations of specific terms of the Directive and specifically considers the harmonizing aim of the Directive as well as the Court's reasoning in Levin[27].

The *fifth chapter* introduces the reader to the CFR and explores the legal weight carried by it and in particular the legal relevance of the new term "worker" and the fundamental right not be unjustified dismissed, introduced by Article 30 of the CFR.

The *sixth chapter* examines the EU's competence in the field of employment protection and considers potential avenues for further expansions into the social field and the limits set by the principle of subsidiarity.

The final chapter, *chapter seven,* presents some of the concerns and thoughts that have been raised by academics in respect of this area of law and concludes with my own observations, analysis and conclusion.

[27] Case 53/81 Levin ECR 1035 [1982] 2 CMLR 454

2 EU Employment Law – the Development of an area of Shared Competence

2.1 Introduction

EU's intervention in the Member State's national employment laws serves a number of objectives which can be divided into three broad categories, depending on whether the intervention is justified by an integrationist[28], economic[29] or social[30] rationale or a combination of a pair of them. Support for each of the rationales can be found in the Preamble to the TEU in which the Member States declared themselves: *"determined to promote economic and social progress for their peoples...within the context of the accomplishment of the internal market..."* [31] Unlike the economic and social rationales, the integrationist rationale is however not pursued as an objective in itself but as a means through which an economic or social objective is to be realised.[32]

The original objectives of the European Union were primarily the economical aspects of the labour market and the Union did not have any competence in the social field.[33] This is because the institutions of the European Union only have powers and is able to act in those areas where power to act has been granted to it by the Member States. Further, in accordance with the principle of conferral [34] the Union shall act only within the limits of the competences conferred upon it and only to achieve the objectives set out in the Treaties.[35] It follows that any measures adopted by any of the EU institutions must be founded on a legal basis in the Treaties.

For some time, competence within the social field therefore remained exclusively with the Member States and the Union was free to act in employment related matters only where they arose in the context of free

[28] The integrationist rationale is concerned with the establishment and the functioning of the internal market. As such it affords the EU the opportunity to intervene in domestic employment law to the extent that national employment law provisions can be said to constitute barriers to free movement and/or distortions of competition.
[29] The economic rationale is relied on to justify EU intervention for reasons relating to the performance of the EU, e.g. growth, reduced unemployment, enhanced efficiency, better infrastructure and improved international competitiveness.
[30] The social rationale is used to find support for EU interventions which aim to improve the position of workers. The social rationale reflects the perceived need to intervene for the benefit of workers.
[31] Syrpis, (2007), p. 4.
[32] Ibid, p. 51.
[33] Bruun/Lörcher/Schömann, (2012), p. 1.
[34] Article 5(1) TEU
[35] Art 5(2) TEU

movement of workers. As shall be seen in the below, the Union's competences have however been gradually extended since the Treaty of Rome in 1957, first by the Single European Act[36]and then by the Treaties of Maastricht[37], Amsterdam[38] and Nice[39].

In order to fully understand and be able to form an educated opinion about where the line between the Member States' and the Union's competences should be drawn it is essential to understand the context in which European labour law has developed and to appreciate the underlying policy aims which to a large extent are influenced by political, social and economic considerations. It has also been suggested that a close examination of the chequered history and development of the EU's competences in the politically sensitive field of EU employment may assist in identifying potential ways forward.[40]

It should be noted that following the Lisbon Treaty, which came into effect on 1 December 2009, much of the terminology referred to in the following has changed and what was previously referred to as the European Community or the EC is therefore now the European Union or simply the EU and what was previously known as the common market is now referred to as the internal market.

In the following chapters, even when describing the historical developments of the European Union the current terminology has been used although it would not have been the terminology used at the time. Where reference is made to Treaty provisions I have sometimes referred to both the old and the current provisions, placing the latter in brackets. I have done this to limit the risk of misunderstanding and to assist the reader gaining a good understanding of the social progress, that has taken place since 1957 and which European labour law to a large extent has been affected by.

[36] The Single European Act was signed on 17 February 1986, and on 28 February 1986 and came into effect on 1 July 1987
[37] The Treaty of Maastricht (formally, the Treaty on European Union or TEU) was signed on 7 February 1992 and came into force on 1 November 1993
[38] The Treaty of Amsterdam (officially the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts), was signed on 2 October 1997, and entered into force on 1 May 1999
[39] The Treaty of Nice was signed on 26 February 2001 and came into force on 1 February 2003
[40] Syrpis, (2007), p. 161.

2.2 The Treaty of Rome – The Establishment of an Internal Market

2.2.1 The European Economic Community

The Treaty of Rome[41], ("the EEC Treaty") created the European Economic Community, ("the EEC") in 1957. The aim of the EEC was the establishment of an internal market, (fundamentally an integrationist-economic project). A customs union was hence established and free movement of persons, services, capital and freedom of competition was introduced.[42] The realisation of the internal market was greatly assisted by the abolishment of customs duties between the Member States.[43] Further and more importantly for the purposes of this thesis, Article 3(1)(g) EC[44] provided that the Union should have exclusive competence in *"the establishing of the competition rules necessary for the functioning of the internal market"*.

The social aims of the Union were however largely neglected and although the Treaty of Rome did contain a Title on Social Policy, its provisions did not confer much in terms of direct rights on citizens. The explanation for this was a presiding strong belief that, once artificial obstacles to the free movement of labour, goods and capital had been removed, the internal market would operate to ensure that the market resources were allocated in the most cost efficient way. This in turn would generate economic growth and ensure social progress, which was seen as a reward for efficiency. This classic neo-liberal market approach was reflected in what is now Article 151 TFEU which provided that an improvement in working conditions would *"ensue"* from the functioning of the internal market and that social policy, employment and labour relations therefore would be determined by market mechanisms rather than legislative intervention.[45]

This approach must however be seen in the light of the thriving economic climate which characterised Europe at the time. An unprecedented increase of social rights being granted at national level did no doubt also play an important role together with two influential reports that had been issued in 1956, one by a committee set up by the Member States, referred to as "the Spaak Report" and another by a committee of experts from the International

[41] The Treaty of Rome, (officially the Treaty establishing the European Economic Community ("TEEC"), was signed on 25 March 1957 and formed the basis of the European Economic Community ("EEC") on 1 January 1958
[42] Bruun/Lörcher/Schömann, (2012), p.1.
[43] Steiner/Woods/Twigg-Flesner, (2006), p. 309.
[44] Since the Treaty of Lisbon the substantive content of what used to be Article 3(1)(g) EC has been transferred to a Protocol (No. 27) on the Internal Market and Competition, annexed to the TEU and the TFEU. The constitutional status of the principle of undistorted competition has not been altered although it has been questioned since it was removed from the Treaty, see Van Rumpoy, Ben, *"The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts"*, 13 December 2011
[45] Barnard, (2006), p. 4 f.

Labour Organization, ("the ILO"), "the Ohlin Report". Both of these reports had suggested that there was no need for an interventionist social dimension for the proposed common market, (save for certain measures against "unfair competition"). In addition the Member States generally felt that social policy and particularly labour law very much were policy areas which should be dealt with at national level, being considered vital to preserve the integrity and political stability of the Member States' respective regimes.[46] As a result the EEC Treaty contained only a minimum of provisions granting the institutions of the Union competence to issue coordinating regulations in the sphere of the social dimension.[47]

For the development of European labour law this meant that, although the Member States were in agreement about the need to improve working conditions and living standards in the Union, no significant developments of social nature took place over the next coming years except for in the context of free movement of workers.[48]

2.2.2 Free Movement as a legal basis for EU intervention in the Social Field (and the integrationist-economic rationale for the EU "worker")

Among the original objectives of the EEC was to establish an internal market for labour but as already seen, the original Treaty of Rome did not grant the Union institutions much authority per se in respect of employment related matters. [49] What is now Article 45 of the TFEU did however provide that: *"Freedom of movement for workers shall be secured within the Union"* and in accordance with the second paragraph of the same article, that any discrimination between workers of the Member States on the basis of nationality should be abolished.

Despite the fact that Article 45 TFEU since the case of Angonese[50] has been held to have direct effect and create rights which are directly enforceable by the Union's citizens, it is important to remember that the overarching aim of Article 45 TFEU was economic rather than social. Its primary aim was to facilitate for workers from Member States with high unemployment rates to seek up employment in other Member States with higher employment rates where their skills were better needed as it was believed to lead to increased productivity and more equalized employment conditions among competing businesses across the Union.[51]

[46] Ibid, p. 7 f.
[47] Bruun/Lörcher/Schömann, (2012), p.1.
[48] Nyström, (2011), p. 49.
[49] Bercusson, (2009), p. 31 f.
[50] Case 281/98 Angonese [2000] ECR I-4139
[51] Barnard, (2006), p. 7.

Since 1957, the concept (and implications) of freedom of movement has been developed extensively by the case law of the Court of Justice, as has the concept of "worker" itself. It is now widely accepted that this is a Union concept and as such entirely independent of the interpretations given to it by the courts in the Member States.[52] The reasoning behind this is a clear example of the Court's support of the integrationist economic rationale and it could not have been put clearer:

"If the definition of this term were a matter for the competence of national law, it would...be possible for each Member State to modify the meaning of the concept of migrant worker and to eliminate at will the protection afforded by the Treaty to certain categories of persons…[the Treaty Articles] would, therefore be deprived of all effect and the above mentioned objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law." [53]

Irrespective of the fact that the concept of free movement of workers originated from an economic rather than a social objective, it has had an impact on many areas of a social nature. Areas affected by the free movement provisions include transfers of pensions and social benefits, migrant workers' entitlements to unemployment benefits, social security, family issues of education, housing etc. As social issues came to be dealt with under the general economic guidelines of free movement of labour rather than as independent social issues, some tension in the balance between the economic and social perceptions of free movement of workers was unavoidable. It was nevertheless this tension, caused by this overlap of EU economic and social policy in the area of free movement, which was the driving force behind many developments in EU social policy and has had important implications for the regulation of employment and industrial relations in the EU.[54] The Court's interpretative approach of the term "worker" as well as the rationale relied on by the Court in the context of EU employment law will be considered further in 2.4.

2.3 The Development of the EU and the Expansion of EU Social Law

In the early 70's European labour law had attracted considerable interest and in October 1972, following a Heads of States meeting in Paris a final communiqué was issued. [55] The communiqué declared that the Member States:

"...attached as much importance to vigorous action in the social field as to the achievement of economic union... (and considered) it essential to ensure

[52] Case 53/81 Levin [1982] ECR 1035
[53] Case 75/63 Hoekstra [1964] CMLR 319
[54]Bercusson, (2009), p. 32.
[55] Ibid, p. 108.

the increasing involvement of labour and management in the economic and social decisions of the [Union]".

For the first time, the social dimension was expressed to be just as important as the economic dimension.[56] This radical change in approach has been explained by the social turbulence experienced in Western Europe in 1968 and in part also by the recession which followed from the oil crisis in 1973. It had also become apparent that the Union required a human face to persuade its citizens that the Union was more than just a device enabling businesses to exploit the internal market. [57] It is commonly accepted that it was economic and political developments within the Union that opened the way for the adoption of the path breaking Social Action Programme in 1974.[58]

2.3.1 The Social Action Programme 1974

The Social Action Programme of 1974 was the first Social Action Programme, launched by the Commission in response to a mandate issued by the Heads of States meeting in Paris at the Summit of October 1972.

The Social Action Programme of 1974 set out to achieve:

1) full and better employment in the [Union];
2) improved living and working conditions; and
3) increased involvement of management and labour in the economic and social decisions of the [Union] and of workers in companies.[59]

As a result, a number of directives were adopted in the field of health and safety, providing the Union worker with increased protection. Against the threat of rising unemployment, directives in the field of employment were also issued to ease the impact of future mass redundancies. As there were no Treaty provisions granting the Union explicit competence in this area, the directives dealing with collective redundancies, transfers of undertakings, equal pay and equal treatment were adopted on the basis that they were necessary to achieve fair competition in the internal market. The competence relied upon to adopt the above mentioned directives therefore derived from the Treaty provisions concerned with *"the establishment or functioning of the internal market"*, (now Article 115 TFEU).

Nyström has explained the development during this period as a reflection of a general welfare expansion that took place in Western Europe around this time.[60] Bercusson has also pointed to the strong political influence exercised

[56] Case 43/75 Defrenne (No. 2) [1976] ECR 455
[57] Barnard, (2006), p. 8 f.
[58] Ibid, p. 9.
[59] Bercusson, (2009), p. 109.
[60] Nyström, (2011), p. 50.

by the Social Democrats in Germany who were committed supporters of social progress in the employment field. The reason for this support appears to have been to undercut the concerns raised from German employers that proposed domestic legislation would reduce the competitiveness of German industry. Strengthened protection for the Union worker compatible with national German employment law was also seen as desirable as it would eliminate the incentive for employers to shift their investments from Germany to other European Member States.[61] In this context it should however be noted that it was only in the field of the equality directives that the level of protection came to be extended to the Union worker. In respect of the other directives and notably the Acquired Rights Directive, (which I shall revert to in this regard), the harmonisation was only partial.

As put by a former Commissioner for Social Affairs, the Social Action Programme of 1974 *"...reflected a political judgment of what was thought to be both desirable and possible rather than juridical judgment of what were thought to be the social policy implications of the Rome Treaty".*[62]

2.3.2 "Harmonisation"

"Harmonisation" was the name of the social policy strategy which rather ingeniously was adopted by the EU in the first Social Action Programme of 1974. As the EEC Treaty of 1957 did not provide the necessary legal competences for the EU to intervene in the social field, any social policy measures had to be justified as measurements contributing to the internal market.[63] Both the directive on Collective Redundancies[64] and the Acquired Rights Directive[65], were adopted on this basis, (although the extent of their harmonising effect has been questioned.)[66] A third directive[67] which provided the employees with additional protection in the event of the employer's insolvency was also adopted.

The strategy of harmonisation did however bring the relation between EU law and social and labour policy into sharp focus. Over all, it became clear that the incorporation of industrial relations and collective bargaining needed to be taken into account in any further attempts of harmonisation. This was because different national industrial relations systems in combination with differing formal labour laws often give rise to different practical applications of national laws.[68]

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[61] Bercusson, (2009), p. 109.
[62] Bercusson, (2009), p. 35.
[63] Ibid, p. 110.
[64] Directive 75/129/EEC
[65] Directive 77/187/EEC
[66] Hellsten, J, *"From Internal Market Regulation to European Labour Law, On Social and Economic Factors in the Developing European Labour Law"*, p. 11-19.
[67] Directive 80/987/EEC
[68] Bercusson, (2009), pp. 110 and 112.

The two alternative scenarios that the strategy of harmonisation is likely to produce are, according to Bercusson:

1) Formal Harmonisation

Where similar labour laws are invoked, their effects on different industrial relations systems give rise to variable results. This is often the case in the case of nationally implemented EU directives which at a first glance may appear very similar and address common sets of problems. It is also mirrored in the *formal* successes of harmonisation policy (e.g. the same directives applied in all Member States), but in the variable consequences in practice of this formal success. Bercusson refers to this as "formal harmonisation".[69] An example of this problem can be seen in the discussion of the problems arising from different national definitions of *"pressing business reasons"*, a concept developed to justify dismissals under a draft of the Acquired Rights Directive. Although the Commission acknowledged the *"elastic definition of this concept"* it refused to define it. This approach was much criticised by the European Parliament as it meant that the interpretation of the concept was left to the courts of each of the Member States. Rather interestingly, the Commission, in a later report to the Council regarding legislation concerning individual dismissals, did however conclude that *"...all Member States would appear to accept that a reduction in the volume of business or the introduction of rationalisation measures, that is economic grounds, are sufficient justification for dismissal".*[70]

2) Substantive Harmonisation

The Member States' labour laws are often different precisely because of the differences in their national industrial relations systems. Different industrial relations systems mean that the national labour laws invoked to deal with a particular problem are different by way of necessity. Bercusson refers to this as "substantive harmonisation".[71] In order to achieve substantive harmonisation in the field of national labour laws, Member States may require different laws to be adopted to accommodate their different national environments. In view of the lack of specific EU competence in the field of employment law it is perhaps not surprising that this has been the major obstacle at which progress towards harmonisation as a legal policy of the Union has been halted.[72]

It was not until the EU gained some competences in the field of employment and industrial relations, first in the Single European Act 1986 and then the Treaty of Maastricht 1992, that Union social initiatives could be adopted without the need to justify them in terms of harmonisation of laws directly affecting the internal market.

[69] Ibid, p. 112.
[70] EIRR, No.5 (May 1974), p. 9 at p.13 and No. 13 (January 1975), p. 6.
[71] Bercusson, (2009), p. 113.
[72] Ibid, p. 110.

"Harmonisation" does however still appear in the context of EU employment and industrial relations as an EU objective, originally stipulated in Article 117 of the EEC Treaty of 1957, (now in Article 151 TFEU):

"The Union and the Member States, (...) shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."

2.3.3 UK Deregulation Policy and formal recognition of the Social Dialouge

2.3.3.1 UK Deregulation Policy

From 1979 the UK government, led by Margaret Thatcher's Conservative party, operated a domestic deregulation strategy. The aim of the UK Conservative government's strategy was to remove institutions of labour market regulation and reduce legal intervention in the relationships between employers and individual employees to a minimum. The UK government's deregulation strategy aimed to remove not only regulations derived from state intervention, but also those that resulted from the activities of collective organisations of labour and trade unions.[73]

In view of the above it is therefore rather ironic that the UK's blockage of EU labour legislation is exactly what appears to have provided the critical impetus to a transformation in the EU's legal strategy for social policy and labour law.[74]

2.3.3.2 The Social Dialouge

In 1985, at the initiative of Jacques Delors, the President of the Commission, the Social Partners[75] were invited to the castle of Val Duchesse to discuss how the social dialogue could be advanced. [76] In an article from 1985, it was observed that:

"The Commission has adopted a unique approach to further its employment law agenda. It has not only maintained regular contact with the representatives of workers and employers, but has actively encouraged the development of Union level worker and employer organizations. It has done

[73] Ibid, p. 126.
[74] Ibid, p. 17.
[75] References to the Social Partners are to The European Trade Union Confederation (ETUC) and the organisations of employers; BusinessEurope (formerly UNICE) and Centre Européen des Entreprises à Participation Publique et des entreprises d`intérêt économique general (CEEP)
[76] Bercusson, (2009), p. 126.

so by offering such groups the opportunity to engage in extensive negotiations on all Union employment proposals."[77]

The attitudes of the Social Partners towards the Social Dialogue need to be considered in the context of the 1992 Single European Market Programme (launched by Delors in 1985). The objective of the single market (proposed by Delors' 1992 Single European Market Programme), would come to have serious implications for employment and industrial relations in the EU. In particular, the creation of the single market posed a genuine threat in the form of competition between enterprises in different Member States who were faced with different direct and indirect labour costs and different systems of social and labour regulation.[78] Labour costs have been assessed to account for some two-thirds of the production costs of goods and services[79] and it is therefore not surprising that the single market led to concerns that companies in Member States with lower labour and social standards would gain a competitive advantage over companies based in Member States where labour costs were higher, raising the threat of what has been labelled "social dumping" or "social regime competition". This inevitably meant a fierce and protracted battle between the Social Partners over the political and legal strategies to be adopted to best deal with the predicted effects of the single market.[80]

2.3.3.3 Deregulation – v – EU Social Policy jurisdiction

The strategy adopted by the trade unions has been described as dictated by a "political-distributive" reasoning which recognised the risks posed by social dumping in the Single European Market, but which also acknowledged the advantages to be reaped by companies free to compete without national barriers. The aim of the trade unions was to strike a balance between the costs of the social protection (which were deemed necessary to offset the risk of social dumping) and the losses to the companies which would occur by this necessary degree of regulation. The "political-distributive" strategy was therefore in large directed towards labour and social standards regulation at European level which was considered to be the best way forward to secure the fair distribution of the benefits of the Single European Market.

As expected, the strategy adopted by the employer organisations was characterised by an "economic-productive" way of thinking. For companies in the EU, the principal competitive challenge came from outside the EU, primarily the USA and Japan. Companies in those countries benefited from significantly lower social and labour standards, a competitive advantage creating an obstacle for companies in the EU. Any social policy adopted in

[77] Sandler, A.L, Players and Process: The Evolution of Employment Law in the EEC, (1985), 7 Comparative Labour Law 1, at p.16.
[78] Bercusson, (2009), p. 133.
[79] Eurostat, EU labour costs 1999, Statistics in focus, Population and social conditions, Theme 3, 3/2001
[80] Bercusson, (2009), pp. 134 and 137.

the new Single European Market should therefore, through deregulation, focus on reducing this competitive advantage by eliminating social and labour regulation burdening companies in the EU.[81]

Each of these social policy strategies were accompanied by a legal strategy. The "political-distributive" strategy advanced by the trade unions envisaged a *transfer* of the social policy jurisdiction to the EU. The advantage of "harmonised" social and labour standards throughout the EU were the equalisation of indirect labour costs for all companies in the EU which would reduce, if not entirely eliminate, the danger of unequal labour and social standards distorting competition in favour of Member states with lower labour and social standards.[82] The deregulation strategy put forward by the employer organisations was based on the assumption that no common social and labour standards would be imposed through EU measures.[83] The Member States would retain the competence over the social and labour standards, accepting that there would be an element of direct competition between the Member States social policy regimes.[84] The employer organisations advocated that this approach would reduce the need for central regulatory bureaucracy. The deregulation strategy also had an additional attraction to the employers as it meant that social regulation initiatives at national level were likely to be held back for fear of burdening Member State companies. In conclusion, the deregulatory social policy strategy favoured by the employer organisations opened up for the risks of a regulatory social regime competition in which Member States would compete against each other to lower indirect social and labour costs[85] and *"a race to the bottom"* scenario.[86]

Bercusson also makes the interesting point that both of the above strategies, despite their obvious differences, resulted in an outcome which meant that the Member States' autonomy in the field of social policy became reduced. Whilst it is inevitable that the first "political-distributive" strategy entailing a transfer of the social policy jurisdiction to the EU would result in a loss of the Member States' autonomy in the social field, Bercusson's reasons for arguing that the second "economic-productive" strategy favoured by the employers' organisations would produce a similar outcome are perhaps less obvious. However, Bercusson suggests that due to the fact that the Member States will be very mindful of any increased labour cost implications that social initiatives will have on companies on their national territory, the autonomy that the Member States on the face of it will appear to have retained, will indirectly, through political pressure be reduced if not eliminated altogether. In addition, the pressure for further deregulation would continue.[87]

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[81] Ibid, p. 137.
[82] Ibid, p. 134.
[83] Ibid, p. 137.
[84] Ibid, p. 134.
[85] Ibid, p. 137 f.
[86] Barnard, (2006), p. 51.
[87] Bercusson, (2009), p. 135 f.

2.3.3.4 Qualified Majority Voting through the Single European Act 1986

The Single European Act ("the SEA") came into force on 1 July 1987. It signalled a new drive for European integration. The Commission's proposal of the Single European Market Programme in 1985 implied the approval of a large number of directives aimed at eliminating the many obstacles identified. To achieve the approval of these directives, the SEA derogated from the requirement of unanimity laid down in the then Article 100 EEC (now Article 115 TFEU) by adding to the EEC Treaty a new Article 100A EEC (now Article 114 TFEU) to allow for qualified majority voting.

However, at the insistence of the UK government, fearful of being outvoted on new social policy initiatives which it categorically opposed to, there was inserted a second paragraph into the new Article 100A EEC (now Article 114(2) TFEU):

"Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons".

The purpose of the insertion of the second paragraph was unambiguous. However, as part of the compromise made with the UK, (which prevented proposals *"relating to the rights and interests of employed persons"* from being adopted through qualified majority voting), a new Article 118A (now Article 153 TFEU) was inserted by the SEA, specifically stipulating that the qualified majority voting process could be used for proposals *"encouraging improvements, especially in the working environment, as regards the health and safety of workers".*

The significance of the new legal basis adopted by the SEA in respect of EU policy on employment and industrial relations did soon become clear. The Commission's 1989 Social Action Programme had highlighted the issue of working time. Rather than relying on what is now Article 114 TFEU (which would have allowed for approval by qualified majority voting) as its legal basis, the Commission decided to rely on Article 153 TFEU and argued that the diversity of regulatory practices in the Member States regarding flexibility of working time posed a potential threat to the well-being and health of workers. The Commission's choice of legal basis was deliberate as it, by avoiding Article 114 TFEU, was able to avoid the question of whether the proposal should be excluded from the qualified majority voting regime. As a consequence, a heated debate over what would fall under the heading *"working environment"* and *"health and safety of workers"* commenced.[88] The UK's challenge before the Court of Justice regarding the Commission's choice of a legal basis for the Working Time directive, subsequently adopted by the Council, was however unsuccessful.[89]

[88] Nyström, (2011), p. 51.
[89] Case C-84/94 United Kingdom v Council [1996] ECR I - 5755

2.3.4 The Treaty of Maastricht 1992 and the Agreement on Social Policy – extending the EU's competence

Following a period defined by deregulation the next real breakthrough in the social field came with the Treaty of Maastricht.

The protracted debate over the future of social policy in the EU (which involved not only the Social Partners but also the EU institutions) has been characterised by two important developments:

1) the Community Charter of Fundamental Social Rights of Workers 1989 ("the Charter"); and

2) the Protocol and the Agreement on Social Policy of the Treaty on European Union ("the Social Policy Protocol").[90]

2.3.4.1 The Community Charter of Fundamental Social Rights of Workers 1989

The adoption of the Charter has been described as a "powerful signal" that the Member States were committed to support the development of a common set of social policy and labour law objectives. This stimulated a move towards an expansion of social and labour competences at EU level which in turn also came to have a positive impact on the development of the Social Dialogue.[91]Article 28 of the Charter stipulated that:

"The European Council invites the Commission to submit as soon as possible initiatives which fall within its powers, as provided for in the Treaties, with a view to the adoption of legal instruments for the effective implementation, as and when the internal market is completed, of those rights, which come within the [Union]'s area of competence."

Although the UK government's opposition meant that the Charter could not be integrated into the Treaty of Rome its legal status of a political declaration was frequently cited in the preambles to measures proposed by the Commission as well as in the preamble to the Social Policy Protocol and the Agreement on Social Policy. Despite its merely declaratory character and the opposition of the UK government, the Charter was therefore not insignificant in terms of the launching of future employment and industrial relations policy initiatives.[92]

[90] Bercusson, (2009), p. 138.
[91] Ibid, p. 141.
[92] Ibid, p. 141.

2.3.4.2 The Agreement on Social Policy and the Social Policy Protocol

The Treaty of Maastricht included a Protocol incorporating an Agreement on Social Policy, (the result of negotiations between the Social Partners). The Agreement on Social Policy was adopted by all of the Member States, (with the exception of the UK). Through the Treaty of Maastricht the social competences of the Union therefore came to be extended as the Agreement not only introduced a new and extended scope of Union social policy which went *beyond* the Union's previous competence but, (as seen above), also directed the Commission to prepare proposals for the new competences to be implemented.[93]

2.3.4.2.1 The Agreement on Social Policy

The Agreement on Social Policy also provided the first substantial legal basis for EU legislation in the fields of employment and industrial relations by authorising the Council to proceed by qualified majority voting to adopt, by means of directives, minimum requirements for gradual implementation in the following fields:

1) improvement of the working environment to protect worker's health an safety;

2) working conditions;

3) the information and consultation of workers;

4) equality between men and women with regard to labour market opportunities and treatment at work; and

5) the integration of persons excluded from the labour market.

   Unanimity would however still be required in the areas listed below and notably also in respect of employment protection of workers, an area that the Commission (in view of the effects that different levels of national dismissal protection systems was seen to have on creating varying indirect wage costs between the companies in the Member States), had suggested should be the subject of harmonisation:

6) social security and social protection of workers;

7) protection of workers where their employment is terminated;

[93] Ibid, pp. 142 and 145.

8) representation and collective defence of the interests of workers and employers, including co-determination, subject to what is now Article 153 (5) TFEU;

9) conditions of employment for third country nationals legally residing in Union territory; and

10) financial contributions for promotion of employment and job creation.[94]

2.3.4.2.2 The Social Policy Protocol

At the Maastricht summit in December 1991, the then 12 Member States of the European Union were unable to agree on the future direction of social policy in the new European Union. As unanimity was required for the Maastricht Treaty to be adopted the Social Policy Protocol was the legal mechanism adopted to resolve the deadlock situation reached over the social policy provisions of a new Social Chapter of the EC Treaty (which reflected the Agreement on Social Policy reached by the Social Partners in October 1991).[95]

As the UK government refused to be bound by the Agreement on Social Policy, the Social Policy Protocol to the Treaty of Maastricht included a compromise in the form of an "opt-out" in favour of the UK. Between 1992 -1997 a "two speed" Europe in the sphere of employment and industrial relations therefore came to exist.[96]

In accordance with the procedures of the Protocol and the Agreement on Social Policy, the directives on European Works Councils[97], parental leave[98]and part-time work[99] did not get the approval by all of the Member States until May 1997 when the newly elected UK labour government decided to terminate the "opt-out". The Treaty of Amsterdam of June 1997 deleted the Social Policy Protocol and incorporated the Agreement on Social Policy into a revised "Social Chapter" of the EC Treaty.[100]

[94] Ibid, p. 144.
[95] Barnard, (2006), p. 17.
[96] Ibid, p. 17.
[97] Directive on European Works Councils (1994)
[98] Directive on parental leave (1996)
[99] Directive on part-time work (1997)
[100] Barnard, (2006), p. 22.

2.3.5 The Treaty of Amsterdam, the Employment Title, the European Employment Strategy and the Open Method of Coordination

Towards the end of the 1990's the Single Market for goods, services and capital was well established. The Single Market for labour was however far from completed and in large the labour markets of the Member States' had remained national.[101] Already in the Commission's White Paper from 1993[102] Delors had highlighted employment as one of the most important areas of concern and with increasing unemployment problems facing the EU a new Title on Employment was incorporated into the EC Treaty by the Treaty of Amsterdam in 1997.[103] The introduction of the Employment Title can also be seen as a reaction to the EU's economic integration in the 1990's. As many of the Member States were reluctant to delegate further powers to the European institutions viable alternatives needed to be considered.

2.3.5.1 The Employment Title and the European Employment Strategy

The Employment Title, (now comprising of Articles 145-150 TFEU) was largely the result of pressure from France and the Scandinavian countries and committed the Member States and the Union to work towards *"...developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change..."* with a view to achieving a competitive social market economy, aiming at full employment and social progress.[104] Barnard has also claimed that the inclusion of the Employment Title can be interpreted as increased awareness of the interdependency that the effects of the EMU had brought to the participating Member States' economies.[105]

Article 148 TFEU sets out the specific process for implementing the European Employment Strategy ("the EES"). The EES was designed as the main tool to help ensure that Member States were able to achieve the EU level employment policy priorities. This co-ordination of employment policies at EU level is built around several components:

1) A Joint Employment Report: the various National Action Plans are reviewed and brought together into an EU-wide Joint Employment Report and the employment guidelines are revised as required;

[101] Bercusson, (2009), p. 168.
[102] White Paper: *"Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century"*, 1993
[103] Bercusson, (2009), p. 168.
[104] Barnard, (2006), p. 24.
[105] Ibid, p. 25.

2) Employment guidelines: a series of EU guidelines are agreed every year which set out the common priorities for Member States' employment policies;

3) National Action Plans: every Member State draws up an annual National Action Plan that describes how the guidelines are to be put into practice in their country; and

4) Recommendations: the EU issues country-specific recommendations on how to implement the employment guidelines.[106]

The EES aims to develop a social dimension to the activities of the EU. As such, it represents a major development in the implementation of EU social policies. The EES does not cover all policies that are related to employment. Important areas that concern economic and employment growth in the European Union, such as monetary, fiscal and wage policy, are not included. Nonetheless, the EES has contributed in a variety of different ways to the re-conceptualisation of EU social policy and to the strengthening of the "European social model". In particular, the Open Method of Coordination, which has become known as the "Luxembourg process" brought employment to the forefront of the European and national debate.[107]

The Employment Title is usually characterised as a typical "soft-law" coordination measure as although it requires the Member States to engage in the field of employment policy, it does not confer any competences on the EU to regulate the national labour markets.[108]

2.3.5.2 The Open Method of Coordination

The Employment Title of the Treaty on the Functioning of the European Union, originally introduced by the 1997 Treaty of Amsterdam, is perceived as the original model of the Open Method of Coordination ("the OMC"). Employment policy has been described as the paradigm case of the OMC with an annual report resulting in guidelines, which the Member States *"shall take into account in their employment policies"*[109], followed by an annual report on national employment policy and reviewed in a report by the Council and Commission upon which the European Council may make (non-binding) recommendations to Member States.[110]

It is a policymaking process which does not lead to binding EU legislative measures nor require the Member States to change their laws. It simply aims to spread best practices and achieve greater convergence towards the main EU goals.[111]

[106] http://ec.europa.eu/social/main.jsp?catId=101&langId=en
[107] Bercusson, (2009), p. 170.
[108] Ibid, p. 187.
[109] Now Article 148(2) TFEU
[110] Bercusson, (2009), p. 173.
[111] Barnard, (2006), p. 141.

The "Lisbon Strategy" from 2000 set out for the EU *"to become the most competitive and dynamic knowledge based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion"*. In its Social Policy Agenda 2000-2005 the Commission made it clear that it did not seek to achieve the goals of the Lisbon Strategy through harmonisation of social policy and emphasised its reliance on the process of the OMC to achieve its ambitious aims.[112]

2.3.6 The Treaty of Nice and the Laeken Declaration

To a large extent, the Treaty of Nice of December 2000 focused on the enlargement of the Community by the accession of new Member States, with much attention being directed to questions concerning the composition of the Commission (increase in numbers to take account of the acceding countries) and the weighting of votes (mainly in favour of larger Member States) and voting procedures in the Council of Ministers (significant extension of qualified majority voting to many policy areas which previously required unanimity).[113]

There was however one important change to the qualified majority voting procedure which had an impact on the field of employment and industrial relations. Through a new provision (now Article 153(2) TFEU), the Council, on a proposal from the Commission was now able to authorise qualified majority voting in three cases where unanimity previously had been the rule. It should be noted that this now also covers the scenario of *"protection of workers where their employment contract is terminated"*.[114]

The Charter, which contained central employment rights, was also formally adopted as a political declaration, (although it did not become legally binding until the Treaty of Lisbon).[115] The Charter represented a significant contribution to the promotion of rights on employment and industrial relations in the EU. As an independent source of rights not limited to national practice in individual Member States the Charter broke new ground by including in a single list of fundamental rights, not only traditional civil and political rights, but also social and economic rights, proving that these latter rights are recognised as having the same status as civil and political rights. In addition, the Charter also put pressure on EU institutions to promote a European social model.[116]

[112] Bercusson, (2009), p. 188 f.
[113] Nyström, (2011), p. 54.
[114] Bercusson, (2009), p. 204.
[115] Nyström, (2011), p. 54.
[116] Bercusson, (2009), p. 219.

One year after the Treaty of Nice, when the European Council met in Laeken, a fresh declaration was adopted.[117] The "Laeken Declaration" consisted of more than 64 issues regarding the future development and enlargement of the Union which the Convention on the Future of Europe headed by the former French President, Valéry Giscard d'Estaing would consider.

The Laeken Declaration focused on four main themes:

1) A more precise division and delimitation of competences between the EU and the Member States in accordance with subsidiarity;

2) The status of the Charter of Fundamental Rights, which was "proclaimed" at Nice;

3) A simplification of the Treaties to make them clearer and more accessible without affecting their meaning; and

4) The role of national Parliaments in the European architecture.

Special working groups were established to deal with certain areas such as the subsidiarity principle, the Charter, the division of competences between the EU and the Member States and Social Europe.[118] The Working Group[119] concerned with the Charter recommended that it was integrated into the draft Constitutional Treaty.[120]

2.3.7 The Treaty of Lisbon and the Charter of Fundamental Rights

The Treaty of Lisbon came into force on 1 December 2009 after many years of institutional impasse since the failed referenda on the Constitutional Treaty in France and the Netherlands in 2005. The three pillar structure has now been abolished and with it also the European Community which was replaced by the European Union.[121]

Despite the idea of a European Constitution having been abandoned, the Treaty of Lisbon was still largely inspired by the Constitutional Treaty with the majority of the institutional and policy reforms envisaged in the Constitution still to be found in the Treaty of Lisbon. As a result the EU is still based on two founding Treaties: the Treaty on the European Union ("the TEU") and the Treaty establishing the European Community. The

[117] House of Commons Library Research paper 02/14, *"The Laeken Declaration and the Convention on the Future of Europe"*, 8 March 2002.
[118] http://www.eu-oplysningen.dk/euo_en/spsv/all/5/?print=1
[119] Working Group II
[120] Bercusson, (2009), p. 218.
[121] http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0033_en.htm

latter Treaty has however been renamed the Treaty on the Functioning of the EU ("the TFEU").

The new Art 3(3) TEU describes the internal market objectives as follows:

"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

It should be noted that the reference to the internal market, is no longer, as it was under the Constitution, accompanied by the words *"...where competition is free and undistorted".* Instead this wording has been moved into a protocol on the internal market and competition.[122] As protocols, through Article 51 TEU are afforded equal legal weight to the Treaties this is perhaps of less significance.[123] However, taken together with the other changes which the Treaty of Lisbon has made to the existing statements of the values and aims and objectives of the Union, it has been suggested that a change in emphasis towards the social may be detected.[124] Nyström has however questioned whether the reference made to the Union as a social market economy carries much weight and has queried the difference between a *"social market economy"* and a simple *"market economy"*.[125]

Article 3(6) TEU further stipulates that the Union shall pursue its objectives by appropriate means commensurate with the competences conferred upon it by the Treaties. For the first time, a precise classification distinguishing between three main types of competences can now be found in Articles 2-6 of the TFEU:

1) Exclusive competences;

2) Shared competences; and

3) Supporting competences.

[122] Protocol No. 27
[123] House of Lords, European Union Committee, *"The Treaty of Lisbon: an impact assessment"*, 10th Report of Session 2007 - 08, 13 March 2008.
[124] Syrpis,*"The Treaty of Lisbon: Much Ado...But about what?"*, Industrial Law Journal. Vol. 37, No 3, September (2008), p. 219 ff.
[125] Nyström, (2011), p. 56.

The new systematisation in the Treaties between the EU's and the Member States' competences did not set out to transfer any additional competences to either the EU or to the Member States and as previously, the area of employment law does now fall within the category shared competences.[126] In accordance with Article 5(2) TFEU, the Union shall take "measures" to ensure coordination of the employment policies of the Member States by defining guidelines for these policies. These "measures" would appear to refer to the use of the OMC process referred to in 2.3.5. As before, the Union may also take initiatives to ensure coordination of Member States' social policies.[127]

The Treaty of Lisbon also meant that the CFR became legally binding. Article 6 of the Treaty states that the Union recognises the rights, freedoms and principles set out in the CFR and that it shall have the same legal value as the Treaties.[128] Through the CFR, several employment rights and notably the right to protection against unjustified dismissal in Article 30 CFR was recognised as a legally binding fundamental right.

Through the use of a protocol added to the Treaty, the UK and Poland sought to ensure that the CFR would not create any rights enforceable in Poland or the UK. Unsurprisingly, the British government had particular reservations with regard to the social and labour rights of Title IV.[129] The protocol therefore states that the CFR creates no new rights, enforceable in the UK, over and above those already provided for in national law.[130] Despite the fact that Article 6(1) TEU also provides that the provisions of the CFR shall not operate to extend the competences of the EU as defined in the Treaties there has been some debate about how this will work in practice and whether it will be open to legal challenge on the grounds that it violates a principle that EU law must be applied uniformly to all Member States.[131]

The extent of the EU's competences in the field of employment law and unfair dismissal as well as the question whether the CFR is capable of creating additional universally applicable EU employment rights, (including an autonomous right for the CFR "worker" not to be "unjustified dismissed") will be further explored in chapters 5 and 6.

[126] Article 4 TFEU
[127] Article 5(3) TFEU
[128] http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/charteroffundamentalri_ghtsoftheeuropeanunion.htm
[129] Bercusson, (2009), p. 725 ff.
[130] http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/charteroffundamentalri_ghtsoftheeuropeanunion.htm
[131] Bruun/Lörcher/Schömann, (2012), p. 1.

2.4 The Rationale for the EU concept "worker" today – a discussion

Earlier in this chapter, it has been seen how political developments in the EU opened up for several directives being adopted in areas such as equality and health and safety as well as in relation to employment protection. It has also been seen that the EU's competence to act in the field of employment law and employment protection is not uncontroversial.

In accordance with the integrationist approach, the EU initially only intervened in the Member States' domestic regulations of employment law where it considered it necessary to do so to prevent distortion of competition in the internal market. As a result of the ongoing tension between the Union's economic and social aims, EU employment law did however continue to develop. By refusing to accept Member State definitions limiting the definition of "worker" (in the context of free movement) to "employees" with a contract of employment the Court of Justice played an important role in developing the concept of "worker" to a universal wide and purposive Union concept, capable of conferring individual EU employment rights on anyone engaged in economic activity, to even include those who are seeking work.[132]

It is undisputed that the extensive interpretation developed by the Court of Justice in respect of the term "worker" initially was influenced by economic rather than social considerations. I have already mentioned that the rationale behind the Court of Justice's purposive interpretative approach appears to have been to ensure that the supply of workers (or the lack of supply) did not jeopardize the realisation of the internal market. To facilitate and encourage workers from one Member State to move to another to take up employment it was however recognised that certain social rights had to be provided for. This did nevertheless mean that the social rights conferred on the EU workers initially were, (although sometimes perhaps not in a direct way), justified by economic and internal market concerns.

In the case of Levin[133] the Court considered whether the right of free movement conferred on "workers" under Article 45 TFEU was subject to the income generated from the work in question being above the minimum amount required for subsistence. On the basis of a predominantly integrationist-economic rationale, the Court reasoned that: *"...the achievement of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment..."* The Court explained that as long as the work was effective and genuine, (as opposed to marginal or ancillary), it was necessary to conclude that the term worker had a Union meaning as "*…if that was not*

[132] Case C-292/89 Antonissen [1991] ECR I-745 and Case 75/63 Hoekstra [1964] CMLR 319
[133] Case 53/81 Levin [1982] ECR 1035

the case, the [Union] rules on free movement for workers would be frustrated, since the meaning of the term could be decided upon and modified unilaterally, without any control by the [Union] institutions, by the Member States, which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty."

The integrationist rationale was also relied on in the case of Defrenne[134] where the Court of Justice interpreted ex-Article 119 EEC (now Article 157 TFEU) as having an economic as well as a social objective. In that case the Court justified the social objective of equal pay between men and women by internal market considerations by making reference to social dumping concerns, stating that the aim of ex-Article 119 EEC was to avoid a situation where employers in Member States with higher social standards (where the principle of equal pay had been implemented) would suffer a competitive disadvantage compared to employers in Member States whose social legislation did not eliminate discrimination against women workers in respect of wages. The Court also found some further support for the social objective of Article 157 TFEU in ex-Article 117 EEC (now Article 151 TFEU) which by its insertion into the body of the Treaty devoted to social policy (positioned before ex-Article 119 EEC) gave emphasis to *"...the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained".*

In the case of Shröder[135] the Court subsequently concluded that the economic aim pursued by Article 157 TFEU, (i.e. the elimination of distortions of competition between companies established in different Member States), was secondary to the social aim pursued by the same provision, that equality between men and women and the principle of equal pay constituted the expression of a fundamental human right and principles protected by the legal order of the Union. In view of the Court's change of emphasis towards the social objective of Article 157 TFEU it is interesting to note that the Court in Allonby[136] took the view that the term "worker" in Article 157 TFEU "*...having regard to its context and to the objectives of the Treaty"* felt that a Union definition would be required. A Union definition of the term had previously been justified with reference to an economic-integrationist rationale – not a social-integrationist one. In addition, the Court stated that the provisions of UK law which provided that only "employees" could join the pension scheme would be incompatible with Article 157 TFEU and should be disapplied if their application was such that it adversely affected more women than men.

Whilst the Court's approach to the Union concept of "worker" in Levin can be explained by reference to an integrationist-economic rationale, the Court's reasoning in Allonby is less obvious unless it is to be understood as if fundamental rights require a universal and uniform application.

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[134] Case 43/75 Defrenne (No. 2) [1976] ECR 455
[135] Case C-50/96 Schröder [2000] ECR I-743
[136] Case C-256/01 Allonby [2004] IRLR 224

In its Green Paper "Modernising labour law to meet the challenges of the 21st century"[137] the Commission noted that outside the specific context of freedom of movement of workers and Article 45 TFEU, EU employment law often leaves the definition of "worker" to the individual Member States.[138] For example, the Acquired Rights Directive defines "employee" as: *"any person, whom, in the Member State concerned, is protected as an employee under national employment law"*.

In view of the term "employee" being a national concept and of a more limited scope it is not difficult to see how it will clash with the EU's labour market policies and regulations aimed to include workers who are not necessarily "employees". This was the reason why, in the wider policy goal of creating an internal market and securing free movement for workers, the Court refused to accept different national concepts which sought to apply the term "worker" only to those working under a contract of employment.[139]

With the evolution of EU employment law and in particular the extensive and uniform interpretation that the Court of Justice has given the Union term "worker" in mind, I shall in the following chapters 3 and 4 now turn to consider the interpretation given to the term "employee" in Sweden and England in the context of their national regulations of unfair dismissal, including the extended protection against dismissal afforded by the Acquired Rights Directive.

[137] COM/2007/0627/final
[138] http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/worker.htm
[139] Case 75/63 Hoekstra [1964] CMLR 319

3 The Concept of Unfair Dismissal in Sweden and England and national definitions of the term "Employee"

3.1 Introduction

Employment protection legislation will invariably exclude some groups of workers from its scope. In the majority of the EU's Member States self-employed people, maritime workers, domestic workers, family members working in a family business, diplomats, political office-holders, entertainers, sportspeople, police and civil servants will be excluded from the rules of national employment protection legislation alternatively be subject to less generous rules for hiring and firing compared to the general workforce. Some countries also have exemptions or alternative regulations for particular industries. Sometimes additional exemptions are also made for certain groups of workers (or firms) in order to create further employment opportunities.[140]

In cases of unfair dismissal, which is a national concept existing in both Sweden and England, (and in the EU's other Member States), the term "employee" is often used to determine which workers who are eligible to make a claim for unfair dismissal. Only workers who fit the definition of the term "employee" will enjoy protection from being unfairly dismissed.

This poses a question, if the term "employee" is defined differently in different Member States and in each Member States' national employment protection legislation, could this not (combined with other country specific factors having an impact on costs) have the effect of incentivising multinational companies to establish themselves in countries where the employment protection legislation is less extensive and thereby also less costly to comply with for a multinational employer?

In most countries, the concept of an open-ended full time contract of employment is not defined explicitly in legislation. Instead, it is a concept developed through case law and legal writing. In a comparative study for the European Commission Zeijen states:

[140] Venn, D, *"Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators"*,(2009), p.19.

"The conventional elements in the definition of contract of employment common to all Member States are: agreement; work performance, length of time, remuneration and, most importantly, dependency, subordination and control. The latter issues are the subject of increasingly flexible interpretation by the courts. In general it appears that the legal concept of contract of employment in continental Member States is broader and more comprehensive than that in Ireland and the United Kingdom... In the United Kingdom for instance, one third of those in employment – such as "casual" workers and temporary workers supplied through an agent – is excluded from statutory employment rights".[141]

As illustrated by the cases of Massam Dzodzi[142] and Volker[143], (cases where a Member State's own nationals claimed that they were victims of indirect discrimination in their own countries) the Union provisions governing the free movement of workers does not apply to purely internal situations of a Member State. In the above mentioned cases the Court said that it therefore follows that a national who never has exercised the right to move freely within the Union is prevented from relying on Article 45 TFEU and the Court of Justice's interpretation of "worker" when their circumstances relates to a wholly internal employment matter. [144] In any event the protection offered to workers (in the context of free movement) is far from adequate to substitute the Member States' national laws relating to unfair dismissal protection, and indeed, were never designed with this as its objective either.

National laws and national definitions of employees and workers are therefore being applied by the national courts in establishing employment rights when the situation in question lacks the required union element. However, the extent to which employment protection is provided to different categories of employees and self-employed workers varies between the different Member States. The scope of protection offered to each category is further clouded by differences in legal definitions of who falls within the definition of being an employee. Various thresholds as to length of service and certain qualifications also serve to exclude some categories of atypical workers such as temporary and agency workers from full employment protection enjoyed by the average full time employee.[145]

Any significant differences in the employment protection legislation between the EU's Member States can therefore clearly operate to create competitive advantages to companies operating in those Member States where the employment protection legislation is less burdensome on the employer.

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[141] Zeijen, H, European Commission: The Regulation of Working Conditions in the Member States of the European Community, Volume I, Social Europe Supplement 4/92, p. 4.
[142] Joined Cases No's. C-297/88 and C-197/89 Massam Dzodzi [1990] ECR I-3763
[143] Case C-332/90 Volker [1992] ECR I-341
[144] Blainpain, R, ELL, p. 2, para 466.
[145] Bercusson, (2009), p. 478.

The aim of this chapter is however not to provide an exhaustive comparison and analyse all potential dissimilarities that exists in respect of the employment protection between the EU's Member States. Instead it is designed to give the reader an example of an area of employment law where the Member States have retained full competence and the EU therefore so far has had no or very little impact on the Member States' employment protection legislation.

Accordingly the purpose of this chapter is limited to provide an overview of the characteristics of the current regulation of the concept of unfair dismissal in Sweden and England whilst drawing the reader's attention to the different interpretations that the courts in these countries have given to the term "employee". It also highlights other eligibility criteria, such as whether an open-ended full time contract exists or whether a minimum period of continuous employment has been satisfied before the employee can enjoy national statutory protection from being unfairly dismissed. This approach is aimed to serve as an illustrative example of some of the national differences that exist between these Member States' concepts of unfair dismissal. Although the comparison only deals with the employee's eligibility to make a claim for unfair dismissal it is one of many legislative concepts at national level capable of creating an unlevelled playing field. As highlighted earlier in this thesis, social protection has come under increased scrutiny in the internal market, as legal systems with lower social protection and labour costs has been claimed to create a competitive advantage to employers operating in those jurisdictions.[146]

3.2 Unfair Dismissal in Sweden and England and Swedish and English "Employees"

3.2.1 Introduction

Section 7 of the Swedish Employment Protection Act, ("LAS")[147], operates to provide that *"employees"* who are employed under an open-ended contract of employment are treated fairly in the workplace and enjoy protection against unfair dismissal. It follows that such employees only can be dismissed on objective grounds and that the employer must have a valid and objective reason for the termination, and that it must be related to the employment relationship.[148]

The "corresponding" English provision is found in the Employment Rights Act 1996, ("ERA"), section 94(1) which guarantees English *"employees"*

[146] Ibid, p. 47.
[147] Lag (1982:80) om anställningskydd
[148] Adlercreutz/Mulder, (2007), p. 160 f.

with continuous employment of two years[149] or more the right not to be unfairly dismissed. For a dismissal to be fair it must be fair both substantively and procedurally.

3.2.2 National Eligibility Criteria in Sweden and England

In both Sweden and England the legislator has imposed certain eligibility criteria which operate to limit the protection against unfair dismissal to certain categories of workers.

3.2.2.1 Exclusion of certain categories of Employees

The Swedish unfair dismissal protection under LAS excludes the following categories of employees from its scope:

- ✓ employees who due to their work responsibilities and conditions of employment will be deemed to be in a leading or comparable position within the company;
- ✓ employees who are family members of the employer;
- ✓ employees who are employed to work in the employer's household; and
- ✓ employees who are employed with special employment support, in a protected form of work or in apprenticeship employment.[150]

Swedish law purposively interprets the excluded categories narrowly. This is in keeping with the fact that section 1 is mandatory and that any attempts to contract out of the employment protection offered by LAS will be considered null and void.[151] There are different reasons motivating the exclusion of the above groups from protection under the above Act. The exclusion of the first category is mainly due to the fact that independent contractors and other workers excluded under the first provision generally are considered to be in a better bargaining position and hence in a less dependent position.[152]

In England, certain categories of employees have also been excluded from protection under the ERA 1996. The excluded English employees are:

- ✓ employees who are working under illegal contracts (unless the employee was

[149] Continuous employment of one year will be sufficient for employees employed before 6 April 2012
[150] Section 1 LAS
[151] Ds 2002:56, p. 93 and Ds 2002:56 p. 112.
[152] Sigeman, (2006), p. 27.

- ✓ unaware of the illegality);
- ✓ members of the armed forces and the police service;
- ✓ employees working for government departments where a national security certificate has been issued; and
- ✓ fishermen who are remunerated by a share of the profits.

3.2.2.2 Open-ended contracts and Continous employment

The requirement that the Swedish employee is employed under an open-ended contract of employment has already been mentioned. In England there is no stipulation of such a requirement, although, it would appear unlikely that an employee under a fixed term contract would be able to claim unfair dismissal on the expiry of such a contract, (as the presumption would be that the dismissal was due to the contract expiring rather than any other reason). Instead the British legislator uses a concept of continuous employment to limit the protection afforded against unfair dismissal to certain categories of employees and has recently increased the required continuous employment from one year to two in an attempt to reduce the amount of costly claims being brought against British employers.[153] In this respect, it is interesting to note that the Swedish legislator, contrary to the British, has not actively sought to exclude certain categories of employees through this criterion. Instead the 1st paragraph of section 4 LAS presupposes that all contracts of employment are open-ended contracts of employment.[154]

3.2.3 Swedish Employees –v – English Employees

The eligibility criterion that without question has received the most attention in the literature, as well as politically, is without doubt the definition of the term employee. Only those who fit the definition of employee are currently afforded protection against unfair dismissal. Both the Swedish and the

[153] This is a clear example of an economic efficiency objective being pursued by the legislator at national level.

[154] Although other forms of contracts of employment also may be entered into, they are only permitted in the limited circumstances provided by sections 5 and 6 LAS with the most common being the probationary contract, provided for in section 6 LAS and allowing for a maximum probationary period of six months. On the expiry of the six months, the probationary contract automatically transfers to an open-ended contract of employment, unless notice has been given by the employer that the employment will cease upon the probationary contract expiring. In addition, paragraph 2 of section 5 LAS further provides that an employee who, in a five year period has been engaged temporarily for a period of time (or periods of time) or for a specified period (or specified periods) which combined amounts to at least two years automatically becomes employed under an open-ended contract of employment.

British courts have developed fine tests to assist them in the exercise of deciding which workers are considered employees.

3.2.3.1 The Swedish Employee and the relevant Assessment Criteria

There is no statutory definition of the term employee in LAS, instead the interpretation has developed through a combination of judicial interpretations – in particular by the Supreme Court ("HD")[155], the Labour Court ("AD")[156] and through preparatory works.[157]

Swedish law imposes no formality requirements in respect of the creation of a contract of employment and an orally concluded contract or a contract concluded through the parties' subsequent course of dealings is as valid as a written contract.[158] In a HD case from 1949[159], the multi-factor test which currently is used to determine when a contract of employment exists was first expressed in the following terms:

"The question whether someone, from a legal point of view, is someone else's employee or not is to be determined by what can be said to have been agreed between the parties. When interpreting what has been agreed, one needs to consider all the relevant circumstances of the contract at the time the contract was concluded and must not allow one particular term of the contract to decide what has been agreed. It may also be of assistance to consider the parties' financial or social positions as these may be indicative of how the agreement is to be interpreted".

According to the multi-factor test the court's decision should be based on the general impression that the specific facts of the case viewed together produces.[160] Contrary to what the position is when the terms of a normal commercial contract is interpreted by the court, the interpretation is therefore not limited to what the parties at the time of entering into the contract had expected their contractual positions to be. Instead it will be important to consider how the parties have conducted themselves throughout the duration of the contract as this will be viewed as a valuable source of evidence of how the parties originally considered their relation. Circumstances and state of affairs which assist to explain the parties' relationship and their dealings will also be relevant as independent factors for the purpose of assessing their contractual relation.[161]

[155] Högsta Domstolen
[156] Arbetsdomstolen
[157] Ds 2002:56, p. 85.
[158] Adlercreutz/Mulder, (2007), p. 48.
[159] NJA 1949 p. 768.
[160] Adlercreutz/Mulder, (2007), p. 41.
[161] Ds 2002:56 p. 115.

In summary, the criteria that are frequently used by the Swedish courts to determine whether a contractual relation between two parties amounts to that between the parties to a contract of employment are:

1) Whether there is a personal duty to perform; [162]

2) Whether direction and control was exercised by employer;

3) The length of the engagement and the lack of pre-specified tasks;

4) Whether the work that the worker performs is for the same employer and represents the principal share of his/her total work;

5) Whether the worker provides services for one employer only;

6) Whether the employer supply the equipment;

7) Whether there is an element of guaranteed remuneration and reimbursement work related expenses; and

8) The worker's financial dependence.[163]

3.2.3.1.1 Personal duty to perform

A lot of emphasis was traditionally placed on whether the contract placed the worker under a personal duty to perform the work. The current approach is more focused on whether the work actually has been performed by the worker who has agreed to perform. Where the worker has performed work personally there is generally an inclination towards considering the worker an employee. In contrast, where the worker has not performed the work personally and is not contractually obliged to either but is free to sub-contract others to perform the contract the situation is usually more akin to an independent contractor situation.[164]

3.2.3.1.2 Direction and Control exercised by employer

The fact that the work is done in accordance with the employer's directions and that it is performed under his control is generally a strong indicator that the worker should be seen as an employee. It should however be noted that an element of control is not a pre-requisite in order to arrive at the conclusion that a worker is an employee. In particular it has not been considered significant in situations where the lack of control is due to the fact that the worker possesses higher skills than the employer and this is the reason for control not being exercised.[165]

[162] Adlercreutz/Mulder, (2007), p. 42.
[163] Ds 2002:56 p. 116 f.
[164] Adlercreutz/Mulder, (2007), p. 42.
[165] NJA 1973 p. 501

3.2.3.1.3 Length of engagement and lack of pre-specified tasks

Where an engagement is for a longer period and the worker is performing tasks and work directed by the employer on an ad-hoc basis compared to pre-specified tasks that the worker from the outset has been contracted specifically to perform the worker will generally be considered an employee. It should however be noted that nothing prevents that shorter engagements also may amount to contracts of employment.[166]

3.2.3.1.4 The work that the worker performs is for the same employer and represents the principal share of his/her work

In circumstances where the worker is working predominantly for one employer the courts may be inclined to class the worker as an employee.[167]

3.2.3.1.5 The worker provides services for one employer only and is prevented from providing services for another employer

There is generally a presumption that a worker who provides services for one employer only and who for contractual reasons or due to the extent of his/her work is unable to provide similar services for another employer, is an employee.[168] In AD 1979 nr 155 the circumstances of a contractual relation where the situation of the worker at the outset had been comparable to that of an independent contractor, was held to have shifted to that of an employee when the contractual relationship had been altered in such a way that the independent contractor had become more and more dependent on the employer.[169]

3.2.3.1.6 Supply of equipment from the employer

Where work is performed with the use of the employer's equipment or tools there is generally a presumption in favour of a contract of employment.[170] In situations where the worker provides his/her own equipment there is equally a presumption that the worker is an independent contractor. In the case AD 1981 nr 121 the court considered lorry drivers of a distribution company to be independent contractors following a re-organisation which had meant that the ownership of the valuable lorries had been transferred to each of the individual drivers.[171]

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[166] Ds 2002:56 p. 116 and NJA 1992 p. 361.
[167] Ds 2002:56 , p. 117.
[168] Ds 2002:56 , p. 117.
[169] AD 1979 nr 155
[170] Ds 2002:56 , p. 117.
[171] AD 1981 nr 121

3.2.3.1.7 An element of guaranteed remuneration and reimbursement of expenses

Where at least part of the remuneration is guaranteed rather than performance related and disbursements such as expenses incurred by the worker in the course of the employment are being reimbursed there is an argument in favour of a contract of employment.[172]

3.2.3.1.8 Financial dependence

The degree of economic dependence necessary for a worker with a low degree of subordination to be considered an employee varies depending on the branch of business. In a number of cases, the court has for example found freelancing journalists to be independent contractors despite a considerable element of financial dependence, only having one source of income and in one case more than 21 years of service.[173] The rulings have been explained by the fact that the court tends to apply employee/independent contractor definitions established through established custom in the trade or by collective agreements.[174] The justification for the court's harsh approach appears to have been that the worker's employment conditions were negotiated by collective agreement and therefore considered to have been reached by parties of equally strong bargaining power.[175]

3.2.3.2 The English Employee and the relevant Assessment Criteria

English law defines the employee by drawing a distinction between employees who provide their labour under a contract of employment or a contract of service and those who provide their labour under a contract for services.[176] The latter category is generally referred to as self-employed.[177]

Section 230(1)-(2) ERA1996 defines an employee as *"an individual who has entered into or works under…a contract of employment"*. A contract of employment has further been defined to mean *"a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing."*

The absence of any statutory definitions (or comprehensive guidelines) of either a "contract of service" (under which an employee is contracted to work) or a "contract for services" (under which the self-employed works) has resulted in different tests being developed to differentiate between employees and the self-employed. The currently favoured test is referred to

[172] Adlercreutz/ Mulder, (2007), p. 48.
[173] AD 1998 nr 138 and AD 1994 nr 104.
[174] Ds 2002:56 , p. 132 f.
[175] Ds 2002:56 , p. 121.
[176] Section 230(1) ERA 1996
[177] Cavalier/Upex, *"The Concept of Employment Contract in European Union private law"*, International & Comparative Law Quarterly, vol. 55, (2006), p. 587.

as the multiple test and was introduced by the case of Ready-Mixed Concrete.[178] In accordance with the multiple test, the existence of a contract of service will, (in a similar fashion to the Swedish multi-factor test), be determined by careful consideration of several factors.

The case of Ready-Mixed Concrete dealt with the employer's duty to pay national insurance. It concerned an individual who had been an employee for a year when a new system of delivery was introduced. Under the new delivery system the drivers were to be treated as self-employed independent contractors. When the employee six years later entered into a new written contract for the carriage of concrete and bought a lorry through a finance company associated with his employer's business and painted in the company's colours, the Court of Appeal concluded that a contract for services existed and that the individual therefore fell outside of the "employee" definition. This, despite the fact that the employer always had been able to require the driver to drive the lorry for the maximum hours permitted and the driver was required to wear the company's uniform and carry out all reasonable orders *"as if he were an employee"* of the company. Although there were many things indicating that the driver was an employee the Court of Appeal emphasised the fact that he had had the *"ownership of the instrumentalities".*

Since the case of Ready-Mixed Concrete, three key areas have emerged as the most important for determining whether a contract of service exists and the presence of the following factors can therefore be said to be the most significant:

1) Personal Service – i.e. whether the employee is under a contractual duty to personally perform services for the employer in return for a wage or remuneration;

2) Mutuality of Obligation – i.e. the obligation on the employer to provide work and the obligation on the employee to accept that work;

3) Control – i.e. the employer exercises a certain element of control over the employee's work.

Other factors can nevertheless also be important in determining whether a contract of service exists.

3.2.3.2.1 Personal Service

Where a contract provides that the worker is under a personal duty to perform and the work also has been performed by the worker personally, there is generally a presumption for a contract of service. Likewise, where the worker is free to arrange for a substitute worker to perform the services

[178] Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497

or to sub-contract his service obligations, the worker's status is usually more consistent with that of the self-employed or an independent contractor.

The fact that a worker has been able to provide a substitute or has been entitled to delegate the work will however not necessarily prevent a finding of a contract of service where the right to delegate has been restricted to situations where the worker was unable to perform the work personally.[179] In comparison, where the worker's ability to delegate his/her main duties has been largely unrestrained, a contract for services will generally be presumed, even if the individual worker never actually exercised the right to provide a substitute.[180]

3.2.3.2.2 Mutuality of Obligation

Carmichael[181] is one of the leading cases on mutuality of obligation. It concerned two tour guides who had performed a series of temporary contracts and the question was whether, looking at the overall arrangement, (including the time between the periods of work) a contract of service existed. However, because there was no obligation on the employer to provide work and the individuals were free to decline to work when it was offered to them, (and indeed also had declined work on several occasions), it was held that the individuals could not be considered to be employees.

A different conclusion was however reached in the case of ABC News Intercontinental Inc v Gizbert[182], which concerned the employment status of a TV reporter. Although the ABC were under an obligation to offer the reporter 100 days work per year, the reporter was under no express contractual obligation to accept work. On the basis of the high level of control that the ABC exercised over the reporter, the restrictions on the reporter to work for a competitor and the reporter's place in the organisation, the EAT was however prepared to assert that the reporter was under an implied obligation to accept or refuse assignments in good faith and was thereby able to find that an overreaching "umbrella" contract (under which the reporter was held to work even between the periods of his assignments) existed. A similar conclusion was reached in the cases of Quashie v Stringfellows[183] and Drake v Ipsos Mori[184] which involved the employment status of a lap dancer and an ad hoc market researcher.

[179] MacFarlane and another v Glasgow City Council [2001] IRLR 7
[180] Green v St Nicholas Parochial Church Council [2005] UKEAT/0904/04; Stafforshire Sentinel Newspapers Ltd v Potter [2004] IRLR 752 and Real Time Civil Engineering Ltd v Callaghan UKEAT/0516/05/ZT
[181] Carmichael v National Power [2000] IRLR 43
[182] ABC News Intercontinental Inc v Gizbert UKEAT/0160/06
[183] Quashie v Stringfellows Restaurants Ltd UKEAT/0289/11
[184] Drake v Ipsos Mori UK Ltd UKEAT/0604/11

3.2.3.2.3 Control

Control has been said to ..."*include the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done*". [185]

Case law tends to focus on the extent to which the individual is controlled and the manner in which they carry out their tasks during the engagement. The fact that a worker is told to work from of a particular place of work and of his/her working days and hours combined with the fact that the worker is subject to the employer's day to day directions and rules and policies is generally a strong indication of the worker being an employee. The general rule is however not without exception and many employees, because of their particular skills and expertise, will naturally be subject to very little control from their employers. Conversely, independent contractors can be subject to relatively high levels of supervision.

3.2.3.2.4 Other relevant factors

In the case of Market Investigations[186] Cooke J stated that;

"No exhaustive list can be compiled of the considerations which are relevant to [the] question, nor can strict rules be laid down as to the relevant weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from the sound management of his task".

This approach is in many ways similar to the Swedish multi-factor test, laid down by the HD case NJA 1949 p.768.

3.3 Two national concepts of Unfair Dismissal

3.3.1 Sweden

The requirement that any dismissal needs to be objectively justified aims to strengthen the employee's position and is in keeping with the fundamental

[185] Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497
[186] Market Investigations v Minister of Social Security [1969] 2 QB 173

social and labour rights that became legally binding through the Treaty of Lisbon. At the same time the employer's needs must also be accommodated. LAS does this by providing that redundancy is an objectively justifiable ground for dismissal.[187]

3.3.1.1 Dismissal for Redundancy reasons

In situations of redundancy, dismissals will generally be justified by economic, organisational or other similar reasons. However, even where a dismissal is justified, the employer will be under an obligation to follow a scheme of "last in first out" set out in section 22 LAS. An exception to this rule only applies to small employers with no more than 10 employees.[188] Such employers will be allowed to exclude two of the company's key workers, (irrespective of their seniority), from the general operation of section 22 LAS.[189]

An employee who has been dismissed on the grounds of redundancy will also, for a nine month period, be given priority in respect of any new positions, (within the employee's previous division) that may become available. This right is however subject to the employee having been employed in the employer's organisation for more than one year before he/she was made redundant and subject to the employee notifying the employer that he/she wishes to exercise the right to priority.[190]

3.3.1.2 Dismissal for Personal reasons

In order to be objectively justified, dismissals for personal reasons generally require that the employee is in breach of a material condition of his/her contract of employment or has failed to achieve something which is of significant importance to the employer and which the employee is aware that the employer places such significant importance on.[191]

Dismissals justifiable for personal reasons can range from anything like theft to serious teamwork difficulties. Dishonest activities that have taken place at the place of work or against the employer are generally treated rather unsympathetically whereas crimes that have been committed outside of the course of employment rarely will be sufficient to objectively justify a dismissal. Sickness is generally not considered an objectively justifiable ground for dismissal unless the sickness is resulting in the employee being unable to perform any work of value. Alcoholism is also viewed as a form of sickness and the employer's rehabilitation responsibilities can be extensive. Focus is however always placed on whether the employee is deemed suitable to continue in the employment.[192]

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[187] SOU 2012:62, p. 91 ff.
[188] Section 22, paragraph 1 LAS
[189] Sigeman, (2006) , p. 178.
[190] Section 25 LAS
[191] Sigeman, (2006), p. 179.
[192] Ibid, p. 180.

3.3.2 England

There are five potentially fair reasons for dismissal under section 98(2) of the ERA 1996; conduct, capability, redundancy, breach of a statutory restriction, and "some other substantial reason". It will thus be necessary for the dismissing employer to show that the dismissal took place for one of these reasons.[193] According to section 98(4), ERA 1996, the employer must also show that he acted reasonably in treating that reason as sufficient to justify dismissal.[194]

3.3.2.1 Potentially fair reasons for dismissal

In order for a dismissal to be considered fair the dismissing employer must be able to show that its decision to dismiss was based one or more of the potentially fair reasons within subsection 98(2) ERA 1996 or "some other substantial reason".[195]

3.3.2.2 Reasonableness of the dismissal

Once a potentially fair reason for the dismissal has been established under section 98(1) ERA 1996, the tribunal needs to decide whether the employer acted reasonably in dismissing the employee for that reason. The approach that the tribunal needs to take to determine reasonableness will depend on the reason for the dismissal. In most cases the test for reasonableness is however the test set out by section 98(4) ERA 1996:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case."

The test laid down by section 98(4) ERA 1996 is objective and the tribunal needs to decide whether the employer's decision to dismiss the employee fell within the "range of reasonable responses" that a reasonable employer

[193] Retirement was previously also a potentially fair reason for dismissal but since 6 April 2011 when the default retirement age of 65 was abolished this ceased to be the case.
[194] This has been interpreted by the courts and tribunals as meaning that the dismissal must be procedurally fair. Where the ACAS Code of Practice on Disciplinary and Grievance Procedures apply, employers therefore need to make sure that the dismissal process is compliant.
[195] Section 98(1)(b) ERA 1996

in those circumstances and in that business might have taken.[196] For the purposes of this test, it is irrelevant whether or not the tribunal would have dismissed the employee, had it been in the employer's shoes. The test applies both to the employer's decision to dismiss and to the procedure by which the decision was reached.[197]

It is the reasonableness of the employer's conduct that the tribunal has to assess, not the injustice that the employee has suffered.[198] The tribunal must also disregard any circumstances which were not known to the employer at the time of the dismissal.[199]

3.3.2.2.1 Conduct dismissals

Misconduct is a potentially fair reason for dismissal. In serious cases of misconduct the employer may be able to rely on one single act of misconduct. Less serious but repeated acts of misconduct will also suffice. Examples of misconduct are; disobeyance of reasonable orders; breach of certain terms of the contract of employment; theft or dishonesty; unauthorised absence; violence at work; alcohol or drug abuse (although this may also be treated as an illness); disclosure of confidential information; competing or preparing to compete with the employer's business and repeated poor attendance. In more limited circumstances it may also be considered fair for an employer to dismiss an employee for misconduct that has taken place outside of his place of work.[200]

In cases of conduct dismissals, the employer must be able to show that it, at the time of the dismissal; believed the employee to be guilty of misconduct; had reasonable grounds for believing that the employee was guilty of that misconduct and that it, at the time it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances.[201]

3.3.2.2.2 Capability or qualification dismissals

An employee's lack of capability or qualifications to do his/her job can potentially be a fair reason for dismissal.[202] Capability has been interpreted to mean an employee's "skill, aptitude, health or any other physical or mental quality"[203]. Capability dismissals generally fall within two categories; the first category consists of dismissals relating to the employee's poor performance or attitude whilst the second category consists of dismissals related to the employee's ill health.

[196] Iceland Frozen Foods Ltd v Jones [1982] IRLR 439
[197] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23
[198] Chubb Fire Security Ltd v Harper [1983] IRLR 311
[199] W Devis and Sons Ltd v Atkins [1977] IRLR 314
[200] Singh v London Country Bus Services Ltd [1976] IRLR 175
[201] British Home Stores Ltd v Burchell [1978] IRLR 379
[202] Section 98(2)(a) ERA 1996
[203] Section 98(3)(a) ERA 1996

Qualification dismissals are dismissals relating to any "degree, diploma or other academic, technical or professional qualification" of relevance to the employee's position.[204] Dismissals relating to qualification most commonly arise soon after recruitment when it emerges that the employee does not have the necessary qualifications.[205] However they can also arise where an employee is employed on the basis that he/she will obtain certain qualifications but fail to do so[206] or where the employer's requirements change[207] or where the employee loses his/her qualifications during employment.[208]

Where a dismissal has taken place on the grounds of capability or qualification the tribunal will determine whether the employer acted reasonably by considering factors such as; whether the employee knew what was required of them; whether the employer took steps to minimise the risk of poor performance; whether there was a proper appraisal of the employee and the problem was identified; whether the employer provided training, supervision and encouragement; whether the employer warned the employee of the consequence of failing to improve; whether the employer gave the employee a chance to improve and in some cases, possibly also whether the employer considered alternative employment positions for the employee.

3.3.2.2.3 Redundancy dismissals

Redundancy is a potentially fair reason for dismissal. A redundancy situation exists where the dismissal can be said to be *"wholly or mainly attributable to"* the employer either;

a) ceasing or intending to cease to carry on the business for the purposes of which the employee was employed by it, (i.e. business closure); or

b) ceasing or intending to cease to carry on that business in the place where the employee was so employed, (i.e. workplace closure); or

c) having a reduced requirement for employees to carry out work of a particular kind or to carry out work of a particular kind at the place where the employee was employed to work, (i.e. reduced requirement for employees).[209]

When it comes to cases of dismissals for redundancy reasons, the employer will generally not be considered to have acted unreasonably provided that it has; warned and consulted all of the affected employees (or their

[204] Section 98(3)(b) ERA 1996
[205] Tayside Regional Council v McIntosh [1982] IRLR 272
[206] Blackman v Post Office [1974] IRLR 46
[207] Evans v Bury Football Club Co Ltd EAT/I85/81
[208] Appleyard v Smith (Hull) Ltd IRLR19
[209] Section 139(1) ERA 1996

representatives); applied fair selection criteria and where reasonable to do so, took reasonable steps to avoid minimise redundancies by redeploying potentially redundant employees.

3.3.2.2.4 Breach of Statutory restriction dismissals

A dismissal will be potentially fair if the employee's continued employment would mean that either the employer or the employee would contravene a statutory duty or restriction.[210] It will however be necessary for the employer to show that the employee's continued employment *actually* would contravene a statutory duty. The fact that the employer reasonably believed that the employee's continued employment would contravene a statutory duty will not be sufficient.[211] (A reasonably held belief can however sometimes be sufficient under the potentially fair reason "some other substantial reason" below).[212]

Examples of situations that often fall under the statutory restriction category are situations where continued employment would be in breach of immigration rules; where the employee has lost his/her driving licence and driving forms part of his/her employment, where the employee has failed to obtain certain vocational qualifications which are and where the employee discovers that the employee has or has received a criminal record.

In cases of dismissals on the grounds of statutory restriction, the tribunal will consider whether the employer acted reasonably by looking at the extent of the statutory restriction and the extent to which it affects the employee's ability to do his/her job; the duration of the statutory restriction and potential alternatives to dismissal such as adjustments to the employee's job description or alternative employment.

3.3.2.2.5 Some other substantial reason dismissals

Section 98(1)(b) ERA 1996 does not offer much guidance in respect of what situations that this category is intended to cover. Following the recent abolition of retirement as a separate potentially fair reason for dismissal, dismissals that take place on the basis of an employee's age and that the employer is able to justify are now likely to be for "some other substantial reason". For dismissals under this category it is sufficient for the employer to show that the reason for the dismissal is of a kind that *could* justify the dismissal of an employee holding the job in question. The case of Willow Oak Developments Ltd v Silverwood[213] it was established that it is necessary to show that the dismissal actually *did* justify the dismissal in question.

[210] Section 98(2)(d) ERA 1996
[211] Bouchaala v Trusthouse Forte Hotels Ltd [1980] IRLR 382
[212] Klusova v London Borough of Hounslow [2007] EWCA Civ 1127
[213] Willow Oak Developments Ltd v Silverwood [2006] IRLR 607

The distinction is important as it means that once the employer has been able to establish that he/she has dismissed the employee for a potentially fair reason, the dismissal will be held to be fair (subject to it not being procedurally unfair) as long as the employer's decision to dismiss was within the range of "reasonable responses" which will be a matter for the tribunal to decide upon.

Whether the employer's reason to dismiss falls within the range of reasonable responses will inevitably depend on the circumstances of the case but it could depend on whether the employer; investigated the situation; consulted with the employee; warned the employee of the risk of dismissal; gave the employee an opportunity to state their case and explored alternatives to dismissal. It may also be relevant to consider and compare the needs of the employer with those of the employee. The principles established by the case of British Home Stores Ltd v Burchell[214] applied in cases relating to conduct may also be relevant.[215]

3.3.2.3 Fair dismissal procedure

When applying and interpreting the statutory requirements laid down by the ERA 1996 the courts and the tribunals have developed a best practice concept which means that an employer, in order to act reasonably, has to follow a fair procedure when dismissing. In the majority of cases, (excluding cases of dismissals for redundancy), this will mean following the Acas Code which provides that the employer, before dismissing an employee should investigate the issues fully, inform the employee of the issues in writing, conduct a disciplinary hearing or meeting with the employee and inform the employee of the decision in writing. The case of Polkey v AE Dayton Services Ltd[216] also established the "no difference rule" which in effect means that where a dismissal is procedurally unfair, the employer will be prevented from arguing that the dismissal should be viewed as fair because the procedural unfairness would have made no difference to the outcome. Failure to follow the Acas Code will not render any dismissal automatically unfair but may lead to an increase/decrease in compensation of up to 25% to reflect the extent of compliance with the Code.

3.3.2.4 Automatically unfair dismissals

Some dismissals are considered to be automatically unfair. That is to say that, irrespective of whether the procedure followed by the employer has been fair, certain reasons will never be considered fair.

The most important categories of automatically unfair dismissal are:

- ✓ Health and safety dismissals;

[214] British Home Stores Ltd v Burchell [1978] IRLR 379
[215] Perkin v St Georges Healthcare NHS Trust [2005] EWCA Civ 1174
[216] Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)

- ✓ Pregnancy or childbirth related dismissals;
- ✓ Dismissals for asserting a statutory right, including most rights conferred under the Employment Rights Act 1996 such as; a right not to suffer an unlawful deduction; a right to minimum notice; a right to time off for union activities and duties;
- ✓ Dismissals relating to union membership; non-union membership; trade union recognition or taking part in protected industrial action;
- ✓ Dismissal for asserting any right under the Working Time Regulations 1998;
- ✓ Dismissal for making a protected disclosure under the Public Interest Disclosure Act 1998;
- ✓ Dismissal in connection with a refusal by a shop worker to undertake Sunday work;
- ✓ Dismissal in connection with performance of certain duties as an employee representative;
- ✓ Dismissal in connection with performance of certain duties as a pension scheme trustee;
- ✓ Dismissal in connection with the national minimum wage;
- ✓ Dismissal in connection with carrying out jury service;
- ✓ Dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing;
- ✓ Dismissal for asserting certain rights as a part time worker or fixed term employee; and
- ✓ Dismissal in connection with an application for flexible working.

Where an automatically unfair dismissal has taken place, all that the employee needs to establish to obtain a finding that the dismissal was unfair is that the dismissal was for one of the above reasons. The manner in which the employer handled the dismissal will be irrelevant. The normal eligibility criterion of one or two years' continuous employment will generally not apply to automatically unfair dismissals either.

3.4 Discussion

National laws regulating employment protection are generally justified by the need to protect workers from arbitrary decisions as well as to shift some

of the social costs of labour turnover to the dismissing employer. In some of the EU's Member States, such as the UK, the role allocated to the state in this regard is relatively passive and has been described as "non-interventionist".[217]

In a comparative report on employment protection[218] the strictness of different national systems has been measured and compared by the use of different employment protection indicators compiled from different factors relevant to the overall costs and procedures involved in a dismissal. The report which was produced in 2008 revealed the UK as the one of the EU's Member States where employment protection is the least strict. Other countries that were mentioned as countries with weak employment protection traditions were the US and Australia. Interestingly, the low strictness levels in those countries were however considered to not necessarily be linked to the legal Anglo-Saxon heritage of those countries but rather to the regulation of temporary contracts. Both the Swedish as well as the English employer are however also relatively free to take advantage of the flexibility offered by the use of such contracts and other sources[219] do not seem to suggest that the use of temporary contracts has replaced the normal open-ended contract of employment to circumvent the protection afforded by the national concepts of unfair dismissal. Instead, access to protection of unfair dismissal in England is primarily restricted by various eligibility criteria and a narrower interpretation of the term "employee". In a comparative study of Sweden, the United Kingdom, France and the United States the Swedish definition of the term "employee" was found to be the most far reaching. Rönnmar has also suggested that the Swedish interpretation of the term puts less emphasis on the subordination element.[220]

It is also worth noting the increased presence of another English statutory concept, "worker" which over the last decades has seen more and more rights afforded to it. According to section 230(3) ERA1996 the English worker is defined as:

"an individual who has entered into or works under, (or, where the employment has ceased, worked under), a contract of employment or any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

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[217] Bruun/Lörcher/Schömann, (2012), p. 240.
[218] Venn, D, *"Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators"* (2009)
[219] SOU 2012:62; Rönnmar and Numhauser-Henning, Flexicurity, Employability and Changing Employment Protection in a Global Economy – A study of labour law developments in Sweden in a European context, July 2012; and Phillips, G and Scott, K, Employment, Guildford, 2013
[220] Rönnmar, M, *"The Personal Scope of Labour Law and the Notion of Employee in Sweden"* ,The Ouchi Project, National Paper for the 7th JILPT Comparative Labor Law Seminar, Tokyo, March 2004, p. 161.

The introduction of this additional category was intended to create an intermediate class of protected workers, who on the one hand are not employees but on the other hand are not regarded as carrying on a business. Although the worker often is in a similar subordinate and dependant position vis-à-vis their employers as the employee, the English legislator has not wanted to extend the more generous protection enjoyed by the category classed as employees to this group. References to workers can therefore now be found in various statutes[221] some of which are products or direct results of EU directives.[222]

In comparison to the English employee, the English worker has considerably less extensive employment protection rights and in terms of protection against unfair dismissal, currently no protection at all. As pointed out by Sargeant and Lewis this is something that might seem a bit odd considering the increasing amount of rights conferred by the EU on the widely interpreted category of workers (in the context of rights relating to free movement).[223] In addition, when comparing this with the Swedish approach to employment protection under which many self-employed and workers also enjoy full protection[224] it does indeed seem as if a not insignificant imbalance could exist between the protection afforded to the employees in the UK compared to the protection enjoyed by the Swedish employee. In particular as the English worker, (although not able to pass the tests qualifying him as an employee in England), may fit the Swedish definition of employee.

It shall also be remembered that Article 30 of the CFR provides that all "workers" are entitled to protection against "unjustified dismissal" in accordance with Union law and national law and practice. The potential reach and effects of Article 30 shall be discussed further in chapter 5.

[221] The Working Time Regulations 1998 (SI 1998/1833) (WTR), the National Minimum Wage Regulations 1999 (SI 1999/584), and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (2000/1551)

[222] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work

[223] Sargeant, M. and Lewis, D. Employment Law, 3rd Edition, Henry Ling Limited, Dorset Press, Dorchester, 2006, p 23 ff.

[224] Rönnmar, M, *"The Personal Scope of Labour Law and the Notion of Employee in Sweden"*, (2004), p.162 f.

4 Unfair dismissal protection in the EU – the Acquired Rights Directive

4.1 Introduction

In the 1970's there were no Treaty provisions granting the Union any explicit competence to take action to protect employees and any legislative measures therefore had to be adopted with reference to the functioning of the internal market. As seen in 2.3.2 economic and political developments in the EU opened the way for the adoption the Acquired Rights Directive[225], at a time characterised by unprecedented restructuring and mergers.

The Acquired Rights Directive complements the Member States' own national unfair dismissal systems by introducing an *additional* layer of protection in three ways. It does so, firstly by providing for the automatic transfer of the employees' contracts of employment to the new employer when the employer's business changes hands; secondly by stipulating that dismissals for the reason of the transfer are not justified per se; and thirdly by requiring the employers to inform and consult with the employees affected. The provisions relating to the third element of protection will however not be considered further as it falls outside of the scope of this thesis.

The directive has been said to exemplify the gradual involvement of the EU in the social affairs of the Member States following the Social Action Program in 1974 which sought to raise the living and working standards in the EU and to reduce the differences between the Member States' national systems of employment protection. [226] [227] The original version of the directive was first adopted in 1977[228] and has since been amended twice, first in 1998[229] and then again in 2001 when the current version came into force. As previously highlighted, several concepts in both the original version as well as in the later versions have however been left to the Member States to define in accordance with their national laws and practices. The term "employee" is of these. A certain divergence between the Member States in respect of the level of employment protection under the directive is therefore unavoidable.[230]

[225] Directive 2001/23/EC
[226] DaSilva, A. L, Directive 77/187: The EEC's Attempt to Protect Employees Upon the Sale or Transfer of Businesses, 11 B.C. Int'l & Comp. L. Rev. 147 (1988), p. 147 ff.
[227] Adlercreutz/Mulder, (2007), p. 196.
[228] Directive 1977/187/EEC
[229] Directive 1998/50/EC
[230] Barnard, (2006), p. 622.

The purpose of this chapter is to consider the rationale of the Acquired Rights Directive as well as the implementations of the directive's provisions relating to unfair dismissal in Sweden and England. The chapter concludes with a discussion on whether, in light of the common EU definition "worker", a common EU definition of the term "employee" should be introduced to achieve a more uniform application of the directive across the EU.

4.2 The Purpose of the Acquired Rights Directive

The Preamble of the first 1977 version of the directive describes its context in the [internal] market as follows:

"... Economic trends are bringing in their wake, at both national and [Union] level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers...It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded...Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced."

It is further revealed that the intention of the directive was to *"promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time".*

The legal basis for the adoption of the directive was Article 100 EEC (now Article 115 TFEU, ex Article 94 EC). It should however be noted that the directive aimed at partial harmonisation only.

4.3 The "Employee"

The scope of the directive only applies to employees. According to the current Article 2(1)(d) of the directive, the term "employee" refers to any person in the EU who is protected as an employee under national employment law. Although the directive does not set out to define the term further, Article 2(2) of the directive makes it clear that the directive is without prejudice to national law as regards the definition of contract of employment (or employment relationship). It does however stipulate that employees shall not be excluded from the scope of the directive solely on the basis of the number of hours that they work or by the fact that the employee is employed under a fixed term contract or the fact that they are employed via an agency.[231]

[231] Article 2(2) the Acquired Rights Directive

It is interesting to consider the rationale behind the approach taken by the Court of Justice. In the case of Danmols Inventar[232] (which was heard before any alterations to the directive had taken place) the Court of Justice considered the definition of the term "employee". The question before the Court was whether or not a person who holds a large stake in a company and who also is the chairman of its board of directors may be regarded as an "employee" of that company within the meaning of the directive.

What is interesting to note from the case is not the conclusion that the Court reached at but the way the Court arrived at its decision coupled with the fact that neither the plaintiff nor the defendant appears to have predicted the stance that ultimately was taken by the Court. The plaintiff had claimed that the term "employee" should be defined as someone working for an employer and is subject to the instructions and orders of that employer. A person carrying out work for a company, in which he holds a large share holding, did not fall within that definition the plaintiff argued. The defendant's line of argument had been that the term "employee" (for the purpose of the directive), extended to such a person provided that he did not occupy a dominant position on that board.

The Court reasoned as follows:

"*The Commission observes in the first place that it is necessary to establish a [Union] definition of the term "employee" within the meaning of Directive No 77/187. It takes the view that the term covers any person who in return for remuneration carries out work on behalf of, and as the subordinate party in a relationship with, another person. That definition does not mean that a person cannot be regarded as an employee within the meaning of the Directive because he possesses a certain, or even substantial, shareholding in the undertaking. On the other hand, the Directive does not apply where the person's position in the undertaking is such that he is no longer the subordinate party in an employment relationship.*

It is common ground that Directive No 77/187 does not contain an express definition of the term "employee". In order to establish its meaning it is necessary to apply generally recognised principles of interpretation by referring in the first place to the ordinary meaning to be attributed to that term in its context and by obtaining such guidance as may be derived from [Union] texts and from concepts common to the legal systems of the Member States.

It may be recalled that the Court, inter alia in its judgment of 23 March 1982 (Case 53/81, Levin, (1982) ECR 1035), held that the term "worker" as used in the Treaty, may not be defined by reference to the national laws of the Member States but has a Community meaning. If that was not the case, the [Union] rules on free movement for workers would be frustrated, since

[232] Case 105/84 Danmols Inventar [1985] ECR 2639

the meaning of the term could be decided upon and modified unilaterally, without any control by the [Union] institutions, by the Member States, which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty.

It is necessary to consider whether similar considerations apply to the definition of the term "employee" in the context of Directive No 77/187. According to its Preamble, the Directive is intended to ensure that employees' rights are safeguarded in the event of a change of employer by providing for, inter alia, the transfer from the transferor to the transferee of the employees' rights arising from a contract of employment or from an employment relationship (Article 3) and by protecting employees against dismissals motivated solely by the fact of the transfer of the undertaking (Article 4).

It is clear from those provisions that Directive No 77/187 is intended to achieve only partial harmonization essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. Its aim is therefore to ensure, as far as possible, that the contract of employment or the employment relationship continues unchanged with the transferee so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not however intended to establish a uniform level of protection throughout the [Union] on the basis of common criteria.

It follows that Directive No 77/187 may be relied upon only by persons who are, in one way or another, protected as employees under the law of the Member State concerned. If they are so protected, the Directive ensures that their rights arising from a contract of employment or an employment relationship are not diminished as a result of the transfer.

In reply to the second question it must therefore be held that the term "employee" within the meaning of Directive No 77/187 must be interpreted as covering any person who, in the Member State concerned, is protected as an employee under national employment law. It is for the national court to establish whether that is the case in this instance."

The Court of Justice's line of reasoning in Danmols Inventar shall be considered further in 4.5. By way of comparison it should however be noted that many of the other terms such as "transfer", "ETO reasons" and "economic entity" have been given more purposive and directive compliant interpretations as the Member States in respect of these terms have allowed themselves to be influenced by the case law from the Court of Justice.[233]

[233] Case C-324/86 Daddy's Dance Hall [1988] ECR739 and Case C-24/85 Spijkers [1986] ECR 1119

As to the present interpretation of the term "employee" in Sweden and England, both the English TUPE regulations and the Swedish LAS, confer the enhanced protection afforded by the directive on "employees" only. Neither the Swedish nor the English legislator has sought to exclude employees in the public sector, thereby going slightly further than required by the directive. In both Sweden and England the term has been defined in a way which mirrors the interpretation techniques used by their national courts when determining who is an employee for the purpose of an unfair dismissal claim and the scope of the term is also thought to be the same as in the unfair dismissal cases, (see chapter 3).

4.4 Unfair dismissal protection under the Acquired Rights Directive

4.4.1 The Aquired Rights Directive in Sweden and England

The Acquired Rights Directive has been implemented into Swedish law through sections 2(4), 6b and 7(3) of LAS and sections 4(2), 13(2) and 28 of the Co-determination Act, MBL[234]. In order to ensure that these sections conform to EU law they have to be interpreted in the light of EU law and existing case law. In England the directive has been implemented through the Transfer of Undertakings (Protection of Employment) Regulations 2006[235] ("TUPE"), which enhances the national concept of unfair dismissal protection by providing that certain transfer related dismissals will be automatically unfair.

4.4.2 Article 1 – The scope of the Directive

According to Article 1(a) of the directive, the directive only applies in situations where a *"transfer"* of an undertaking, business, or part of an undertaking or business to another employer has taken place as a result of a legal transfer or merger.

Section 6b of the Swedish LAS does not contain any definition of a transfer of an undertaking, business or part of an undertaking or business and the legislative preparatory works only provide that the concepts should be interpreted in light of the directive and EU's case law.

The English TUPE regulations apply where there is a *"relevant transfer"*. Reg. 3(1) TUPE defines this as; *"a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer*

[234] Lag (1976:580) om medbestämmande i arbetslivet
[235] The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE 2006)

in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity." Reg. 3(2) further defines an *"economic entity"* as an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. The TUPE regulations also apply to the situation where there has been a *"service provision change".* This covers the situation where activities are contracted out to a contractor; where activities subsequently are transferred between contractors; and where activities are brought back in house from a contractor.[236]

4.4.3 Article 3 – Automatic transfer of contractual rights and obligations

Article 3(1) of the directive provides that the transferor's rights and obligations existing under a contract of employment on the date of the transfer shall be transferred to the transferee by reason of the said transfer. Article 3(3) further provides that the transferee, after the transfer will be bound to observe the same terms and conditions which the transferor was bound by for a minimum period of a year.

Section 6b of the Swedish LAS introduced the concept of automatic transfers of the employees' employment relationships and acquired rights to the transferee. As collective agreements in Sweden constitute an important source of the employee's terms of employment, the transferee will also be under an obligation to respect these in the same way as any other applicable contractual provisions will have to be observed, unless the transferee already is bound by another collective agreement.[237] In England it is regulation 4(2) of TUPE that provides for the automatic transfer of the transferor's rights, powers duties and liabilities in connection with the contract of employment, to the transferee.

4.4.4 Article 4 – Automatically unfair dismissals

Article 4(1) of the directive provides that a transfer of an undertaking, business or part of the undertaking shall not in itself constitute grounds for dismissal (by either the transferor or the transferee). The same Article does however also provide for an exception where a dismissal is for a reason which is economical, technical or organisational and entails changes in the workforce, a so called ETO reason. Exactly what constitutes an ETO reason is not entirely clear from the EU's case law but considering almost every transfer is likely to have effects involving such changes and the Court of Justice having emphasised on the protective purpose of the directive, it would seem logical that the ETO exception should be given a narrow

[236] Denicolo, (2011), p.113.
[237] Section 28 MBL

interpretation with focus on saving economically weak companies in redundancy situations.[238]

In Sweden this has been implemented through section 7(3) of LAS which provides that a dismissal which relates to a transfer does not per se constitute an objectively justifiable ground for dismissal. The same section also provides for an exception where a dismissal is for an ETO reason.

In England Article 4(1) of the directive is implemented through regulation 7(1) TUPE which provides that the dismissal of an "employee" (with the requisite period of continuous employment[239]), will be automatically unfair where the sole or principal reason for the dismissal is either; the *transfer itself*; or a *reason connected* with the transfer that is *not* an ETO reason, entailing changes in the workforce. This division is however almost artificial and despite some guidance[240] from the Department for Business, Innovation and Skills (BIS) (in the context of changes to terms and conditions) it can be difficult to determine whether the reason for a dismissal has taken place *because of* the transfer or *for a reason connected* with it and ultimately it will be a question of facts to be determined by the employment tribunal on a case by case basis.

4.5 Discussion

It is important to note that the Acquired Rights Directive has been interpreted to provide for partial harmonisation only. The inevitable consequence of partial harmonisation is a certain divergence in the level of employment protection offered.[241] As seen in 4.2 the Court in the case of Danmols Inventar specifically considered the interpretation of the term "employee" in the directive and reasoned that the directive had not intended to *"establish a uniform level of protection throughout the [Union] on the basis of common criteria".* It is however worth mentioning that the Court acknowledged that the Commission had thought it would be necessary to establish a common Union definition of the term "employee" and held the view that the term would cover *"anyone who in return for remuneration carried out work on behalf of, and as the subordinate party in a relationship with, another party".* That understanding also appears to have been shared by the plaintiff and the defendant.

[238] Adlercreutz/Mulder, (2007), p. 200.
[239] At the time of writing the requisite period of continuous employment is 1 year for employees employed prior to 6 April 2012 and 2 years for those employed on or after 6 April 2012.
[240] BIS Department for Business, Innovation and Skills, Employment Rights on the Transfer of an Undertaking, A Guide to the 2006 TUPE Regulations for Employees, Employers and Representatives, June 2009, p. 13
[241] Barnard, (2006), p. 622.

Reference was also made to the case of Levin[242] in which the definition of the term "worker" was held to have a Union meaning and as such was not open to the Member States' own interpretations. In that case the Court had reasoned that to allow for anything but a Union definition would have produced a situation where the scope of the term could be decided upon and modified unilaterally by the Member States to the disadvantage of certain categories of persons who could be excluded from the benefits provided by the Treaty without any control by the Union institutions. The rationale was thus that different national interpretations of the term "worker" would result in the Union rules on freedom of movement for workers being frustrated.

As highlighted in the previous chapter, the scope of the national term "employee" is potentially not insignificant between the EU's different Member States. With this in mind it is easy to see how the present situation not only results in a certain divergence between the level of employment protection enjoyed by the employees throughout the EU, depending on which Member State they are from but possibly also a not inconsiderable difference in labour costs for companies established in the different Member States, (in the event of dismissals triggered by a business transfer situation caught by the directive). In light of the extensive and purposive integrationist-economic rationale relied on by the Court in respect of the Union term "worker" in Levin it is my view that a Union definition of the term "employee" in the context of the Acquired Rights Directive would go some way towards reducing the different levels of protection which presently are allowed to exist due to the directive making reference to national interpretations of the term.

As pointed out by Sargeant[243] the Court in the case of Danmols Inventar did however opt out of the purposive approach it had adopted in Levin by deciding that that logic did not apply because the directive only aimed at partial harmonisation, i.e. it only sought to extend the existing national rights relating to unfair dismissal to also include transfer situations. This despite the fact that the reduction of different levels of protection was mentioned as one of the directive's initial aims. On the basis of the reference made to the directive's partial harmonisation it is probably not incorrect to assume that the Court's stance may have been due to a perceived lack of competence and regards being paid to the principle of subsidiarity.

The EU's competence in the field of employment protection as well as the limits imposed by the principle of subsidiarity will be considered further in chapter 6 but before I move on to that I will in chapter 5 consider the potential impact that the CFR, and in particular Article 30, may have on the Court's perception of its jurisdiction in the field of dismissal protection.

[242] Case 53/81 Levin [1982] ECR 1035
[243] Sargeant, M., A Study of the implementation of the Acquired Rights Directive in the United Kingdom and other Member States of the European Community, 1997, p. 227.

5 The Charter of Fundamental Rights

5.1 Introduction

As seen in 2.3.7 the Charter of Fundamental Rights, ("the CFR") was given legal status by the Lisbon Treaty.

In the Preamble to the CFR fundamental rights are stated to result *"from the constitutional traditions and international obligations common to the Member States"* and Article 6(1) of the TEU provides that *"the Union shall recognise the rights, freedoms and principles set out in the [CFR] of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".*[244]

With the inclusion of several employment rights[245] now recognised as fundamental rights, the CFR has been described as ground breaking. As an independent source of rights not limited to national practice it has also been viewed as a potentially significant contribution to the promotion of employment rights and industrial relations in the EU.[246] In the UK the potential effects of the CFR has been considered with much suspicion. The main concerns raised were however not that the CFR per se would create any new rights but that it would be relied on by the courts in future to extend existing rights that have their origin in the EU and which hence could have the effect of altering English law.[247] This is despite the wording of Article 6 CFR which states that the provisions of the CFR shall not extend, in any way, the competences of the Union as defined in the Treaties.

The purpose of this chapter is to consider whether, (as feared by the UK government), the CFR is capable of creating additional employment rights, including an autonomous right for the "workers" not to be "unjustified dismissed". The absence of a Union definition of the term "worker" in the context of the CFR is also considered.

5.2 Additional Employment Protection Rights?

The CFR includes a large amount of specific rights relating to employment, with Article 30 of the CFR specifically referring to a right of protection

[244] Article 6(1) TEU
[245] Articles 27 to 33 CFR
[246] http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/charteroffundamentalrightsoftheeuropeanunion.htm
[247] http://www.euromove.org.uk/index.php?id=7015

against *"unjustified dismissal".* Recognition of the right to protection against unjustified dismissal as a fundamental right in the CFR confirms that a central element in the European social model is continuity in employment and that termination of employment relationships or contracts of employment must be justified. [248]

5.2.1 Article 30 and the absence of a "worker" definition

As already mentioned, Article 30 of the CFR contains protection against unjustified dismissal. In the English language version reference is made to *"every worker"* but other language versions make reference to "employees". Although it is clear that the reference in the CFR is not to the "free movement-worker" it is less clear to whom the CFR is addressed and whether the term is to be defined by the Court of Justice or by the Member States themselves. A literal reading of Article 30 would appear to suggest that all categories of workers, (both private and public sector workers), enjoy the protection. It follows from this that all categories of employees (including those working in atypical employment and otherwise excluded from national employment protection against unfair dismissal) also would fall within this definition and the protective scope of Article 30.[249] If this is correct, it would mean a wider scope than the definition given to the term employee in Sweden and England for the purpose of their national concepts of unfair dismissal and the protection under the Acquired Rights Directive, but would seem to be in line with the fact that the 1989 Charter originally was drafted as a Charter of the rights of citizens to a Charter for workers. Despite this, the reference to "worker" in the CFR must not to be confused with the concept of "worker" in the context of free movement.

Another point to consider is whether Article 30 and the other rights in the CFR represent a minimum floor of rights or not. Different opinions have been expressed on this subject.[250] If the CFR does represent a minimum floor of rights it would seem that a common Union definition would be required in respect of the right not to be unjustified dismissed as well as the concept of the term "worker" in order to ensure that the fundamental rights in the CFR apply universally to all of the Member States' workers. If, on the other hand that is not the case and these concepts were to be defined at national level, the whole concept of "fundamental rights" would be highly questionable as the fundamental rights in the CFR only would be "fundamental" at the discretion and to the extent permitted by the individual Member States.

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[248] Bercusson, (2009), p. 382.
[249] Bercusson, (2009), p. 383.
[250] Contrast the view expressed by Deakin, S. in "*In search of the Social Market Economy",* published in Bruun/Lörcher/Schömann, (2012), p. 41 with the conclusion drawn by Blanke, T.. In the "*The Principle of Subsidiarity in the Lisbon Treaty"*, p. 259 of the same publication.

It is not difficult to envisage a situation where such "discretionary" fundamental rights could be narrowed down by the Member States governments for financial motives. The UK's Conservative governments' current deregulation politics and the recent increase in the eligibility criteria requirement from one to two years' continuous employment is an illustrative example of how the UK government already has managed to successfully reduce the category of protected employees in the context of claims for unfair dismissal.

5.2.2 Effect on national unfair dismissal protection?

Article 30 CFR does not use the word "unfair" or "unlawful" to describe the fundamental right to protection against dismissal that the worker is entitled to. Bercusson has suggested that the justification for the dismissal must be substantial rather than formal. He has contrasted this with the English position where a reason for dismissal needs to fall within one of the "fair" reasons. According to Bercusson, to satisfy Article 30, it will not be sufficient for an employer to show that the reason falls within a "fair" reason – instead he suggests that a dismissal under Article 30 only will be justified where it can be proven that the reason for the dismissal fulfils specific substantive requirements for termination as well as any relevant procedural requirements.[251]

Whether this would have any practical difference in Sweden or England is however not clear as the national unfair dismissal systems in both Sweden and England are far from arbitrary systems where employers can carry out dismissals without substantive grounds. The scope is however admittedly potentially much wider by virtue of the protection in Article 30 being conferred on all "workers" coupled with the absence of any qualification criteria such as continuous employment or an open-ended contract of employment.

5.3 The Future of Fundamental Rights

The Treaty of Lisbon introduced two significant changes to fundamental rights. Firstly the CFR became legally binding and secondly, Article 6(2) of the TEU also provided that the EU would accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

As seen earlier in 5.1 the CFR has been afforded the same legal value as the Treaties and is therefore legally binding on the institutions of the Union, and on the Member States *when implementing Union law*. (What this

[251] Bercusson, (2009), p. 383.

qualification actually means will be considered in 6.3.3). Article 6(3) of the TEU also provided that *"fundamental rights... as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".* It should however be remembered that the Court already since the 1970's, has considered the fundamental rights protected by the ECHR as forming part of the general principles of EU law and already in 2006, (before the CFR became legally binding), referred to it as a source of fundamental rights.[252]

It would therefore appear that the Court of Justice has taken the view that the CFR is one of a range of sources it uses to identify general principles of law. In line with the wording of the Preamble, it has not been interpreted to create new rights, but to simply reaffirm rights as they result from various other sources. So far the indications are therefore that the Court will not, (at least not in the current political climate), seek to use the CFR in a more proactive way just because the CFR has become legally binding. The Member States, and in particular the UK, are (for somewhat different reasons) clearly anxious about the possible future effects of the CFR and have sought to restrain its possible effects in a range of ways. This can be exemplified by the reference in the CFR being altered from citizens to workers[253], by the Member States insisting on the CFR expressly confirming that it does not in any way extend the competences of the EU[254] and by the UK insisting on a Protocol being annexed to the CFR in an attempt to prevent the CFR from creating any new rights applicable to the UK, (unless the UK national law has provided for such rights independently).[255]

In light of this, it has been suggested that it is unlikely that the CFR will have any far-reaching effects although the very existence of a legally binding formal list of rights has been predicted to generate an increase in the number

[252] Nyström, (2011), p. 91.
[253] It should however be noted that Bercusson has commented that the scope of the CFR was reduced insofar as it only applies to workers as not all citizens are workers, but that it also was enlarged as not all workers are citizens.
[254] Article 51(2) CFR provides that "*The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."*
[255] The UK and Poland have a Protocol on the application of the CFR (Protocol No. 30*)*, which states that the UK courts or the Court of Justice may not declare UK law incompatible with the CFR. The Protocol has incorrectly been described as an "opt-out" from the CFR, as Article 1(2) of the Protocol states that "*... nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*" The preamble of the Protocol does however state that the protocol "*…is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally."* With several of the rights in Title IV (Solidarity Title) already having been recognised as general principles of EU law, the CFR does not to extend the ability of the ECJ or any court of the UK, to find that the laws, regulations administrative provisions, practices or action of the UK are inconsistent with the CFR's fundamental rights, freedoms and principles.

of rights-based challenges to the legality of EU or Member State action.[256] Bercusson has shown more enthusiasm and has even suggested that Article 30 may contribute towards harmonisation of European labour law on dismissals. Two arguments have been put forward in support of this:

1) Harmonisation of costs relating to unfair dismissals in the EU would reduce the risk of multinational companies facing restructuring from dismissing worker's where it is financially advantageous.

2) To harmonise (at a minimum level) the fundamental right to protection against unjustified dismissal, including procedural requirements, has been suggested to suit a well functioning European labour market.[257]

In respect of the second argument, I have noted that this appears to presuppose that the "worker" in the CFR would be the same as the "worker" in the context of freedom of movement. The Court's willingness to adopt an autonomous and extensive definition of the term "worker" has however been strictly confined to the policy area of free movement (and the Court's reluctance to expand the concept into other areas has already been seen in chapter 4).[258]

At the same time, the way that the Court has expanded the coverage of free movement law into the private sector should however not be marginalised. The Court has already shown a greater willingness to apply a more extensive interpretation to the term "worker" in the context of discrimination and equality law (which would suggest that the Court may be more willing to expand the concept to the CFR). The case of Allonby[259] was a UK unfair dismissal and sex discrimination case concerning part-time lecturers who did not have their contracts renewed following the restructuring of their employer's establishment. Instead they were rehired through an agency, and expressed to be employed as *"self-employed independent contractors"* under the terms of the new arrangement. The new contracts also meant that they were denied access to a certain pension scheme. It should also be noted that women represented a higher proportion of the part-time lecturers when compared with the group of lecturers that had had their contracts renewed with the employer directly. The Court of Justice did however find that the lecturers fell within the Union definition of "worker". The Court reasoned that term worker within the meaning of ex-Article 141(1) EC (now 157 TFEU) was not expressly defined in the EC Treaty and that it was necessary to apply *"the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty".* Among the objectives of the Union was to promote equality between men and women. Ex-Article 141(1) EC and the principle of equal pay was held to constitute a specific expression of the principle of equality for men and women, which

[256] Syrpis, Phil, The Treaty of Lisbon: much ado...but about what?, Industrial Law Journal, 2008, p. 6-7.
[257] Bercusson, (2009), p. 383.
[258] Ibid, p. 372.
[259] Case C-256/01 Allonby [2004], IRLR 224

formed part of the fundamental principles protected by the legal order of the [Union]. For this reason, the Court reasoned that the term worker had to be given a wide and purposive [Union] meaning and could not be defined by reference to the Member States' national legislation. The Court commented that the provisions of UK law which provided that only "employees" could join the pension scheme would be incompatible with ex-Article 141 and should be disapplied if their application was such that it adversely affected more women than men.

Further, as Nielsen[260] has emphasized, the Treaty provisions on free movement were originally only binding on the Member States and there is still some doubt as to whether the provisions relating to free movement can be relied on against private actors such as employers. The Advocate General in the case of Viking discussed the problem of horizontal direct effect at length in his opinion. From the cases of Viking and Laval it was however made clear that ex-Articles 43 and 49 EC, (now Articles 49 and 56 TFEU) had direct effect which the employers could rely on against the trade unions. It is no news that the criteria which have to be met for a Treaty provision to be capable of creating direct effect is that the provision is sufficiently clear and precise. As Nielsen quite rightly points out, some of the fundamental rights under the CFR are reasonably precise.[261] Nielsen has thus suggested that the most important effect of the Lisbon Treaty on labour law might be the fact that the CFR has been elevated to a higher level in the hierarchy of sources and therefore now can take direct effect on the same conditions as other Treaty provisions, (subject to the particular provision being sufficiently clear and precise).

[260] Nielsen, Ruth, *"Free Movement and Fundamental Rights"*, European Labour Law Journal, Volume 1 (2010), No. 1, p. 31.
[261] Ibid, p. 31-32.

6 The Principle of Subsidiarity – How far does the EU's Competences reach?

6.1 Introduction

It has always been a fundamental principle of EU law that the Union does not enjoy any general competence to legislate and must only "…*act within the limits of the powers conferred on it…".*[262] Therefore, in order for the Union to interfere in a specific field, it will be necessary to establish that the relevant competence exists. Further, the principle of subsidiarity also requires the Union to consider whether it is the appropriate body to act and if so, the Union will be required to make sure that the proposed action is proportionate.

Where the Union has exclusive competence, the Member States cannot act in the field irrespective of whether appropriate legislation exist at Union level or not. The corollary of this is that where the Member States have not conferred power to act on the Union the legal competence remains with the Member States.[263]

It has been suggested that the present state of European integration is revealed by the scope and distribution of competences between the EU and its Member States. The current distribution of competences has however been said to be at a crossroads with the development of the EU.[264]

As seen in chapter 2, the social dimension of the EU has gradually evolved and the EU's competence in the social field has also expanded. However, the expansion of the EU's social competences has often been the subject of criticism, whether from a political point of view (where Member States lose power to act in a policy area which in large is viewed by the public as a national domain) or from an economic point of view (where increased social regulation and intervention by the EU is considered to have a detrimental effect on the economy).[265] This critique is however not without faults and often fails to take account of the fact that the Member States, in a competitive internal market, on a practical level, often are blocked from exercising any national social policy competences that they have, due to the serious threat of social dumping.

[262] Art 5(1) TEU
[263] Barnard, (2006), p. 63.
[264] Bruun/Lörcher/Schömann, (2012), p. 165 f.
[265] Ibid, p. 167.

The aim of this chapter is to seek to establish how far the EU's competences reach in matters relating to employment and also consider the impact of the principle of subsidiarity both in this context as well as in the context of fundamental rights in the CFR.

6.2 The EU's Social Competences

According to the Treaty, the Union's aim is to realise the common objectives of the Member States and to coordinate policies of the Member States which concern the said objectives.[266] As previously mentioned the Union does not have any general competence to act and can therefore only act where the relevant competences have been assigned to it by the Member States. Competences not conferred upon the EU remain with the Member States. This principle is affirmed by Article 5(2) of the Lisbon Treaty.

Prior to the Lisbon Treaty coming into force the EU's competences were subject to extensive scrutinising as there was increased concerns raised over what has been referred to as a *"creeping expansion of competences"*.[267] The result of the Laeken Declaration was that different competences were systematically catalogued in Articles 2-6 TFEU.

6.2.1 Division of Competences after the Lisbon Treaty

In very general terms it can be said that the TFEU distinguishes between three kinds of competences:

1) Exclusive competence[268](which means that only the EU may legislate and adopt legally binding acts);

2) Shared competence[269] (in which the EU has a pre-emptive prerogative to regulate); and

3) Competence for the EU to coordinate, support and complement policies of the Member States.[270]

The areas that fall within the second category are set out in a non exclusive list in Article 4 TFEU and include the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries,

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[266] Ibid, p. 255.
[267] Pollack, M. A., *"The End of Creeping Competence?"*, EU Policy-Making Since Maastricht, Journal of Common Market Studies, Vol.38, No.3, September 2000, pp. 519-38.
[268] Article 2(1) TFEU
[269] Article 2(2) TFEU
[270] Article 2(3), 2(5), 5 and 6 TFEU

environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice and common safety concerns in public health matters. As an area of social policy, employment law is often said to fall within this category. The reason for no specific reference being made to employment has been explained as political.
Instead, a special category[271] of competences relating to economic employment and social policy was included in the TFEU after the category of shared competences but before the category of supporting, coordinating and complementary competences.

Article 2(3) TFEU provides that the Member States shall *"coordinate their economic and employment policies within the arrangements as determined by this Treaty, which the Union shall have the competence to provide"* and Article 5(2) TFEU provides that *"the Union shall take measures to ensure coordination of the employment policies of the Member States".* The legal consequences of a specific competence falling within Article 5 TFEU is however not entirely clear and the exact division between the different categories of social policy competences is further clouded by the many unwritten competences which include the principle of implied powers[272], the concept of effet utile[273], the decisions of the Court of Justice and the limits placed on national legislative action through the Member States' own interpretations of the principle of subsidiarity.[274]

6.2.2 The EU's Competence in Employment related matters

Whether regulation in social matters such as employment primarily is a Member State responsibility or not is a question which has been said to provoke different answers in different Member States. The spectrum is broad and ranges from Member States with more liberal traditions such as the UK which attributes the state a more passive role in social matters to Member States such as France with traditions imposing an obligation on the state to actively intervene in social matters to ensure an *"ordre public social"*. Over the last two decades, a slight but steady change towards more liberal traditions has been observed.[275]

The EU has competence to adopt directives concerning "*protection of workers where their employment contract is terminated*"[276] and, (as seen in

[271] Article 2(3) TFEU
[272] The doctrine of implied powers, developed by the European Court of Justice has expanded the EU's scope of competences to include not only powers expressly laid down in the Treaty but also powers that can be implied from express provisions.
[273] The Court of Justice has used the concept of effet utile to denote that EU law must be capable of having practical effect in the sense that Member States have to give to EU law the same status as they give to their domestic law.
[274] Bruun/Lörcher/Schömann, (2012), p. 245.
[275] Ibid, p. 240.
[276] Article 153(1d) TFEU

chapter 2 and 4), have not hesitated to exercise this competence in the past. However, regulation of dismissal can be both sensitive and complex, which explains why, in order to adopt a directive on the subject, the Council of Ministers "*shall act unanimously*".[277]

Expansion of the competences of the Union in the field of employment is further constrained by the influence of internal market considerations, the need for political consent and the expressed limitations on its powers which comes in via the principle of subsidiarity.

6.3 The Principle of Subsidiarity

The exercise of powers in the EU is regulated by the principle of subsidiarity which determines whether the EU should act or whether the Member States are better placed to take legal action in a specific area.[278] A brief account of the history of the principle of subsidiarity has been included to assist the reader's understanding of the context in which the principle has developed.

6.3.1 ...before the Lisbon Treaty

For many years the role attributed to the principle of subsidiarity was very limited. It was not until the 1980's that the principle of subsidiarity officially became an integral part of Union law with an obligation on the Union to comply with the principle in the exercise of its powers. The success of the principle of subsidiarity has in part been explained by the transformation of the Union from the founding Treaty-based Economic Community towards an *"ever closer political union"* as this inevitably meant that focus was turned to the division of the legal, administrative and judicial competences between the Union and the Member States. The subsidiarity principle was first expressed in the Treaty of Maastricht in an attempt to counterbalance and justify the ongoing process whereby more and more competences were transferred from the Member States to the Union.

Another explanation for the development of the subsidiarity principle which has been ascribed equal importance is the ambiguity of the EU's identity between a Union of States and a Union of Citizens. When the Charter of Fundamental Rights was approved at the summit in Nice 2000 the principle of subsidiarity was revisited as the universal validity that followed with fundamental rights was viewed to potentially have the capacity of undermining the legal sovereignty of the Member States.[279]

[277] Article 153(2) TFEU
[278] Bruun/Lörcher/Schömann, (2012), p. 235.
[279] Ibid, p. 237.

Before the Treaty of Lisbon the definition of the principle of subsidiarity was often criticised for being unclear in respect of the distinction between those competences referred to as "exclusive" and those referred to as "shared", "joint" or "concurrent". In the case of the latter category of competences, it was argued that, although the Member States were assumed to have retained an overall competence, they could only act for as long as the EU had not usurped a particular field of law by passing legislation. The upshot of this argument was therefore that the subsidiarity principle could not apply to any matter covered by the original EEC Treaty and that there were could be no shared competences at all.[280] As seen in 6.2.2 the Treaty of Lisbon did however assist to clarification this.

6.3.2 ...after the Lisbon Treaty

The wording of the subsidiarity principle has not changed much since the Treaty of Maastricht and the principle is now expressed in Article 5(3) TEU:

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

Following the much criticised cases of Viking[281] and Laval[282] the scope of the principle of subsidiarity in employment matters has however been brought into question. Before Viking and Laval, (which were concerned with the fundamental right to strike), strong national labour laws, setting standards above the basic floor of rights guaranteed by the EU through Treaty provisions and directives, were actively encouraged as a counterweight to the effects of the internal market.[283] By associating national labour laws with the internal market concept of distortion of competition, the Court of Justice did however reject the EU's previous approach to national employment law policy and encouraged the Member States to engage in a race to the bottom in respect of their national employment law systems.[284] The starting point for the Court in Viking and Laval was the employer's assertion of its free movement rights. The Court held that restrictions on the exercise of these rights only could be accepted to the extent that they were held to serve a proportionate legitimate interest. In other words – the status of the employer's economic rights were not called into question, while at the same time the exercise of the social rights, stipulated by the EU were made

[280] Ibid, p. 244.
[281] C-438/05 Viking [2007] ECR I-10779
[282] C-341/05 Laval [2007] ECR I-11767
[283] Bruun/Lörcher/Schömann, (2012), p. 22.
[284] Deakin, S, *"Regulatory Competition after Laval"* (2008) Centre for Business Research, University of Cambridge Working Paper No. 364, p. 21 f.

subject to a strict proportionality test. [285] The effects should however perhaps not be exaggerated and it should be noted that the Advocate General as well as the Court of Justice expressed concerns regarding social dumping and that it was realised that unrestrained exercise of economic freedom of movement may threaten existing jobs and working conditions to the extent that it may be characterised as an "abuse" of the exercise of economic freedoms.[286]

6.3.3 ... in the context of Fundamental Rights

The CFR expressly states in Article 51(1) that its provisions are addressed to the institutions of the EU with due regard to subsidiarity and only to Member States, *"when they are implementing Union law"*. [287]

The relevance of evoking the principle of subsidiarity in the context of fundamental rights has also been questioned as the fact that the principle is referred to begs the question of whether the Member States only are bound by fundamental rights to the extent that they do not contradict the principle of subsidiarity. According to Blanke the Union and the Member States are however strictly bound to respect the fundamental rights in the CFR and cannot avoid their obligation by reference to the principle of subsidiarity. He argues that to deny the validity of the fundamental rights in the CFR would destroy their character as universal rights and principles. Blanke has further suggested that fundamental rights should be regarded as *"a minimum floor of rights common to all Member States"* and that the principle of subsidiarity only applies where the Member States' rights go beyond the fundamental rights in the CFR.[288] If this is the correct approach it would be interesting to consider how the CFR would define a minimum floor concept of protection against unjustified dismissal.

Closely linked with the above question is the central problem posed by Article 51(2) CFR which provides that the CFR does not establish any new powers or tasks for the Union. As Bercusson has pointed out the EU does in many cases lack explicit powers to promote many of the rights in the CFR. The effect of fundamental rights being confronted by lack of or limited EU competences is questionable as a situation where fundamental rights are subject to competences would undermine the whole concept of fundamental rights. Bercusson's solution to this paradox is however for the powers of the EU to be expanded by the Court of Justice to the extent necessary to safeguard and enforce the rights in the CFR.[289] Such an expansion could

[285] Syrpis, Phil, The Treaty of Lisbon: much ado...but about what?, Industrial Law Journal, 2008, p. 7 f. and Bruun/Lörcher/Schömann, (2012), p. 19 f.
[286] C-341/05 Laval [2007] ECR I-11767 and C- 438/05 Viking [2007] ECR I-10779
[287] It has sometimes been suggested that the impact of CFR may be restricted by article 51(1) which provides that the CFR is applicable only when Member States are implementing Union law. The Court of Justice has however taken a wider view that EU law applies to all national law which falls within the scope of EU competence.
[288] Bruun/Lörcher/Schömann, (2012), p. 259.
[289] Bercusson, (2009) p. 399.

perhaps include a common EU concept of protection against unjustified dismissal as well as a common definition of the term “worker” for the purpose of the CFR.

7 Analysis and Conclusion

This thesis set out to discuss whether different national interpretations of the term "employee" (in the context of unfair dismissal) sit comfortably with the rationale for the uniform Court of Justice term "worker" and whether this situation can be justified in the light of the potential unlevelling of the internal market and Article 30 of the CFR.

The topic was approached by first considering the rationale for the EU's wide interpretation of the term "worker" (in the context of free movement) and also how the Court's approach has changed as the social dimension and EU employment law has developed. It was seen in chapter 2 how the Court has shown great willingness to extend the uniform EU concept of "worker" to the areas of equality and non-discrimination. The underlying rationales relied on by the Court in these contexts have varied but it does nevertheless not appear that the Court has struggled to justify a uniform definition of the term "worker" irrespective of whether the rationale relied on has been economic or social.

Attention was then turned to the different interpretations given by the national courts in Sweden and England to the term "employee" (for the purpose of their national concepts of unfair dismissal, including the nationally implemented Acquired Rights Directive). As seen in chapter 3, the different tests employed by the national courts are very similar although it would appear that the English courts, in comparison to Sweden, have given the term "employee" a more narrow interpretation and that the Swedish courts have placed less emphasis on the subordination element. In addition, access to protection against unfair dismissal in England is more restricted by various eligibility criteria, such as the requirement of two years continuous employment. In Sweden the only eligibility criterion is the requirement of an open-ended contract of employment. Access to the additional layer of protection in the Acquired Rights Directive is also, due to the directive only applying to those who are *"protected as an employee under national employment law"*, subject to the additional national eligibility requirements mentioned above.

With the new intermediate class of English "workers", it would also appear that the difference in the scope of protection conferred by the Acquired Rights Directive on Swedish and English employees perhaps is greater than initially anticipated. In particular as the English worker, (despite not being able to pass the tests qualifying him/her as an employee in England), perhaps would fit the Swedish definition of "employee" (which has been more extensively interpreted). In comparison to the Swedish and English employees, the English worker enjoys no protection against unfair dismissal. This irregularity coupled with the Acquired Rights Directive's aim to seek to safeguard the interests of the EU's employees against the effects of the

internal market, is what made me question the explanation given by the Court for declining to give the term "employee" a Union meaning.

It has already been seen that the Court of Justice in Danmols Inventar[290] declined the opportunity to give the term "employee" a Union meaning. The rationale for this was explained to be that the Acquired Rights Directive only sought to partially harmonise the protection afforded to the Member States' employees and the Court's purposive approach seen in Levin was hence abandoned. The Court specifically said that the Directive was not "*...intended to establish a uniform level of protection throughout the [Union] on the basis of common criteria."*

I have contrasted the approach taken by the Court in the context of the Acquired Rights Directive with the extensive and uniform definition given to the EU concept "worker" and I find the Court's reasoning in Danmols Inventar difficult to accept. The Acquired Rights Directive was adopted for the purpose of safeguarding the rights of the Union's employees whilst seeking to partially harmonise the level of social protection guaranteed to the EU's employees in an attempt to raise the living and working standards in the EU. Further, the Court of Justice has not been unwilling to assist with the interpretation in respect of the concept of a *relevant transfer*[291] which assists in determining the applicability of the directive. The fact that a uniform interpretation of the concept relevant transfer has been thought necessary to define at EU level, makes it difficult to understand the basis for the Court's justification that the interpretation of the term "employee" should be left to the Member States' discretion. The explanation given of partial harmonisation is no more relevant to the concept of "employee" than to the concept of a "relevant transfer" as both of the concepts are applied to determine the applicability and scope of the directive and thus are capable of affecting labour costs differently depending on the interpretations applied.

Whether the true explanation for the Court in Danmols Inventar declining to give the term "employee" a Union meaning was due to the fact that the Acquired Rights Directive concerned an area of shared competence where the Member States in large had retained competence is impossible to answer although I do not wish to rule it out. With several of the employment rights in the CFR recently having been given the status of fundamental rights, including the right to protection against unjustified dismissal, it is however not impossible that the Court soon may be given an opportunity to consider its jurisdiction in respect of employment protection rights again.

I have discussed the concept of unjustified dismissal in the CFR (which may have the potential of creating direct effect) which affords the right to protection against unjustified dismissal the elevated status of a fundamental right. As a fundamental right, Article 30 has been thought to produce a minimum floor of rights universally applicable to all of the EU's Member States, (without concerns for the principle of subsidiarity). Any other

[290] Case 105/84 Danmols Inventar [1985] ECR 2639
[291] Case 24/85 Spijkers [1986] ECR 1119

interpretation leads to the unacceptable situation of different categories of workers being granted different "fundamental rights" depending on which Member State they reside in (as is currently the position under the Acquired Rights Directive).

As seen in chapter 4, I have queried whether the Court's decision not to interpret the term "employee" for the purpose of the Acquired Rights Directive may have been lack of competence or subsidiarity concerns as employment policy is a highly politically sensitive area of shared competence.

The fact that the CFR (on the face of it) has not established any new powers or tasks for the Union must therefore be considered. Bercusson has pointed out that the EU does in many cases lack explicit powers to promote many of the rights in the CFR. Whether the Court would find itself able to rely on the CFR in order to expand its competences within the employment field therefore remains to be seen. The effect of fundamental rights being put into question due to lack of or limited EU competences has however been described as questionable as such an interpretation would undermine the whole concept of fundamental rights.

There is however also an argument that the CFR has not introduced any rights which did not already exist. (It is on the basis of this argument that the UK's "opt-out" protocol has been said not to carry much weight). However, if this is true, it would mean that the current position, whereby English employees but not English workers are guaranteed protection against unfair and unjustified dismissal is accepted. As previously highlighted this may be at odds with Article 30's elevated status to a fundamental right as it in effect would mean that the Member States would have a discretion as to which workers that they allow the fundamental right in Article 30 to be conferred upon – in the same fashion that the English legislator, with the sanctioning of the Court of Justice's approval, so far has managed to restrict the scope of the Acquired Rights Directive.

Finally, the introduction of Article 30 CFR also raises the question whether a Union concept of unfair or unjustified dismissal should be introduced altogether. It is not my intention to argue for total harmonisation at EU level but I do consider that the concept of unjustified dismissal in Article 30 and the interpretation of the CFR concept "worker" should be given a purposive and universal Union interpretation, (although not necessarily the same definition that the Court has given to the "worker in the context of free movement).

My reason for advocating for a Union concept is that it would provide the EU with a comparative measuring tool which can be used to ensure that all the Member States workers are guaranteed a minimum level of protection

against unjustified dismissal.[292] Without a Union definition there is no minimum standard to measure potential national variations against. In addition, the risk of any further deregulation policies and a continued race to the bottom can hopefully be reduced.

[292] Due to the Acquired Rights Directive having ben implemented at national level, this would automatically also include dismissals which are unfair due to a relevant ”transfer” having taken place.

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