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The Safeguarding of Employees' Rights Arising from Collective Agreements in the Event of Transfers of Undertakings

- Balancing the Tension between Employees' and Employers' Interests

JAEM03 Master Thesis

European Business Law
30 higher education credits

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Term: Spring 2014

ABSTRACT

Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, aims primarily to protect employees from being placed in a less favourable position solely as a result of a transfer of an undertaking. Article 3(3) of the Directive, more particularly, provides that, upon a transfer of an undertaking, the new employer is bound by terms and conditions agreed in collective agreements on the same terms as applicable to the previous employer until the collective agreement terminates, expires or is replaced by another one. This thesis explores the case law of the Court of Justice on Article 3(3) of the Directive, with the aim of analysing how the Court deals with the tension between employees' and employers' interests, inherent in Directive 2001/23/EC, and how those interests are balanced. The Court's balancing of interests is assessed, both in the light of the aim and nature of the Directive and in the light of the Charter of Fundamental Rights. Moreover, it is placed in the broader context of the tension between social and economic rights within the European Union. The main conclusions of this analysis are that, overall, the Court is successful in ensuring a fair balance between employees' and employers' interests in its case law on Article 3(3) of the Directive. One case, however, departs from this conclusion, as the Court fails to give sufficient weight to the employees' rights, whether assessed in the light of the aim of the Directive, the Charter of Fundamental Rights or the increased emphasis on social objectives within the Union.

PREFACE

My interest in employment law stems from my practical experience of working with that area of law as an associate in a law firm in Iceland. Icelandic employment law is, to a large extent, implementation of European legislation and I had, therefore, thought that it would be both practical and interesting to write my master thesis on the topic of European employment law. The idea for the specific topic of transfers of undertakings was born in a conversation with my supervisor, Professor Xavier Groussot, in the fall of 2013 where he brought my attention to this new and interesting judgment from the Court of Justice on the subject. The case of *Mark Alemo-Herron* was the inspiration for this thesis but I decided to focus more broadly on all the cases of the Court which deal with the transfer of employees' rights arising from collective agreements. I must also admit that my participation in the European Law Moot Court Competition 2013-2014, and the profound interest I developed of European constitutional aspects during that journey, influenced my approach of this thesis and may be reflected in the analysis chapter.

I would like to express my gratitude to my supervisor, Xavier Groussot, for his assistance and constructive feedback. Moreover, I feel the need to thank my fellow Moot Court team-mates – Laura, Daniel and Christin - for their moral support throughout this whole process, and my friend, Svanhildur Þorsteinsdóttir, for her helpful comments. Last but not least, I want to thank my husband, Hartmann Elíasson, for his endless support and encouragement and my children, Kristinn Rafn and Halla Karítas, for their patience.

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1. INTRODUCTION

When an undertaking is transferred to a new owner, as a result of a legal transfer or a merger, the situation of the employees of the undertaking changes, as their employer is replaced by a new one. Since this situation could have adverse consequences for the employees, a directive was adopted at European Union ('Union') level, first in 1977, amended in 1998 and consolidated in 2001. Directive 2001/23/EC[1] on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings (the 'Transfer of Undertakings Directive' or the 'Directive') aims to protect employees and to ensure that their rights are safeguarded in the event of a change of employer.[2] The idea is that mere change of ownership of an undertaking should not have any consequences for the employees.[3]

However, the interests of the employees in retaining all their rights in the event of a transfer of an undertaking can collide with the new employer's interests in being able to arrange its own affairs. This is particularly true for employees' rights under collective agreements which the new employer is not part of. Inherent in the Transfer of Undertakings Directive is, thus, a tension between employees' and employers' interests.

The purpose of this thesis is to examine and analyse the case law of the Court on Article 3(3) of the Transfer of Undertakings Directive. Article 3(3) of the Directive provides that in the event of a transfer of an undertaking, the new employer is bound by terms and conditions agreed in collective agreements on the same terms as applicable to the previous employer until the collective agreement terminates, expires or is replaced by another one. The aim is to analyse how the Court of Justice of the European Union (the 'Court of Justice' or the 'Court') deals with the tension between employees' and employers' interests, in the context of collective agreements and whether the Court is successful in balancing those interests. The main focus will be on the case law on Article 3(3) of the Directive, which comprises eight judgments. An overview will, however, also be provided of the main conclusions of the Court's case law on Article 3(1), which deals with employees' rights under individual contracts of employment. Before examining and analysing the Court's case law it is, however, necessary to look at the Transfer of Undertakings Directive itself, both in general terms and

[1] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16.
[2] Recital 3 in the Preamble to the Directive.
[3] Gregor Thüsing, *European Labour Law* (Verlag C.H. Beck 2013) 105.

with regard to the relevant provisions for the purpose of this thesis. Apart from relying on the Court's case law, the content of this thesis will be supported by references to legislative texts, Preparatory Documents and doctrine, in the field of, *inter alia*, Union social policy and employment law.

The second chapter of this thesis contains a general discussion on the Transfer of Undertakings Directive. The historical context of the Directive will be examined and an overview given of the developments of European employment law and social policy (chapter 2.1). The aim and nature of the Directive will be assessed (chapter 2.2) and its amendments traced (chapter 2.3). An overview will also be given of the structure and main provisions of the Directive (chapter 2.4). In the third and fourth chapter the focus will shift towards Article 3 of the Directive more particularly, which provides for the transfer of employment relationships to the new employer. Before the case law on Article 3(3) on rights arising from collective agreements is scrutinised, it is appropriate to look at the main conclusions of the Court's case law on Article 3(1) of the Directive, since those provisions are closely linked (chapter 3). Chapter 4 contains general comments on the provision in Article 3(3) of the Directive (4.1), a short overview of the different rules on collective agreements in the Member States (4.2) and, lastly, summaries of the cases where the Court has dealt with Article 3(3) of the Directive and rights arising from collective agreements (4.3).

In the analysis chapter (chapter 5) the Court's case law on Article 3(3) of the Transfer of Undertakings Directive will be examined and analysed in detail. The main conclusions of the case law will be summed up (chapter 5.1) and an attempt made to answer whether the Court has been successful in balancing the competing interests inherent in the Directive, both in the light of the aim and nature of the Directive (chapter 5.2) as well as the Charter of Fundamental Rights of the European Union[4] (the 'Charter of Fundamental Rights' or the 'Charter') (chapter 5.3). Lastly, the focus will shift to the broader issue of the tension between economic and social rights and the impact of the Lisbon Treaty in that context (chapter 5.4). Finally, in the concluding chapter, the main content and conclusions of the thesis will be summed up.

[4] Charter of Fundamental Rights of the European Union [2010] OJ C83/02.

2. GENERAL COMMENTS ON THE TRANSFER OF UNDERTAKINGS DIRECTIVE

2.1. The Historical Context of the Transfer of Undertakings Directive – Developments of European Employment Law and Social Policy since the Rome Treaty

The original objectives of the European Economic Community were economic in nature. Article 2 of the Rome Treaty of 1957 stated:

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

The common market should consist of free movement of labour, goods, services and capital. Workers were, thus, merely seen as a production factor. The idea was that economic integration through the common market would ensure optimum rate of economic growth and optimum allocation of resources which then would lead to the improvement of living and working conditions.[5] Therefore, the main motivation for social policy provisions lay in presuppositions of economic integration.[6]

The Rome Treaty did contain a Title on Social Policy but its provisions were limited in scope and did not confer legally enforceable rights. The first provision of that Title was Article 117 EEC,[7] which stipulated that the Member States 'agree upon 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'.[8] Moreover, the competence of the Community to adopt secondary legislation in the field of employment law[9] was very limited. The only explicit legal basis was Article 100 EEC,[10] which stipulated that the Council, acting unanimously on a proposal from the Commission, could issue directives for the approximation of provisions that directly affected the establishment or functioning of the common market. Consequently, development of employment law at Community level was

[5] Catherine Barnard, *EC Employment Law* (3rd edn, Oxford University Press 2006) 4-5; Brian Bercusson, *European Labour Law* (2nd edn, Cambridge University Press 2009) 334.
[6] Kaarlo Tuori, 'European social constitution: between solidarity and access justice' in K. Purnhagen and P. Rott (eds) *Varieties of European Economic Law and Regulation* (Springer forthcoming 2014) 26.
[7] A similar provision is now in Article 151 TFEU.
[8] Barnard, *EC Employment Law* (n 5) 4.
[9] The term 'employment law' will be used simultaneously for 'employment law' and 'labour law'.
[10] A similar provision is now in Article 115 TFEU.

only relevant if it was useful for promoting the establishment or functioning of the common market.[11]

There was little development of European social and employment law during the first decade of the common market.[12] The early 1970s, however, witnessed a change of approach, explained in part by social unrest in Western Europe in 1968 and an economic recession in Europe following the twin oil shocks of the 1970s. At the time of the accession of three new Member States, the Heads of State and Government issued a communiqué of the Paris Summit in 1972, noting that the Member States 'attached as much importance to vigorous action in the social field as to the achievement of Economic and Monetary Union'.[13] It became evident that the growth-based ideology of the European Economic Community was not working as expected and that a social dimension was needed. The view was that the Community needed a human face to demonstrate that it was more than a device enabling business to exploit the common market. There were also concerns that the restructuring brought about by the removal of barriers to trade at the European level could be detrimental to individual employees.[14]

This led to the Commission adopting the Social Action Programme in 1974. The programme contained three objectives, i.e. to attain full and better employment in the Community, to improve living and working conditions and to increase both the involvement of management and labour in the economic and social decisions of the Community and also of employees in the life of the undertaking.[15] Quite extensive legislative activity resulted from this Social Action Programme, which was, however, confined to certain areas of employment law, and not the social sphere in the broader sense.[16]

A part of this wave of legislative activity was the adoption of the Transfer of Undertakings Directive of 14 February 1977.[17] Other directives that formed part of this wave and were also intended to address the social consequences of economic change were Directive

[11] Ruth Nielsen, *EU Labour Law* (2nd edn, DJØF Publishing 2013) 59.
[12] Jari Hellsten, *From Internal Market Regulation to European Labour Law*, First Article (Helsinki University Print 2007) 7.
[13] EC Bull. 10/1972, para 6.
[14] Barnard, *EC Employment Law* (n 5) 8-9, 619; Thüsing (n 3) 105.
[15] Council Resolution concerning a Social Action Programme [1974] OJ C13/1.
[16] Barnard, *EC Employment Law* (n 5) 9-10.
[17] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L61/26.

75/129/EEC[18] on collective redundancy and Directive 80/987/EEC[19] that concerned insolvency.[20]

The early 1980s were characterised by general stagnation of economic development and the enthusiasm for developing European employment and social law began to fade. In times of decreasing economic growth and increasing unemployment, the conservative Thatcher government in the UK insisted on strict limits to the growth of Community social policy. It strongly advocated deregulation of the labour markets in order to ensure maximum flexibility of the workforce and enable business to compete in a global market. Although this view was contrary to the stance adopted by the Commission, which did not equate flexibility with deregulation and refused to abandon its commitment to safeguarding the rights of employees, all social policy measures required unanimity in the Council which meant that the UK could veto any proposal to which it was opposed.[21]

A second wave of legislative activity in the field of employment law was facilitated by the Single European Act of 1987, as a number of amendments were made to the legal basis provisions so as to increase the legislative competences of the Community in the field of employment law. The amended provisions represented an important shift in thinking, as they viewed the protection of labour as a value in its own right and demonstrated that harmonisation of labour standard by the Community would merely take the form of setting a floor of basic rights. A part from that, however, the Single European Act made few concessions to those who had argued for adding a social dimension to the single market programme. Furthermore, the deadline for completion of the single market was concerned with the realisation of the four freedoms without any mention being made of social policy.[22]

The lack of a true social dimension of the Single European Act did prompt some concerns about the success of the single market programme and about the detrimental consequences the programme could have on employees. There was a growing recognition that social and economic conditions were intertwined and that economic efficiency had to be balanced by objectives to humanise the market.[23]

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[18] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L48/29.
[19] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L283/23.
[20] Hellsten, First Article (n 12) 7-8; Barnard, *EC Employment Law* (n 5) 619; Thüsing (n 3) 105-106.
[21] Barnard, *EC Employment Law* (n 5) 10; Thüsing (n 3) 5.
[22] Barnard, *EC Employment Law* (n 5) 11-12; Tuori (n 6) 26.
[23] Barnard, *EC Employment Law* (n 5) 12-13.

A step in the direction of a more social dimension was taken with the signing of the Community Charter of Fundamental Social Rights of Workers (the 'Community Social Charter') in 1989. Although it was only adopted as a Declaration of the European Council, with the UK opting out, and lacked free standing legal effect, it did contain 26 social rights which the Member States had the responsibility to guarantee and it did recognise that the same importance should be attached to the social and economic aspects of the European Community. Moreover, the Community Social Charter did prove important for the development of a social dimension, as the Commission adopted a Social Charter Action Programme[24] in order to achieve the objectives set out in the Charter, which led to the adoption of a number of directives in the field of employment law.[25]

The Member States' desire for a social dimension to accompany the single market programme led to the changes brought about by the Maastricht Treaty of 1992.[26] The Agreement on Social Policy, which was annexed to the Social Protocol of the Maastricht Treaty and not incorporated into the Treaty due to resistance by the UK, represented a significant surge in the development of European employment law. The importance of the Agreement on Social Policy lay in the fact that it broadened the scope of Community competence in the social field and increased the areas of qualified majority voting. It, moreover, envisaged a greater role for social partners and helped to rebalance the disequilibrium between the economic and social dimension inherent in the original Rome Treaty.[27]

By the Amsterdam Treaty of 1997, the Agreement on Social Policy was incorporated into the Treaty and a new Employment Title was added.[28] The Commission's attempts during the 1990s to create a better mix between economic and social policies culminated with the Amsterdam Treaty and the inclusion of the Employment Title represented the recognition of increased inter-dependencies between Community economic policy and national social policy.[29] Furthermore, Article 117 EC[30] was revised so as to include a reference to 'fundamental social rights such as those set out in the European Social Charter [of the Council

[24] Commission, 'Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers' COM (89) 568 final.
[25] Barnard, *EC Employment Law* (n 5) 13-15; Tuori (n 6) 26-27.
[26] Bercusson (n 5) 335.
[27] Barnard, *EC Employment Law* (n 5) 18-19; Thüsing (n 3) 6.
[28] Thüsing (n 3) 6.
[29] Catherine Barnard, *EU Employment Law* (4th edn, Oxford University Press 2012) 22-23, 44; Tuori (n 6) 27.
[30] That provision became a new Article 136 EC but is now in Article 151 TFEU.

of Europe] signed at Turin on 18 October 1961 and in the 1989 Community Charter of Fundamental Social Rights'. [31]

For the purpose of social policy the most significant development in the Nice Treaty of 2001 was the adoption of the Charter of Fundamental Rights, which contained in a single document, civil, political, economic and social rights based on, *inter alia*, the European Convention on Human Rights ('ECHR'), the Community Social Charter from 1989 and the Council of Europe's Social Charter from 1961 (the 'European Social Charter'), as well as the constitutional traditions common to the Member States.[32]

Few changes were made to the Employment Title by the Lisbon Treaty of 2009. The main legal basis of secondary legislation in the employment law field can now be found in Article 153 of the Treaty on the Functioning of the European Union[33] ('TFEU'), which is a general rule for enacting employment legislation and enables an extensive harmonisation of national employment law. Other employment law related provisions in the TFEU include the rules on freedom of movement for workers (Articles 45-48 TFEU) and the principle of equal pay for men and women (Article 157 TFEU).[34] The general legislative bases for approximation of laws are Article 114 TFEU, for measures which have as their objective the establishment and functioning of the internal market, requiring merely qualified majority voting, and Article 115 TFEU, for measures which directly affect the establishment or functioning of the internal market, requiring unanimity in the Council.

As for the field of social policy more generally, the Lisbon Treaty made a significant impact by giving the Charter of Fundamental Rights the same legal value as the Treaties. Furthermore, the Lisbon Treaty gave social policy a more prominent role in the values and objectives of the Union. According to Article 2 of the Treaty on European Union[35] ('TEU'), which came in new with the Lisbon Treaty, the values of the Union are human dignity, freedom, democracy, equality, non-discrimination, the rule of law and respect for human rights, pluralism, tolerance, justice and solidarity. Article 3(3) TEU, also a new provision, emphasises the links between the economic and social objectives of the Treaty, stipulating that the Union shall 'work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at

[31] Barnard, *EC Employment Law* (n 5) 23.
[32] Barnard, *EU Employment Law* (n 29) 26.
[33] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.
[34] Nielsen (n 11) 59; Thüsing (n 3) 8.
[35] Consolidated version of the Treaty on European Union [2008] OJ C115/13.

full employment and social progress.' Furthermore, a horizontal social clause was introduced in Article 9 TFEU requiring the Union to take into account 'the promotion of a high level of employment, the guarantee of adequate social protection […]'.[36]

This overview of the development of European employment law and social policy demonstrates the circumstances in which the Transfer of Undertakings Directive was adopted and how the emphasis on social objectives and employees protection has increased steadily since the 1970s.

2.2. The Aim of the Transfer of Undertakings Directive

Prior to the adoption of the original Transfer of Undertakings Directive in 1977, as a part of the Commission's Social Action Programme, the number of mergers and acquisitions at European level had increased.[37] As stated in the Preamble to the Directive, 'economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings'.[38] In an explanatory memorandum attached to the proposal for the original Transfer of Undertakings Directive, the Commission stated:

> Industrial development, both within individual Member States and at Community level, has resulted in a rapid increase in concentrations of undertakings. […]
> Experience has shown that changes brought about in the structure of industrial undertakings as a result of concentrations have often had far-reaching consequences on the social situation of the workers employed by the undertakings concerned and that the legislation of the Member States applicable to such operations did not always take sufficient account of the interest of the workers. […]
> These problems and the need to solve them at Community level have now been acknowledged.[39]

The purpose of the Transfer of Undertakings Directive was, therefore, 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded', as stated in the Preamble to the Directive.[40] The Directive did not govern the level and scope of national employment terms and conditions, but intended

[36] Barnard, *EU Employment Law* (n 29) 27.
[37] Thüsing (n 3) 106.
[38] Recital 1 in the Preamble to the original Directive.
[39] Commission, 'Proposal for Directive of the Council on harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations' COM (74) 351 final/2, 1-2.
[40] Recital 2 in the Preamble to the original Directive. See also the Commission's explanatory memorandum, COM (74) 351 final/2 (n 39) 3.

merely to ensure that the rights of employees which existed under national law prior to the transfer would continue to apply after the transfer. The protection under the Directive was, however, of fundamental importance in ensuring that employees did not lose the enjoyment of their employment rights as a result of the transfer of their employer's business.[41] This aim of the Directive has been confirmed by the Court, which has stated that the purpose of the Directive is to 'ensure, as far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the same terms and conditions as those agreed with the transferor'.[42]

However, recitals 3 and 4 in the Preamble to the original Transfer of Undertakings Directive indicate that the Directive also contained an economic aspect, i.e. the concerns that differences in employment protection between the Member States could have a direct effect on the functioning of the common market. This reflected a tension between the economic and social aims that characterised much of the Commission's Social Action Programme, i.e. the tension between employment protection objectives, on the one hand, and the demands of business in a changing competitive environment and the importance of facilitating restructuring and market integration, on the other.[43]

This dual, economic and social, aim of the Directive is also evidenced by the fact that the legal basis of the Directive was Article 100 EEC, which allowed for approximation of provisions that directly affected the establishment or functioning of the common market, while the Preamble also referred to Article 117 EEC and the need to maintain the improvement of working conditions and standard of living for employees.[44] The Court has also confirmed the Directive's dual aim, by stating that the intention of the legislature was 'both to ensure comparable protection for workers' rights in the different Member States and to harmonize the costs which such protective rules entail for Community undertakings'.[45]

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[41] Síofra O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart Publishing 2002) 242.

[42] Case C-287/86 *Ny Mølle Kro* [1987] ECR 05465, para 12; Case C-324/86 *Daddy's Dance Hall* [1988] ECR 00739, para 9; Joined Cases C-144/87 and C-145/87 *Berg* [1988] ECR 02559, para 12; Case C-362/89 *D'Urso* [1991] ECR I-4105, para 9; Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas* [1992] ECR I-06557, para 21.

[43] O'Leary, *Employment Law at the European Court of Justice* (n 41) 242-243; Hellsten, First Article (n 12) 19; ACL Davies, *EU Labour Law* (Edward Elgar 2012) 220.

[44] Recital 5 in the Preamble to the original Directive. See also the Commission's explanatory memorandum, COM (74) 351 final/2 (n 39) 2-3.

[45] Case C-382/92 *Commission v United Kingdom* [1994] ECR I-02435, para 15. See also Commission, 'Commission Report on Council Directive 2001/23/EC' COM (2007) 334 final, 2, where the aim of harmonisation by the Directive is held to be twofold, i.e. 'to ensure comparable protection of employees' rights in the Member States and to approximate the obligations which the rules of protection place on European undertakings'.

However, despite the fact that an economic aspect is, thus, inherent in the Transfer of Undertakings Directive, the predominant aim of the Directive was, undeniably, protection of employees, as is clear from the Directive's Preamble and Preparatory Documents.[46]

The harmonisation sought by the Transfer of Undertakings Directive was only partial. As stated by the Court in *Danmols Inventar*,[47] the Directive was not intended to 'establish a uniform level of protection throughout the Community on the basis of common criteria'.[48] A wide discretion is, thus, left to the Member States and national courts when implementing and applying the Directive, and national law has a significant role to play, such as in defining key terms of the Directive.[49] Another aspect of the partial harmonisation nature of the Transfer of Undertakings Directive is that it only sets minimum standards, i.e. Member States are free to enact provisions and promote or permit collective agreements more favourable to employees.[50]

2.3. The Amendments to the Transfer of Undertakings Directive

The original Transfer of Undertakings Directive from 1977 was amended by Directive 98/50/EC on 29 June 1998, i.e. after the signing of the Amsterdam Treaty. In an explanatory memorandum attached to the first proposal for Directive 98/50/EC, the Commission stated:

> On a legislative level, the effectiveness of the Directive, in terms of the social protection it guarantees, cannot be denied. The Directive has proved to be an invaluable instrument for protecting employees in cases of corporate reorganization, ensuring peaceful and consensual economic and technological restructuring and laying down minimum standards for promoting fair competition with respect to such changes. It could, however, be argued that the Directive's failure to provide for greater flexibility in the event of transfers of insolvent businesses or of undertakings facing major economic difficulties, as well as its failure to cover explicitly the transnational dimension of corporate

[46] See recitals 2 and 5 in the Preamble to the original Directive and the Commission's explanatory memorandum, COM (74) 351 final/2 (n 39) 3. See also Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law: Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*' (2013) 42 Industrial Law Journal 439.
[47] Case C-105/84 *Danmols Inventar* [1985] ECR 2639, para 26.
[48] See also *Daddy's Dance Hall* (n 42) para 19; *Commission v United Kingdom* (n 45) para 28; Case C-209/91 *Rask and Christensen* [1992] ECR I-05755, para 27.
[49] Barnard, *EC Employment Law* (n 5) 622; Thüsing (n 3) 119. See also *Danmols Inventar* (n 47) para 16; Article 2 of the current Transfer of Undertaking Directive.
[50] Barnard, *EU Employment Law* (n 29) 625; Davies (n 43) 228-229. See also Article 8 of the current Transfer of Undertakings Directive.

> restructuring, may have jeopardized or at least prejudiced the very objectives it was intended to achieve.[51]

According to the Preamble to Directive 98/50/EC, its purpose was to amend the Transfer of Undertakings Directive from 1977 in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of undertakings in economic difficulties and the case law of the Court.[52] The main amendments made to the Transfer of Undertakings Directive by Directive 98/50/EC were clarifying certain terms of the Directive which had proved problematic, such as 'undertaking', 'transfer' and 'employee', permitting flexibility in insolvency procedures, strengthening the legal positions of employees' representatives and putting stricter notification duties in place.[53]

Directive 98/50/EC was adopted on the same legal basis as the previous Directive, i.e. Article 100 EC. Interestingly, though, both the reference to the effect on the functioning of the common market and to Article 117 EEC and social upwards harmonisation in the Preamble to the previous Directive were missing from the Preamble to Directive 98/50/EC. Literally speaking, the Transfer of Undertakings Directive was, therefore, left without a formal tie to the social chapter in the Treaty.[54] However, the Preamble to Directive 98/50/EC did refer to the Community Social Charter from 1989, in particular provisions that stated that 'the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community'.[55]

In October 2001, the Transfer of Undertakings Directive from 1977, as amended by Directive 98/50/EC, was repealed and consolidated through the current Transfer of Undertakings Directive (Directive 2001/23/EC),[56] which was adopted 'in the interest of clarity and rationality' but did not materially change the previous Directive.[57] The current Transfer of Undertakings Directive was adopted on the same legislative basis, i.e. Article 94 EC [previously Article 100 EEC], the reference to Article 117 EC and social upwards

[51] Commission, 'Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, of 8 September 1994' COM (94) 300 final, 1.
[52] Recital 3 in the Preamble to Directive 98/50/EC.
[53] Thüsing (n 3) 106; O'Leary, *Employment Law at the European Court of Justice* (n 41) 280.
[54] Hellsten, First Article (n 12) 37-38.
[55] Recital 1 in the Preamble to Directive 98/50/EC.
[56] Hereinafter, references to the 'Transfer of Undertakings Directive' will refer to this, current, Directive (2001/23/EC) and references will be made to the Articles as they appear in this Directive.
[57] See recital 1 in the Preamble to the current Transfer of Undertakings Directive.

harmonisation was still missing from the Preamble, but the reference to the Community Social Charter remained the same as in the Preamble to Directive 98/50/EC.[58]

2.4. The Structure and Main Provisions of the Transfer of Undertakings Directive

The Transfer of Undertakings Directive applies, according to Article 1(1)(a), where an undertaking or business (or part thereof) is transferred to another employer 'as a result of a legal transfer or merger'. Article 1(2) provides that the Directive shall apply where and in so far as the undertaking or business (or part thereof) to be transferred is situated within the territorial scope of the Treaty. Consequently, the scope of the Directive covers both cross-border and national transfers.

The Transfer of Undertakings Directive establishes essentially a three pillar protection for employees. Firstly, it provides, in Article 3, for the automatic transfer of the employment relationship, with all its rights and obligations, from the transferor[59] to the transferee[60], by virtue of a transfer of the undertaking to another employer. This protection covers both rights arising from individual contracts of employment (Article 3(1)) and rights under collective agreements (Article 3(3)). According to Article 2(1)(d) of the Directive, the term 'employment relationship' is based on the national definition of employee, but Article 2(2) prevents part-time workers, fixed-term workers and temporary workers from being excluded. Secondly, Article 4 of the Directive protects employees against dismissal by the transferor or transferee, subject to the employer's right to dismiss employees for economic, technical or organisational reasons entailing changes in the workforce. Thirdly, the transferor and the transferee are required, under Article 7, to inform and consult the representatives of the employees affected by the transfer.[61]

As already mentioned, the level of protection guaranteed by the Directive is minimum protection, since Member States are free to apply laws, regulations, administrative provisions or collective agreements which are more favourable to employees, as confirmed by Article 8 of the Directive.[62]

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[58] Recital 5 in the Preamble to the current Transfer of Undertakings Directive.
[59] A 'transferor' is defined in Article 2(1)(a) of the Directive as 'any natural or legal persons who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business'.
[60] Article 2(1)(b) defines 'transferee' as 'any natural or legal persons who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business'.
[61] Barnard, *EC Employment Law* (n 5) 621-622; Thüsing (n 3) 119.
[62] Barnard, *EC Employment Law* (n 5) 622.

It should be noted that Article 3, which is the elementary provision of this Directive,[63] has remained largely unchanged since the original Transfer of Undertakings Directive, apart from paragraph 2 of the Article, which came in new with the amending Directive 98/50/EC and allows Member States to adopt measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee. By the amending Directive 98/50/EC, Article 3(2) on rights under collective agreements, hence, became Article 3(3) and the last sub-paragraph of Article 3, which excludes from the scope of the Directive certain benefits arising under supplementary company pension schemes, became Article 3(4), instead of Article 3(3) before.

[63] See e.g. Hellsten, First Article (n 12) 18.

3. THE SAFEGUARDING OF EMPLOYEES' RIGHTS ARISING FROM INDIVIDUAL CONTRACTS OF EMPLOYMENT – ARTICLE 3(1)

The Transfer of Undertakings Directive is one of the most disputed directives in the field of Union social policy, with an extensive case law from the Court of Justice.[64] The EFTA Court has also delivered several judgments on the interpretation of the Directive.[65] A vast part of the case law of the Court of Justice on the Directive has concerned problems of interpretation in relation to the notion of a 'transfer of an undertaking' and the nature of the contractual relations giving rise to a transfer. However, the case law on employees' rights under Article 3 is also extensive.[66]

Due to the close links between Article 3(1) on rights stemming from individual contracts of employment and Article 3(3) on rights stemming from collective agreements, it is appropriate to take a look at the case law of the Court concerning Article 3(1) of the Directive, and the protection afforded to employees more generally, before going into more details on the case law on Article 3(3) of the Directive.

Article 3(1) of the Transfer of Undertakings Directive states:

> The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

The explanatory memorandum attached to the Commission's proposal for the original Transfer of Undertakings Directive from 1977 stipulates, regarding Article 3:

> This provision, which requires the automatic transfer of employment relationships to the transferee, is the core of the proposed Directive. It is designed to prevent the transferee

[64] Amandine Garde, 'Recent Developments in the Law relating to Transfers of Undertakings' (2002) 39 Common Market Law Review 523; Hellsten, First Article (n 12) 17; Gavin Barrett, 'Light Acquired on Acquired Rights: Examining Developments in Employment Rights on Transfers of Undertakings' (2005) 42 Common Market Law Review 1053.

[65] Case E-2/95, *Eidesund*; Case E-3/95, *Langeland*; Case E-2/96, *Ulstein and Røiseng*; Case E-3/96, *Tor Angeir Ask and Others*; Case E-3/01, *Viggósdóttir*; Case E-2/04, *Rasmussen and Others*.

[66] Sylvaine Laulom 'The European Court of Justice in the Dialogue on Transfers of Undertakings: A Fallible Interlocutor?' in Silvana Sciarra (ed), *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart Publishing 2001) 150; Barrett (n 64) 1053-1054.

> from refusing, on the basis of civil law provisions governing transfers, to retain the workers in employment or from concluding an agreement with the transferor to exclude employment relationships from the transfer. In the latter case, the transferor would have no alternative but to give notice to workers affected by such exclusion. Such an outcome would be in conflict with the aims of protection for workers.[67]

In *D'Urso*,[68] the Court established that the contracts of employment or employment relationships existing on the date of transfer of an undertaking between the transferor and the employees may not be maintained with the transferor and are *automatically* transferred to the transferee by the mere fact of the transfer.[69] This is due to the mandatory nature of the Directive and entails that the transfer of the contracts of employment may not be made subject to the intention of the transferor or the transferee, nor the consent of the employees. The transferor is, thus, released from his obligations as an employer by reason of the transfer and the transferee may not obstruct the transfer by refusing to fulfil his obligations.[70] The Member States can, however, provide for joint liability for both the transferor and transferee after the date of the transfer in respect of obligations which arose before the transfer from a contract of employment existing on the date of transfer.[71] Some Member States have adopted some form of joint-liability rule which entails that the transferor continues to be liable for pre-transfer debts with the transferee.[72]

Although the transfer of the employment relationships is automatic and, thus, not subject to the consent of the employees, the employees can refuse to have their employment contracts transferred to the transferee. In *Danmols Inventar*,[73] the Court had held that 'the protection which the directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer' and that in such situations Article 3(1) of the Directive would not apply.[74] In *Katsikas*,[75] the Court stated that the Directive does not oblige the employees to continue their employment relationship with the transferee as such an obligation would jeopardise the

[67] COM (74) 351 final/2 (n 39) 5-6.
[68] *D'Urso* (n 42) paras 12, 20 (emphasis added).
[69] See also *Berg* (n 42) para 13; Case C-305/94 *Rotsart de Hertaing* [1996] ECR 5927, para 18; Case C-478/03 *Celtec* [2005] ECR 4389, para 38.
[70] *Berg* (n 42) para 11; *Rotsart de Hertaing* (n 69) paras 20; *Celtec* (n 69) para 37.
[71] Article 3(1), second sub-paragraph. See also Barnard, *EU Employment Law* (n 29) 605-606; Roger Blanpain, *European Labour Law* (13th edn, Kluwer Law International 2012) 787.
[72] Barnard, *EU Employment Law* (n 29) 606; Thüsing (n 3) 127-128.
[73] *Danmols Inventar* (n 47) para 16.
[74] See also *D'Urso* (n 42) para 11; Joined Cases C-171/94 and C-172/94, *Merckx and Neuhuys* [1996] ECR I-01253, para 33; Case C-399/96 *Europiéces* [1998] ECR I-06965, para 38.
[75] *Katsikas* (n 42) paras 31-33.

fundamental rights of employees to freely choose their employer.[76] However, if the employees voluntarily decide not to transfer, it is for the Member States to determine the fate of the contracts of employment or employment relationships, i.e. whether they are regarded as terminated either by the employees or by the employer or whether they are maintained with the transferor.[77]

Another aspect of the mandatory nature of the Transfer of Undertakings Directive is that employees cannot waive the rights conferred upon them by the Directive.[78] In *Daddy's Dance Hall*,[79] the Court held:

> Since this protection [of employees' rights] is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.
>
> It follows that employees are not entitled to waive the rights conferred on them by the directive and that those rights cannot be restricted even with their consent.[80]

This non-entitlement to waive employees' rights applies even if the disadvantages resulting from a waiver of rights are offset by new benefits in such a way that the employee is not placed overall in a less favourable situation than before.[81] Provided that the minimum standards of the Directive are met, however, the level of employees' protection may be increased. This is also in line with the rule in Article 8 of the Directive, which provides that Member States are allowed to apply or introduce rules which are more favourable to employees.[82]

The fact that the level of employees' protection cannot be curtailed entails that the transferee may not alter the terms and conditions of the employees' rights in connection with the transfer.[83] However, since the Directive is only intended to achieve partial harmonisation, it merely ensures that employees are protected in their relations with the transferee to the same

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[76] See also *Merckx and Neuhuys* (n 74) para 34.
[77] *Katsikas* (n 42) para 35-36; *Merckx and Neuhuys* (n 74) para 35; *Europiéces* (n 74) para 39; Case C-51/00 *Temco* [2002] ECR I-00969, para 36. See also Barnard, *EU Employment Law* (n 29) 612; Nielsen (n 11) 446.
[78] Barnard, *EU Employment law* (n 29) 611; Laulom (n 66) 172.
[79] *Daddy's Dance Hall* (n 42) paras 14-15.
[80] See also *Rotsart de Hertaing* (n 69) para 17; Case C-4/01 *Martin* [2003] ECR I-12859, para 39-40.
[81] *Daddy's Dance Hall* (n 42) para 15. See also Laulom (n 66) 172; Blanpain (n 71) 787.
[82] Fernando Valdés Dal-Ré, 'Transfer of Undertakings: An Experience of Clashes and Harmonies Between Community Law and National Legal Systems' in Silvana Sciarra (ed), *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart Publishing 2001) 185.
[83] Davies (n 43) 238.

extent as they were in their relations with the transferor under national law.[84] Consequently, the transferee is free to alter the employment relationships in a manner unfavourable to employees, to the same extent as national law would have enabled the transferor to do so, provided that 'the transfer of undertaking itself may never constitute the reason for that amendment'.[85] The transferee is, thus, prevented from bringing the transferred employees' terms and conditions into line with those of existing employees when the transfer takes place, although it remains unclear how long the transferee would have to wait. Generally, this test of when the transfer constitutes the reason for the amendments is not clear-cut.[86] It should be noted that it follows from the judgment in *Delahaye*[87] that the public sector seems to benefit from an exception to this rule.[88]

Among other issues that have been dealt with by the Court concerning Article 3(1) of the Transfer of Undertakings Directive is what kind of rights and obligations shall be transferred. The phrase 'transferor's rights and obligations arising from a contract of employment or from an employment relationship' in Article 3(1) has been interpreted broadly by the Court, to encompass, *inter alia*, rights contingent upon dismissal and the grant of early retirement by agreement with the employer.[89] The other side of that coin is that the Court has held that Article 3(4) of the Directive, which excludes from the scope of the Directive certain benefits arising under supplementary company pension schemes, is to be interpreted strictly. The exception in Article 3(4) only applies to the benefits listed exhaustively in that provision and they must be construed in a narrow sense.[90] The Court has also stated that the transfer of the contracts of employment and employment relationships takes place on the date of the transfer of the undertaking and that only rights and obligations of employees whose contracts of employment or employment relationships are in force on the date of the transfer are covered by Article 3(1).[91] Furthermore, the Court has held that in calculating employees' rights of a financial nature, such as termination payment or salary increases, the transferee must take into account the employees' entire length of service.[92]

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[84] *Daddy's Dance Hall* (n 42) para 16; *Rask and Christensen* (n 48) para 27.
[85] *Daddy's Dance Hall* (n 42) para 17; *Rask and Christensen* (n 48) para 28; Case C-343/98 *Collino and Chiappero* [2000] ECR 6659, para 52; *Martin* (n 80) para 42.
[86] Davies (n 43) 238; Barnard, *EU Employment law* (n 29) 607; Barrett (n 64) 1097-1100, 1104-1105.
[87] Case C-425/02 *Delahaye* [2004] ECR I-10823, paras 31-35.
[88] See also Davies (n 43) 238.
[89] *Martin* (n 80) para 30. See also Barnard, *EU Employment Law* (n 29) 605.
[90] Case C-164/00 *Beckmann* [2002] ECR I-04893, paras 29-30. See also Barrett (n 64) 1101-1102.
[91] Case C-19/83 *Wendelboe* [1985] ECR 00457, para 13. See also Blanpain (n 71) 787.
[92] *Collino and Chiappero* (n 85) para 48. See also Barnard, *EU Employment Law* (n 29) 605.

4. THE SAFEGUARDING OF EMPLOYEES' RIGHTS ARISING FROM COLLECTIVE AGREEMENTS – ARTICLE 3(3)

4.1. Generally on Article 3(3) of the Transfer of Undertakings Directive

Article 3(3) of the Transfer of Undertakings Directive stipulates:

> Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms as applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
> Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

The explanatory memorandum attached to the Commission's proposal for the original Transfer of Undertakings Directive from 1977 states that it would be a breach of the right of free association to impose on the transferee a collective agreement to which he is not already party and which has not been declared generally binding. The explanatory memorandum further provides:

> However, in order to prevent the workers losing their terms of employment reached through collective agreements, paragraph 3 attempts to provide a compromise: although the status of a party to any collective agreement is not imposed on the transferee, he shall respect existing terms of employment reached through collective agreements and shall, in the case of collective bargaining agreements of limited duration, respect the terms of employment laid down in the collective agreement up to the end of its period of validity and, in the case of collective bargaining agreements of unlimited duration, for a period of one year.[93]

Although this statement from the Commission is not fully in line with the final text of Article 3 as adopted in the original Transfer of Undertakings Directive, since quite substantial changes were made to the provision during the legislative process, it reveals that Article 3(3) of the Directive provides a compromise and balances the protection afforded to the employees with the interests of the transferees.[94] That balance is achieved by requiring the transferee to respect the terms agreed in existing collective agreements, despite the fact that the transferee

[93] COM (74) 351 final/2 (n 39) 6.
[94] Thüsing (n 3) 122; Davies (n 43) 238-239. See also Opinion of Advocate General Cruz Villalón in Case C-426/11 *Mark Alemo-Herron* [2013] nyr, para 22.

is not a party to that collective agreement and although the transferee is unwilling or unable to take part or be represented in the bargaining forum.[95] That balance is also achieved by confining the transferee's obligation to the period until the collective agreement terminates, expires or is replaced by another collective agreement. Furthermore, Member States are permitted to limit the period for observing terms and conditions in collective agreements, provided that the period shall not be less than one year.[96]

Before examining the Court's case law on Article 3(3) of the Directive it is necessary to address, shortly, the differences in the definition of collective agreements in the Member States.

4.2. Different Rules on Collective Agreements in the Member States

Article 3(3) of the Transfer of Undertakings Directive concerns employees' rights under collective agreements. The definition of collective agreements is, however, left to the national legislation of the Member States, as a European definition of collective agreements does not exist.[97]

The understanding of the term 'collective agreement' varies between the Member States. There are big differences regarding, *inter alia*, the legal regulation of collective agreements with regard to negotiating rights and duties, levels of collective bargaining and the binding effect of collective agreements. The main difference is between continental European collective agreements, on the one hand, and English collective agreements, on the other, concerning the mandatory normative effect of collective agreements. English collective agreements have no mandatory normative effect but only obtain legal effect as an implied term in the individual contract of employment. Furthermore, English collective agreements are not binding as contracts and, hence, have no obligatory or contractual effect. They can be derogated from to the detriment of the employee by express terms in the individual employment contract. Consequently, individual contracts of employment are the basis of the employment and take precedence over collective agreements under English law.[98]

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[95] CMS Employment Practice Area Group, 'Study on the Application of Directive 2001/23/EC to Cross Border Transfers of Undertakings' (2006) 41 <http://ec.europa.eu/social/BlobServlet?docId=2445&langId=en> accessed 20 May 2014.

[96] Second sub-paragraph of Article 3(3). See also Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) para 22.

[97] Hellsten, First Article (n 12) 19; Niklas Bruun and Jari Hellsten, *Collective Agreements and Competition Law in the EU; The Report of the COLCOM-project* (DJØF Publishing 2001) 29.

[98] Nielsen (n 11) 137, 141, 143; CMS Employment Practice Area Group (n 95) 39.

The general pattern in the continental European countries is that collective agreements are binding as contracts and have mandatory normative effect. They cannot be derogated from to the detriment of the employee by individual contracts of employment or unilateral decisions by the employer. Collective agreements are, thus, ranked higher than individual employment contracts. There are, however, differences between the continental countries in the detailed application of these principles.[99]

As a result of these different rules on collective agreements, the effect of Article 3(3) of the Transfer of Undertakings Directive varies according to the understanding of collective agreements in each Member State.

4.3. Case law of the Court on Article 3(3) of the Transfer of Undertakings Directive

Since the adoption of the original Transfer of Undertakings Directive in 1977, the Court has dealt with Article 3(3) of the Directive and the issue of collective agreements in eight judgments, which will be summarised in the following chapters.

4.3.1. The Personal Scope of the Protection

The issue of which employees benefit from the protection provided in Article 3(3) of the Transfer of Undertakings Directive was dealt with in the Court's first judgment on Article 3(3). The case of *Ny Mølle Kro*[100] concerned Mrs Hansen who worked as a waitress in a tavern in Denmark, Ny Mølle Kro, during the summer season of 1983. Before that time, in January 1981, the operation of the tavern had been taken over by Mrs Hannibalsen. The previous employer, Mrs Larsen, had concluded an agreement with the Association of Hotel and Restaurant Employees according to which Mrs Larsen was to comply with the terms of any collective agreement concluded by that association. Mrs Hansen claimed that the remuneration paid to her by Mrs Hannibalsen was lower than the minimum amount to be paid under the collective agreement with which Mrs Larsen had agreed to comply.[101]

The Court was asked, *inter alia*, whether Article 3(3)[102] of the Transfer of Undertakings Directive must be interpreted as obliging the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who were not employed by the undertaking at the time of its transfer. The Court stated that it followed from the

[99] ibid.
[100] *Ny Mølle Kro* (n 42).
[101] ibid, paras 3-5.
[102] Article 3(2) at the time.

purpose and scheme of the Directive that Article 3(3) was 'intended to ensure the continued observance by the transferee of the terms and conditions of employment agreed in a collective agreement only in respect of workers who were already employed by the undertaking at the date of the transfer, and not as regards persons who were engaged after that date.'[103] The Court's answer was, therefore, that Article 3(3) of the Transfer of Undertakings Directive 'does not oblige the transferee to continue to observe the terms and conditions agreed in a collective agreement in respect of workers who were not employed by the undertaking at the time of the transfer.'[104]

It follows from this judgment, that the transferee does not need to extend the collectively agreed working conditions to employees recruited after the transfer.

4.3.2. The Temporal Scope of the Protection

As mentioned above, Article 3(3) of the Transfer of Undertakings Directive obliges the transferee to observe the terms and conditions agreed in any collective agreement binding on the transferor 'until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'.[105] Accordingly, the protection afforded to employees under Article 3(3) is subject to time limitations.

This issue was dealt with in *Juuri*,[106] a case of 27 November 2008. The facts were that Ms Juuri worked from 5 April 1994 as an employee in the staff canteen in Hämeenlinna. The metal industry collective agreement applied to Ms Juuri's employment relationship but on the last day of validity of that collective agreement, i.e. 31 January 2003, the canteen undertaking in Hämeenlinna was transferred from Rautaruukki to Amica. Amica informed Ms Juuri that as of 1 February 2003 the collective agreement for the accommodation and catering sector, binding on Amica, would apply to her employment. Ms Juuri insisted that the metal industry's collective agreement should continue to apply to her. When Amica did not agree to that, Ms Juuri terminated her contract of employment. Ms Juuri brought an action before the Helsinki District Court arguing that her working conditions had become substantially worse as a result of the transfer of the undertaking.[107]

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[103] *Ny Mølle Kro* (n 42) paras 25-26.
[104] ibid, para 27.
[105] Emphasis added.
[106] Case C-396/07, *Juuri* [2008] ECR I-08883.
[107] ibid, paras 10-13.

A part of the first question referred to the Court concerned Article 3(3) of the Transfer of Undertakings Directive and the implications of the fact that the transferee observed the collective agreement, which was binding on the transferor and guaranteed better working conditions for employees, only until the date of its expiry, the result of which was deterioration in working conditions, according to the employee.[108] The Court referred to Article 3(3) of the Directive and stated:

> Thus that provision aims to ensure that, despite the transfer of the undertaking, all the working conditions continue to be observed in accordance with the intention of the contracting parties to the collective agreement. However, that provision cannot derogate from the intention of those parties as expressed in the collective agreement. Accordingly, if the contracting parties have agreed not to guarantee certain working conditions beyond a particular date, Article 3(3) of Directive 2001/23 cannot impose on the transferee the obligation to observe those working conditions after the agreed date of expiry of the collective agreement, as after that date the agreement is no longer in force.
>
> It follows that Article 3(3) of Directive 2001/23 does not require the transferee to ensure that the working conditions agreed with the transferor are observed after the date of expiry of the collective agreement, even though that date coincides with the date on which the undertaking was transferred.[109]

The Court concluded that it was for the referring court to assess the situation at issue in the light of this interpretation of Article 3(3).[110]

This judgment confirms that the minimum protection afforded to employees under Article 3(3) of the Transfer of Undertakings Directive is confined to the duration of the collective agreement in force at the time of the transfer of the undertaking.[111] This same conclusion can be found in other judgments by the Court, such as *Rask and Christensen*,[112] *Martin*,[113] *Werhof*[114] and *Scattolon*.[115]

In *Scattolon*, a case of 6 September 2011, the situation was particular due to the fact that the collective agreement in force at the time of the transfer binding on the transferor did not terminate or expire by reason of a clause in that collective agreement providing for the

[108] ibid, paras 19, 21.
[109] ibid, paras 33-34.
[110] ibid, para 36.
[111] See Barnard, *EU Employment Law* (n 29) 608-609; Nielsen (n 11) 449.
[112] *Rask and Christensen* (n 48) paras, 29, 31.
[113] *Martin* (n 80) para 46.
[114] Case C-499/04, *Werhof* [2006] ECR I-02397, para 29.
[115] Case C-108/10, *Scattolon* [2011] ECR I-07491, para 73.

termination or expiry, but by reason of national legislation which provided for the replacement of that collective agreement with another collective agreement binding on the transferee.

Ms Scattolon had been employed by the municipality of Scorzè since 16 May 1980 as a cleaner in State schools. She worked as a member of the administrative, technical and auxiliary ('ATA') staff of the local authority and was paid on the basis of the collective agreement for the regions and local authorities sector (the CCNL for local authority employees). Pursuant to Italian legislation and its implementing measures, the local authority ATA staff was transferred, as of 1 January 2000, to the services of the State in such a way that the application of the CCNL for local authority employees was replaced by that of the collective agreement in force with the transferee, namely the CCNL for schools. Ms Scattolon was transferred onto the list of State ATA employees and placed on a salary scale corresponding to nine years of service. She subsequently brought an action seeking recognition of the whole of the length of her service.[116]

The second and third questions from the referring court, which the Court examined together, concerned whether Article 3 of the Transfer of Undertakings Directive must be interpreted as meaning that, in order to calculate the remuneration of workers who have been subject to a transfer, the transferee must take account of the length of the service completed by those workers with the transferor.[117]

The Court stated that the working conditions in the collective agreement in force at the time of the transfer can cease to be applicable, even immediately on the date of the transfer. This would apply when one of the situations referred to in the first sub-paragraph of Article 3(3) are present, i.e. the termination or expiry of the collective agreement or the entry into force or application of another collective agreement. The Court, thus, held that it was permissible for the transferee to apply, from the date of the transfer, the working conditions laid down by the collective agreement in force with the transferee. The arrangements chosen for salary integration must, however, be in conformity with the aim of the directive to prevent employees from being placed in a less favourable position solely as a result of the transfer. The Court, hence, stated that the replacement of the conditions which the employees enjoy under the collective agreement with the transferor with those laid down by the collective agreement in force with the transferee cannot have the aim or effect of imposing on the

[116] ibid, paras 28-31.
[117] ibid, para 67.

employees conditions which are, overall, less favourable than those applicable before the transfer. The achievement of the objective of the Directive could then easily be called into question in any sector governed by collective agreement.[118]

The Court then concluded:

> In the light of the above, the answer to the second and third questions is that, where a transfer within the meaning of Directive 77/187 leads to the immediate application to the transferred workers of the collective agreement in force with the transferee, and where the conditions for remuneration are linked in particular to length of service, Article 3 of that directive precludes the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, is not taken into account when determining their starting salary position with the latter. It is for the national court to examine whether, at the time of the transfer at issue in the main proceedings, there was such a loss of salary.[119]

This judgment must be understood in such a way that a collective agreement in force at the time of the transfer of an undertaking can 'terminate' or 'expire', within the meaning of the first sub-paragraph of Article 3(3) of the Directive, by national legislation or its implementing measures which provide for the replacement of that collective agreement by another collective agreement binding on the transferee. However, in order to prevent the protection under Article 3(3) from being circumvented, such replacement of collective agreements can only take place if the employees are not placed, overall, in a position which is less favourable than the one immediately before the transfer.[120] In circumstances such as the one in this case, the protection under Article 3(3) of the Directive, thus, goes beyond the time limitations in the provision, since the transferee must still comply with the aim of the Directive, even though the transferor's collective agreement has terminated or expired.

4.3.3. The Types of Employees' Rights Covered by the Protection

In the case of *Beckmann,* the question arose whether the obligations arising on dismissal of an employee from a contract of employment, an employment relationship or a collective agreement binding the transferor are transferred to the transferee, even if those obligations

[118] ibid, paras 73-76.
[119] ibid, para 83. See also Barnard, *EU Employment Law* (n 29) 608-609.
[120] See Barnard, *EU Employment Law* (n 29) 609.

derive from or are implemented by statutory instruments.[121] This case concerned Mrs Beckmann who worked within the English National Health Service ('NHS') under the General Whitley Council conditions of service ('GWC conditions of service'), which were established through joint negotiations between employers and employees in the public sector. On 1 June 1995, the body for which Mrs Beckmann worked was transferred to Dynamco Whicheloe Macfarlane Ltd ('DWM') for whom Mrs Beckmann worked until 6 May 1997 when she was dismissed for redundancy. Mrs Beckmann claimed she was entitled to benefits under a section of the GWC conditions which set out the term of a collective agreement.[122]

In a judgment of 4 June 2002, the Court, having established that the benefits in question did not fall within the scope of the exception in Article 3(4) of the Directive relating to old-age, invalidity or survivor's benefits,[123] went on the state that Articles 3(1) and 3(3) relate to all rights of employees mentioned therein which are not covered by Article 3(4).[124] The Court concluded that 'the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee […], regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.'[125] It was, however, for the referring court to determine, if necessary, whether the benefits at issue arose from Mrs Beckmann's contract of employment or employment relationship with the transferor or from a collective agreement which would bind the transferee.[126]

The conclusion that can be drawn from this judgment is that all employees' rights arising from collective agreements, which are not covered by the exception in Article 3(4) of the Directive, are transferred to the transferee, including those that stem from statutory instruments.

4.3.4. The Possibility for the Transferee to Amend the Terms and Conditions Arising from Collective Agreements

The Court has been asked to clarify whether and to what extent the transferee is allowed to amend the terms and conditions of the employment arising from collective agreements.

[121] *Beckmann* (n 90) para 33.
[122] ibid, paras 8-9, 14-16.
[123] ibid, paras 29-32. See chapter 3.
[124] *Beckmann* (n 90) para 37.
[125] ibid, para 40.
[126] ibid, para 39.

The case of *Rask and Christensen,* of 12 November 1992, concerned the issue of whether the transferee is allowed to make changes to the time and composition of the payment of salaries to the employees. The plaintiffs in the main proceedings, Rask and Christensen, were employed by Philips in Denmark in one of its four canteens and, as from 1 January 1989, by ISS, which took over the management of the four canteens on that date. Proceedings between the plaintiffs and ISS arose out of changes made unilaterally by ISS in the day on which the wages were paid and in items going to make up those employees' wages.[127]

One of the questions asked to the Court was whether it was incompatible with Article 3(3)[128] of the Transfer of Undertakings Directive to alter the time when wages are paid to the employees and/or to alter the composition of the employees' wages if it is otherwise provided that the total amount of the wages remains unchanged.[129] The Court reformulated this question as to concern Article 3 of the Directive as a whole, and not only Article 3(3).

With reference to *Daddy's Dance Hall*[130] the Court held that, under Article 3(1), the terms and conditions of the contract of employment or employment relationship relating to wages can be altered by the transferee, in so far as the applicable national law allows such alterations to be made in situations other than the transfer of an undertaking. Such amendments are, however, precluded if made by reason of the transfer, even if the total amount of wages remains the same, i.e. even if the overall situation is not unfavourable for the employee.[131] The Court then added that, under Article 3(3) of the Directive, 'the transferee is also bound to continue to observe the terms and conditions of employment agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'.[132] It is, however, for the national court to assess, the extent, under national law, of the transferor's obligations, whether they arise under a contract of employment, an employment relationship or a collective agreement.[133]

The part of the Court's reasoning in this judgment that concerns Article 3(3) of the Directive is neither detailed nor clear, but this case should be read in conjunction with the case of *Martin*, a case of 6 November 2003, which sheds brighter light on the possibility for the

[127] *Rask and Christensen* (n 48) paras 3-7.
[128] Article 3(2) at the time.
[129] *Rask and Christensen* (n 48) para 10.
[130] *Daddy's Dance Hall* (n 42) para 17.
[131] *Rask and Christensen* (n 48), paras 28, 31. See chapter 3.
[132] *Rask and Christensen* (n 48), paras 29, 31.
[133] ibid, para 30.

transferee to change the terms and conditions arising from collective agreements under Article 3(3) of the Directive.

In *Martin*, a nursing college was transferred from the English NHS to South Bank University ('SBU'). The employees in question had enjoyed the benefits of the GWC conditions of service, including those relating to early retirement, as was stated in their employment contracts. SBU sought to change the terms of the retirement scheme in order to bring them into line with the terms offered to its other employees.[134]

By its fourth question the referring court asked whether an employee may agree to forego entitlements to early payment of pension and retirement lump sum and/or the annual allowance and lump sum compensation, even though the terms of early retirement offered by the transferee do not provide the same benefits and that employee became a member of the transferee's retirement scheme upon the transfer of the undertaking.[135]

The Court began by confirming its previous rulings concerning the possibility of the transferee to change the employment relationships in a manner unfavourable to employees,[136] but then found that in this case the alteration of the early retirement terms was connected to the transfer and any consent given by employees to such an alteration was, therefore invalid in principle.[137] It then went on to state that the referring court would need to assess the effect of the particular circumstance that the relevant section of the GWC conditions of service was the product of a collective agreement.[138] The Court noted the fact that Article 3(3) merely requires the transferee to observe the terms and conditions in collective agreements for a certain period of time,[139] and then concluded:

> Therefore, the answer to the Employment Tribunal's fourth question must be that Article 3 of the directive precludes the transferee from offering the employees of a transferred entity terms less favourable than those offered to them by the transferor in respect of early retirement, and those employees from accepting those terms, where those terms are merely brought into line with the terms offered to the transferee's other employees at the time of the transfer, unless the more favourable terms previously offered by the transferor

[134] *Martin* (n 80) paras 18-25.
[135] ibid, paras 26, 36.
[136] See chapter 3 and *Rask and Christensen* (n 48) above.
[137] *Martin* (n 80) paras 42-45.
[138] ibid, para 46.
[139] ibid, paras 46-47.

> arose from a collective agreement which is no longer legally binding on the employees of the entity transferred, having regard to the conditions set out in [Article 3(3)].[140]

This judgment must be understood as meaning that the possibility for the transferee to change the terms and conditions of the employment relationship are the same under Article 3(3) as under Article 3(1) of the Directive,[141] during the period in which the transferee is bound by the collective agreement in force at the time of the transfer. After the expiry of that period, the employees lose their rights under Article 3(3) and the transferee can amend the terms and conditions of the employees' rights that derive from collective agreements.[142]

In this context, the case of *Scattolon*, is also worth mentioning. As discussed above, the Court found in that case that the collective agreement of the transferor could be replaced by the collective agreement of the transferee upon transfer by national legislation, as long as such replacement does not have 'the aim or effect of imposing on those workers conditions which are, overall, less favourable than those applicable before the transfer'. Rather than being seen as amending the rule that no contractual variations are possible in connection with the transfer, irrespective of whether the amendments lead to a more favourable overall position for the employees, this judgment must be understood as dealing more with the temporal scope of the protection in Article 3(3) of the Directive. As noted above, the transferee is in principle free to alter the terms and conditions of the employment relationship as he wishes when the protection under Article 3(3) has terminated or expired. *Scattolon* must be seen as providing for an exception to that rule, since the transferee must still, in the circumstances such as the one in that case, comply with the aim of the Directive and not provide, overall, less favourable conditions.

4.3.5. Static versus Dynamic Incorporation Clauses

Two of the Court's cases dealt with the question whether clauses in contracts of employment referring to collective agreements can be given a dynamic interpretation, as comprising also future collective agreements, or whether the interpretation must be static, meaning that the transferee cannot be bound by future collective agreements. The circumstances of those cases and the questions asked by the referring courts were, however, different among the two cases.

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[140] *Martin* (n 80), para 48.
[141] See chapter 3 and *Rask and Christensen* (n 48) above.
[142] See Barnard, *EU Employment Law* (n 29) 609.

In *Werhof*, a judgment of 9 March 2006, the claimant in the main proceedings, Mr Werhof, was employed by DUEWAG AG on 1 April 1985. According to his contract of employment, the employment relationship was to be governed by a collective agreement concluded between the North Rhine-Westphalia Metal and Electrical Industry Federation ('AGV') and the Trade Union for the Metal Industry ('IG Metall'), but DUEWAG AG was a member of the AGV. On 1 October 1999 the part of the business in which the claimant was employed was transferred to the defendant in the main proceedings, Freeway Traffic Systems GmbH & Co. KG. The defendant was not a member of any employers' association which concluded collective agreements. IG Metall and AGV concluded a new collective agreement on 23 May 2002 on which the claimant based his claim for an increase in the wage rate and an additional payment.[143]

By its first question, the referring court asked, essentially, whether Article 3(1) of the Transfer of Undertakings Directive must be interpreted as meaning that, where an undertaking is transferred and a contract of employment refers to a collective agreement to which the transferor is a party but not the transferee, the transferee is not bound by collective agreement subsequent to the one in force at the time of that transfer.[144]

The Court began by noting that under the Directive employees enjoy special protection, on transfer of an undertaking, designed to prevent the erosion which could result from an unconditional application of the principle of freedom of contract.[145] According to the Court, the clause in the claimant's contract of employment that referred to a collective agreement was covered by Article 3(1) of the Directive and, consequently, the rights and obligations arising from that collective agreement were automatically transferred to the transferee, even if he was not a party to any collective agreement. The Court further stated that, since a clause referring to a collective agreement cannot have a wider scope than the agreement to which is refers, account also had to be taken of Article 3(3) of the Directive, which contains limitations to the principle that the collective agreement referred to by the contract of employment is applicable.[146]

The Court held that the wording of Article 3(3) of the Directive does not in any way indicate that the Union legislature intended for the transferee to be bound by collective agreements other than the one in force at the time of the transfer, as the objective of the Directive is

[143] *Werhof* (n 114) paras 6-12.
[144] ibid, para 17.
[145] ibid, paras 23-24.
[146] ibid, paras 27-28.

merely to safeguard the rights and obligations of employees in force on the day of the transfer. The Court then added that 'although in accordance with the objective of the Directive the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his operations, cannot be disregarded.'[147] With reference to the fundamental right not to join an association, protected under Article 11 ECHR and in the Union legal order, the Court found that it could not be maintained that a contractual clause referring to a collective agreement must necessarily be dynamic, in the meaning that future collective agreements would apply to a transferee who is not party to the collective agreements.[148] The Court's answer to the first question was, thus, that:

> Article 3(1) of the Directive must be interpreted as not precluding, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.[149]

This judgment entails that a static interpretation of a contractual clause that refers to a collective agreement, meaning that the transferee is not bound by future collective agreements, is *not precluded* by the Directive.[150] That does not say anything about whether such static interpretation is *required* and a dynamic interpretation *precluded* by the Directive in all circumstances.[151] It is also worth noting that although the question from the referring court, and consequently also the answer by the Court, concern interpretation of Article 3(1) of the Directive, that interpretation is also affected by Article 3(3) of the Directive and the matter is highly relevant in relation to the issue of collective agreements.

In the recent judgment of *Mark Alemo-Herron*,[152] of 18 July 2013, the Court was faced with the issue of whether dynamic clauses incorporating future collective agreements are *allowed*,[153] which represent the other side of the coin from the issue dealt with in *Werhof*. The facts of *Mark Alemo-Herron* were that Mark Alemo-Herron and his colleagues were employees in the leisure department of Lewisham London Borough Council ('Lewisham')

[147] ibid, paras 29, 31.
[148] ibid, paras 33-36.
[149] ibid, paras 37.
[150] Emphasis added. See Barnard, *EU Employment Law* (n 29) 609; Nielsen (n 11) 448-449.
[151] Emphasis added.
[152] Case C-426/11 *Mark Alemo-Herron* [2013] nyr.
[153] Emphasis added.

and benefitted from the terms and conditions negotiated by the NJC, the local government collective bargaining body. In accordance with UK rules on collective agreement, the agreements negotiated by the NJC were not binding as a matter of law but as a result of a contractual term contained in the relevant contracts of employment, which provided that the employees' terms and conditions would be 'in accordance with collective agreements negotiated from time to time by the [NJC] […]'. In 2002, Lewisham contracted out its leisure services to a private sector undertaking, CCL Limited. At that time the NJC agreement from 1 April 2002 to 31 March 2004 applied. In May 2004, the leisure department activities were transferred to Parkwood Leisure Ltd. Being also a private sector undertaking, Parkwood did not and could not participate in the NJC. In June 2004 the NJC reached a new agreement, with retrospective effect from 1 April 2004, which was to continue in force until 31 March 2007. Parkwood refused to grant the employees the pay increase agreed within the NJC for the period from April 2004 to March 2007, concluding that the new agreement was not binding on it.[154]

Noting that under domestic contract law the transferee could be bound also by subsequent collective agreements, the referring court asked the Court three questions, which were examined together, concerning the issue whether Article 3 of the Directive must be interpreted as precluding a Member State from providing that dynamic clauses referring to collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee.[155]

The Court referred to its conclusion in *Werhof* and then to Article 8 of the Transfer of Undertakings Directive, which allows for national law or collective agreements that are more favourable to employees. It was undisputed that the clauses in the employment contracts of Mark Alemo-Herron and his colleagues that referred to collective agreements negotiated and agreed after the date of the transfer, providing dynamic contractual rights, were more favourable to the employees.[156] The Court then stated:

> However, Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other.

[154] *Mark Alemo-Herron* (n 152) paras 9-16.
[155] ibid, paras 19-20.
[156] ibid, paras 22-24.

> More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.[157]

The Court found that a dynamic clause referring to future collective agreements that were intended to regulate working conditions in the public sector would be liable to limit considerably the room for manoeuvre necessary for a private transferee to make necessary adjustments and changes following a transfer from the public to the private sector and would, thus, be liable to undermine the fair balance between the interests of the transferee and the employees.[158]

The Court furthermore stated that the provisions of the Directive must be interpreted in a manner consistent with the Charter of Fundamental Rights, in particular Article 16, which lays down the freedom to conduct a business. According to the Court, the freedom to conduct a business covers, *inter alia*, the freedom of contracts and entails that 'the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity'. The Court held that since the transferee in this case was unable to do so, the transferee's contractual freedom was seriously reduced to the point that such a limitation was liable to adversely affect the very essence of its freedom to conduct a business.[159] The answer provided by the Court was, thus:

> Having regard to all the foregoing, the answer to the three questions referred is that Article 3 of Directive 2001/23 must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of transfer.[160]

It follows from this judgment that dynamic incorporation clauses are precluded, despite being more favourable to employees, if the transferee is unable to participate in the negotiation process of the future collective agreements. The conclusions to be drawn from *Werhof* and *Mark Alemo-Herron* are, therefore, that static incorporation clauses are not precluded by

[157] ibid, para 25.
[158] ibid, paras 27-29.
[159] ibid, paras 30-35.
[160] ibid, para 37.

Article 3(3) of the Transfer of Undertakings Directive, whereas dynamic incorporation clauses are precluded, when the transferee cannot participate in the negotiation process of the future collective agreements.

5. ANALYSIS OF THE COURT'S CASE LAW ON ARTICLE 3(3)

5.1. The Main Conclusions of the Case law

The main conclusions of the Court's case law on Article 3(3) of the Transfer of Undertakings Directive can be summed up as follows. The personal scope of the protection afforded to employees under Article 3(3) only covers workers who were employed by the undertaking in question at the time of the transfer.[161] The temporal scope of the protection in Article 3(3) is confined to the duration of the collective agreement in force at the time of the transfer of the undertaking, i.e. 'until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'.[162] However, if the termination or replacement of the collective agreement takes place by reason of national legislation, such replacement can only take place if the employees are not placed, overall, in a position which is unfavourable compared with the situation immediately before the transfer.[163]

As regards the material scope of the protection afforded to employees under Article 3(3) of the Directive, it should be mentioned, firstly, that all employees' rights arising from collective agreements, which are not covered by the exception in Article 3(4) of the Directive, are transferred to the transferee, including those that stem from statutory instruments.[164] Secondly, the transferee has the same possibility to amend the terms and conditions arising from collective agreements under Article 3(3) as he has under Article 3(1) of the Directive, i.e. in so far as national law allows for such alterations and provided that the transfer itself does not constitute the reason for the amendments.[165] However, this only applies during the period in which the transferee is bound by the collective agreement in force at the time of the transfer, since after the expiry of that period the transferee is free to amend the terms of conditions of the employees' rights that derive from collective agreements.[166] Lastly, static incorporation clauses, i.e. clauses in contracts of employment which refer only to the collective agreement in force at the time of the transfer, are allowed under Article 3(3) of the Directive, whereas dynamic incorporation clauses, i.e. clauses in contracts of employment

[161] *Ny Mølle Kro* (n 42). See chapter 4.3.1.
[162] *Juuri* (n 106). See chapter 4.3.2. See also the second sub-paragraph of Article 3(3) of the Directive according to which Member States are permitted to limit that period of protection as long as it is not less than one year.
[163] *Scattolon* (n 115). See chapter 4.3.2.
[164] *Beckmann* (n 90). See chapter 4.3.3.
[165] *Daddy's Dance Hall* (n 42). See chapter 3.
[166] *Martin* (n 80). See chapter 4.3.4.

which refer also to future collective agreements, are precluded, in situations when the transferee cannot participate in the negotiation process of the future collective agreements.[167]

Most of the Court's conclusions discussed above seem quite straightforward and unsurprising. Personal and temporal limitations are put on the transferee's obligations and leeway is given to the transferee to amend terms and conditions of the employment relationship, since the Directive does not cover situations which are not connected with the transfer. At the same time, however, the Court is aware of the primary aim of the Directive to protect employees from being placed in a less favourable position solely as a result of the transfer. In pursuing that aim, the Court makes clear that the protection afforded under the Directive cannot be circumvented by providing for a replacement of collective agreements, without respecting the aim of the Directive. Furthermore, the Court gives a broad meaning to the employees' rights under Article 3(3). These conclusions all contain some kind of balancing and, taken as a whole, they seem to illustrate a fair balance between preserving the aim of protecting employees and not putting unreasonable burdens on the transferee.

There are, however, two judgments on Article 3(3) of the Directive where the Court makes specific reference to the need to balance the tension between the interests of the employees and the transferee. *Werhof* and *Mark Alemo-Herron* are of particular interest in this context and will be dealt with in more detail in the following chapters.

5.2. The Balancing of Interests in the Light of the Aim and Nature of the Transfer of Undertakings Directive

As discussed above in chapter 2.2, the Transfer of Undertakings Directive has a somewhat dual purpose. It is the fruit of the common market thinking, as applied in the 1970s, and the functioning of the common market was the official justification, with Article 100 EEC being the legal basis.[168] It follows, however, from the Directive's Preamble and Preparatory Documents that the predominant aim was protection of employees.[169] It is worth noting that the fact that none of the Court's cases on Article 3(3) of the Directive concerned a cross-border transfer indicates that the importance of the Directive, at least from the perspective of

[167] *Werhof* (n 114); *Mark Alemo-Herron* (n 152). See chapter 4.3.5.
[168] Hellsten, First Article (n 12) 11, 21; Jari Hellsten, *From Internal Market Regulation to European Labour Law*, Fourth (Synthesis) Article (Helsinki University Print 2007) 21.
[169] See recitals 2 and 5 in the Preamble to the original Directive and the Commission's explanatory memorandum, COM (74) 351 final/2 (n 39) 3. See also Prassl (n 46) 439.

Article 3(3), is bigger when it comes to employment protection than with regard to internal market aspects.[170]

There is nothing to indicate that the aim of the Transfer of Undertakings Directive has changed since its adoption in 1977. It is true that the 1990s witnessed a debate on the need for greater flexibility in the Union labour market and that in recent years the Union's focus has been on the 'flexicurity' agenda, which combines employment and income security (employees' interests) with flexibility in labour markets (employers' interests) and emphasises the employability of workers generally, rather than being attached to a particular job with a particular firm.[171] It is also true that that Transfer of Undertakings Directive has been criticised by some for interfering with free enterprise, in particular by severely restricting employers in their ability to restructure their workforce.[172] Nevertheless, despite this criticism and the debates on flexibility and 'flexicurity', the relevant provisions for the purpose of this thesis and the reference to the Directive's aim in the Preamble have remained largely unchanged since the Directive's adoption in 1977. Furthermore, a change of direction or tone cannot be witnessed in the amendments from 1998 and 2001. On the contrary, the Commission stated in a Report from 2007 that it believed that the Directive, nearly 30 years after its adoption, still continued to play a key role in protecting employees' rights.[173] Moreover, it has been held that the Directive in general has followed a logical path of evolution, as the Court has solved problems that have arisen by giving the provisions of the Directive an extensive and teleological interpretation, based on the aim of protecting employees' rights.[174]

It must, therefore, be held that the protection of employees remains the predominant aim of the Transfer of Undertakings Directive still today. However, the dual purpose that is inherent in the Directive, mentioned above, entails that the employment protection objectives of the Directive must be balanced with the need to minimise the disincentives to transferring business in an increasingly integrated European market.[175] Accordingly, although no specific reference is made in the Directive to the need to protect employers,[176] the protection of

[170] See Hellsten, First Article (n 12) 21.
[171] Davies (n 43) 220; O'Leary, *Employment Law at the European Court of Justice* (n 41) 99, 124-126; Ton Wilthagen and Sonja Bekker, 'Flexicurity: Is Europe Right on Track?' in Frank Hendrickx (ed), *Flexicurity and the Lisbon Agenda* (Intersentia 2008) 33.
[172] Barnard, *EC Employment Law* (n 5) 623.
[173] COM (2007) 334 final (n 45) 9.
[174] Hellsten, First Article (n 12) 20; Barnard, *EC Employment Law* (n 5) 621; Davies (n 43) 221.
[175] O'Leary, *Employment Law at the European Court of Justice* (n 41) 243.
[176] Prassl (n 46) 439.

employees under the Directive has its limits and must not put unreasonable burdens on the transferee, in order to encourage the restructuring of business in Europe. As stated in the Commission's Report from 2007:

> By achieving the correct balance between the protection of employees and the freedom to pursue an economic activity, the Directive has made a major contribution to ensuring that numerous restructuring operations in Europe are socially more acceptable.[177]

As noted in chapter 4.1, Article 3(3) of the Transfer of Undertakings Directive attempts to provide a compromise and strives to achieve a balance between the interests of the employees and the transferee. This is done through several employer protective elements, such as the possibility of joint transferor and transferee liability (second sub-paragraph of Article 3(1)) and the potential to limit the applicability of Article 3(3) to one year after the transfer (second sub-paragraph of Article 3(3)).[178] Furthermore, as discussed above in chapter 4.3.2, the protection afforded to employees under Article 3(3) is subject to temporal limitations, i.e. 'until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement' (first sub-paragraph of Article 3(3)).[179]

As already mentioned, the Court has referred to this balancing of interests, in the context of Article 3(3) of the Directive, in two judgments. In *Werhof*,[180] the reference to the balancing was more indirect, as the Court stated that 'although in accordance with the objective of the Directive the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his operations, cannot be disregarded.'[181] In *Mark Alemo-Herron*,[182] however, the Court stated explicitly that the Directive does not aim solely to safeguard the interests of employees but seeks to ensure a fair balance between the interests of employees, on the one hand, and those of the transferee, on the other.[183]

In *Werhof*, Mr Werhof had tried to rely on the Transfer of Undertakings Directive to claim dynamic protection of his rights arising from a collective agreement although his contract of employment did not contain a dynamic clause referring to collective agreements. It is also

[177] COM (2007) 334 final (n 45) 10.
[178] See also chapter 4.1.
[179] See Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 21-22. See also Prassl (n 46) 437.
[180] *Werhof* (n 114) para 31.
[181] See also chapter 4.3.5. above.
[182] *Mark Alemo-Herron* (n 152) para 25.
[183] See also chapter 4.3.5. above.

worth noting that Germany had used the possibility in the second sub-paragraph of Article 3(3) to limit the period of validity of the collective agreement to a maximum period of one year after the transfer. In the light of those circumstances, the Court's conclusion is not surprising. In seeking to strike a balance between the employees' rights and the transferee's freedom to organise its own business affairs, the Court ruled that a static interpretation of a contract clause such as the one in this case was not precluded by the Directive and, consequently, that a dynamic interpretation was not required.[184]

In *Mark Alemo-Herron*, the circumstances were quite different. The employment contracts of Mark Alemo-Herron and his colleagues contained dynamic contractual clauses referring to future collective agreements. The UK had implemented the Transfer of Undertakings Directive by means of the TUPE Regulations from 2006, which incorporated Article 3 of the Directive in substantively identical terms. The UK had, however, not taken advantage of the option in the second sub-paragraph of Article 3(3) of the Directive. The approach that had been taken by national courts, which can probably be explained in part by the flexible nature of the collective bargaining system in the UK,[185] was that transfers could also include dynamic clauses referring to future collective agreements.[186] The Court, however, found that a dynamic incorporation clause referring to future collective agreements in the public sector would be liable to limit considerably the 'room for manoeuvre necessary for a private undertaking to make [the necessary] adjustments and changes' and would be 'liable to undermine the fair balance between the interests of the transferee […] and those of the employees […]'.[187] The Court's conclusion was that the dynamic incorporation clauses were precluded by the Directive.[188]

Although the Court is correct in finding that a fair balance must be struck between the interests of the transferee and the employees, the Court's reasoning seems particularly one-sided. References to the need to ensure that the transferee can make 'the adjustments and changes necessary to carry on its operations' and has the necessary 'room for manoeuvre' are difficult to reconcile with the flexible nature of the collective bargaining system in the UK.

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[184] *Werhof* (n 114) para 37. See also Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 27-31; Davies (n 43) 239; Prassl (n 46) 439.
[185] See chapter 4.2. above.
[186] John McMullen, 'An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) 35 Industrial Law Journal 115-116; Edward Craven, 'Case Comment: Parkwood Leisure Ltd v Alemo-Herron & Ors [2011] UKSC 26' (*UK Supreme Court Blog* 27 June 2011) <http://ukscblog.com/case-comment-parkwood-leisure-ltd-v-alemo-herron-ors-2011-uksc-26/> accessed 20 May 2014. See also Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 34-36.
[187] *Mark Alemo-Herron* (n 152) paras 25-29.
[188] ibid, para 37.

Since collective agreements in the UK do not have their legal basis in the law but in individual contracts of employment and since Article 3 of the Transfer of Undertakings Directive does not provide that the terms and conditions prior to the transfer must be preserved for eternity, nothing seems to prevent the parties from renegotiating the contractual clause that refers to the collective agreement, as long as such amendments are not made in connection with the transfer.[189] The language of the Court also indicates that there is a connection between high disparity in working conditions in a transfer (such as in transfers between public and private undertakings) and less protection for employees.[190] All this does not seem to fit well with the fact that the predominant aim of the Directive is the protection of employees.

What is also interesting about the Court's conclusion that dynamic incorporation clauses were precluded by the Directive is that UK law, as interpreted by the national courts,[191] allowed for dynamic incorporation clauses and, thus, entailed more favourable rights for employees than the Transfer of Undertakings Directive. As already mentioned, such more favourable national provisions are allowed under Article 8 of the Directive and are in line with the partial harmonisation nature of the Directive. That would mean that the Directive should act as a floor (minimum standards) and not as a ceiling (maximum standards) for national regulatory choices.[192] The Court, however, also based its conclusion on the reasoning that the provisions of the Directive had to be interpreted in a manner consistent with Article 16 of the Charter of Fundamental Rights,[193] which precluded an interpretation that would allow for dynamic incorporation clauses. According to the Court, Article 8 of the Directive could not change that conclusion.[194] Interestingly, this entails that the balancing of interests that the Court engages in here is not confined to establishing the minimum standards of protection under the Directive but goes beyond the scope and nature of the Directive to establish the ceiling of the protection that can be provided for employees.

In his opinion in the *Mark Alemo-Herron* case, Advocate General Cruz Villalón adopts a similar approach but with a different method. He first concludes that there is nothing in the

[189] Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) para 36; Prassl (n 46) 440. See also chapters 3 and 4.3.4. above.
[190] Prassl (n 46) 440.
[191] In *Katsikas* (n 42) para 40, the Court confirmed that more favourable national provisions within the meaning of Article 8 of the Directive include their interpretation by national courts.
[192] Hellsten, First Article (n 12) 20-21; Craven (n 186); Prassl (n 46) 444-445. See also Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 23-24.
[193] Issues related to Article 16 of the Charter will be dealt with in the next chapter.
[194] *Mark Alemo-Herron* (n 152) paras 30-37. See also Prassl (n 46) 444-445.

Directive itself that prevents Member States from allowing the transfer of dynamic incorporation clauses,[195] but then goes on to assess whether that conclusions constitutes a breach of fundamental rights. He states that 'even where European Union law expressly gives Member States freedom of action, this must be exercised in accordance with that law', including fundamental rights.[196] He does not mention the balancing of interests explicitly, but his balancing of rights seems to take place within the context of Article 16 of the Charter and not under the Directive as such.

It must also be mentioned that when looking at the Court's case law regarding more favourable national provisions in the context of other Union legislation, the same approach can be found. In *Lindqvist*,[197] which concerned Directive 95/46/EC[198] on the protection of individuals with regard to the processing of personal data, the Court held that nothing 'prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included within the scope thereof, provided that no other provision of Community law precludes it.' Furthermore, in *Rüffert*,[199] the Court struck down national standards exceeding those laid down in Directive 96/71/EC[200] on the posting of workers. The general rule seems to be that Member States are allowed to maintain or introduce provisions which are more favourable for employees, as long as they are compatible with Union primary law, including fundamental rights.[201]

Even though the balancing of interests which the Court claims to engage in *Mark Alemo-Herron* has the effect of circumventing the nature of the Transfer of Undertakings Directive as a partial harmonisation directive setting minimum standards, it must be considered the correct approach that an interpretation of a directive, and consequently also more favourable provisions which the directive allows for, must be compatible with the Charter of Fundamental Rights. The conclusion of such balancing in the light of the Charter is what will be dealt with in the next chapter.

5.3. The Balancing of Interests in the Light of the Charter of Fundamental Rights

[195] Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 20, 39.
[196] ibid, para 47.
[197] Case C-101/01 *Lindqvist* [2003] ECR I-12971, para 98.
[198] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[199] Case C-346/06 *Rüffert* [2008] ECR I-01989, paras 32-35. See also Prassl (n 46) 445.
[200] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.
[201] See Nielsen (n 11) 62.

The Charter of Fundamental Rights became a legally binding instrument on 1 December 2009, when the Lisbon Treaty entered into force.[202] Article 6(1) TEU provides that the 'Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights […], which shall have the same legal value as the Treaties'. The Charter has, thus, been incorporated into the primary law of the Union, following long-drawn-out jurisprudence of the Court of Justice based on the recognition of fundamental rights as general principles of Union law.[203] The Charter embodies in one document civil, political, economic and social rights. According to recital 5 in the Charter's Preamble, the text of the Charter is based on various sources, such as the ECHR, and the social charters adopted by the Union and by the Council of Europe.[204]

Article 51(1) of the Charter stipulates that the provisions of the Charter are addressed to the institutions and bodies of the Union and to the Member States when they are implementing Union law. This undoubtedly covers *Wachauf* type of situations, i.e. the review of Member States measures when implementing Union law. A textual interpretation of Article 51(1) could suggest that the Charter does not apply in horizontal situations. Article 52(1) of the Charter, however, explicitly mentions 'the need to protect the rights and freedom of others', which indicates that the Charter may be applied in horizontal situations, i.e. in relationships between private parties.[205] It can, furthermore, be inferred from cases like *Mangold*[206] and *Kücükdeveci*[207] that fundamental rights appear to be applicable in horizontal situations when linked with the implementation of a Union directive.[208] Many examples can also be found where the Court has, in fact, applied the Charter in horizontal situations, such as e.g. *Erny*,[209] *Scarlet Extended*[210] and *Sky Österreich.*[211]

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[202] Gunnar Thor Petursson, *The Proportionality Principle as a Tool for Disintegration in EU Law: of Balancing and Coherence in the Light of the Fundamental Freedoms* (Lund University 2014) 116; Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights' (2014) 1 Lund University Legal Research Paper Series 2.

[203] Csilla Kollonay-Lehoczky, Klaus Lörcher and Isabelle Schömann, 'The Lisbon Treaty and the Charter of Fundamental Rights of the European Union' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 62; Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 Common Market Law Review 1267.

[204] Petursson (n 202) 117; Síofra O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 317.

[205] Petursson (n 202) 98, 122; Groussot, Pétursson and Pierce (n 202) 6.

[206] Case C-144/04 *Mangold* [2005] ECR I-09981

[207] Case C-555/07 *Kücükdeveci* [2010] ECR I-00365.

[208] Barnard, *EU Employment Law* (n 29) 30; Petursson (n 202) 110.

[209] Case C-172/11 *Erny* [2012] nyr.

[210] Case C-70/10 *Scarlet Extended* [2011] ECR I-11959.

The Transfer of Undertakings Directive governs horizontal situations, i.e. employment relationships between private parties. It follows from the above-mentioned that the Charter can become applicable through the Court's interpretation of the Directive in the context of Member States' implementation of it.[212] The only case on Article 3(3) of the Directive where the Court makes a reference to the Charter is *Mark Alemo-Herron*. It should, however, be mentioned that in *Scattolon*, one question from the referring court concerned Articles 46, 47 and 52(7) of the Charter.[213] Advocate General Bot had a detailed discussion on the applicability of the Charter and the interpretation of Article 47 in his opinion,[214] but the Court did not find it necessary to answer that question.[215]

It is also worth noting that, although no reference was made to the Charter in *Werhof*, presumably since the Charter had not become legally binding at the time, fundamental rights did play a part in the Court's conclusion. The Court stated that secondary legislation must be interpreted in accordance with the general principles of Community law and then referred to Article 11 of the ECHR on the freedom of association, which also includes the right not to join an association.[216] The Court's conclusion that a dynamic interpretation of the contractual clause at issue could not be required was based on the fact that it would mean that the transferee would have been under an obligation to join a representative council, which would have amounted to a breach of Article 11 of the ECHR. Had this ruling been passed today, the Court would probably have referred to Article 12 of the Charter on the freedom of assembly and association, which, according to the Explanations to the Charter, corresponds to Article 11 ECHR.[217] As discussed in chapter 5.2, the balancing undertaken by the Court in this case seems fair. Mr Werhof did not have a dynamic incorporation clause in his employment contract and, in the light of the circumstances of the case, the most natural conclusion was to adopt a static interpretation of the contractual clause, in particular since such a conclusion fully safeguarded the transferee's right not to join an association.[218]

In *Mark Alemo-Herron*, Article 12 of the Charter and the freedom of association was not relevant, as a result of the fact that a duty for the transferee to join an association was by

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[211] Case C-283/11 *Sky Österreich* [2013] nyr. See also Petursson (n 202) 252-253; Groussot, Pétursson and Pierce (n 202) 10.
[212] See Nielsen (n 11) 424.
[213] *Scattolon* (n 115) para 33.
[214] Opinion of Advocate General Bot in *Scattolon* (n 115) paras 110-143.
[215] *Scattolon* (n 115) para 84.
[216] *Werhof* (n 114) paras 32-33. See on the negative freedom of association Nielsen (n 11) 129-136.
[217] See Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/22.
[218] See *Werhof* (n 114) para 35. See also Prassl (n 46) 441.

definition impossible, since a private sector employer could not join the NJC. As stated by Advocate General Cruz Villalón 'the fundamental rights at issue is not the negative aspect of the employer's freedom of association but rather the employer's fundamental right to conduct a business, which is recognised by Article 16 of the Charter'.[219]

Article 16 of the Charter stipulates that the 'freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. Although Article 16 represents the first time the freedom to conduct a business appeared in a legally binding instrument in the Union legal order, it had been given effect to by the Union also prior to the Charter.[220] It follows from the Explanations to the Charter that Article 16 is a codification of the Court's case law and that it is based on a combination of three rights, i.e. the freedom to exercise an economic or commercial activity, the freedom of contract and the right to free competition.[221] Article 16 of the Charter has been applied by the Court in the context of interpreting Union secondary legislation involving balancing of rights at the national level (like in *Mark Alemo-Herron*) but also in situations concerning the validity of Union secondary legislation arising at the national level.[222]

In *Mark Alemo-Herron*, the Court held that the freedom to conduct a business entails that, in the context of Article 3 of the Transfer of Undertakings Directive, the transferee 'must be able to assert its interest effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity'. The Court found that, since the transferee in this case was unable to participate in the collective bargaining body and, thus, unable to do those things, 'the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'. As a result of this Article 3 of the Directive, read in conjunction with Article 8, could not be interpreted as allowing the Member States to provide for the transfer of dynamic incorporation clauses in such situations, as that would be liable to 'adversely affect the very essence of the transferee's freedom to conduct a business'.[223]

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[219] Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 45-46. See also Craven (n 186).
[220] Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14 German Law Journal 1868; Groussot, Pétursson and Pierce (n 202) 3.
[221] Explanations relating to the Charter of Fundamental Rights (n 217) 23. See also Groussot, Pétursson and Pierce (n 202) 3.
[222] Groussot, Pétursson and Pierce (n 202) 10.
[223] *Mark Alemo-Herron* (n 152) paras 33-37.

This conclusion of the Court can be criticised on several points. Firstly of all, it is difficult to see how the very essence of the transferee's freedom to conduct a business would be affected by the transfer of a dynamic incorporation clause and why the transferee should not be able to 'assert its interests effectively in a contractual process to which it is party'. As mentioned above in chapter 5.2, due to the flexible nature of the collective bargaining system in the UK, the transferee should be able to renegotiate the dynamic incorporation clauses with the employees at any time during the term of the employment contract.[224] Moreover, the Court's reasoning is not in line with the ruling in *Sky Österreich*, where the discussion evolved around whether the relevant directive prevented a business activity from being carried out as such.[225] The transferee in *Mark Alemo-Herron* would hardly be prevented from carrying out its business activity as a result of a slight increase in hourly wages provided for in future collective agreements.[226]

It must be held that the approach adopted by Advocate General Cruz Villalón on the issue of Article 16 of the Charter seems more sensible. His suggested conclusion was that Article 16 'does not preclude national legislation that requires the transferee of an undertaking to accept the existing and future terms and conditions agreed by a collective bargaining body, provided that the requirement is not unconditional and irreversible'. Although he states that it is for the national court to make that assessment, his reasoning points to the direction that in this case the requirement would not be unconditional and irreversible.[227]

Another element of the Court's ruling in *Mark Alemo-Herron* which deserves criticism is the fact that the Court seems to approach Article 16 of the Charter as an absolute fundamental right, which it is not.[228] That follows from the wording of Article 16, which subordinates the freedom to conduct a business to 'Union law and national laws and practices', and also from Article 52(1) of the Charter which enshrines the general limitations on the rights in the Charter.[229] Furthermore, the non-absoluteness of Article 16 of the Charter has been confirmed by the Court on many occasions. In *Sky Österreich*, the Court e.g. held that the freedom to conduct a business 'is not absolute, but must be viewed in relation to its social function' and

[224] Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 36, 56. See also Prassl (n 46) 440, 443.
[225] *Sky Österreich* (n 211) para 49.
[226] Prassl (n 46) 443.
[227] Opinion of Advocate General Cruz Villalón in *Mark Alemo-Herron* (n 94) paras 55-58.
[228] Groussot, Pétursson and Pierce (n 202) 14-15.
[229] Filip Dorssemont, 'Values and Objectives' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 55; Usai (n 220) 1870.

'may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest'.[230]

In *Mark Alemo-Herron*, the Court makes no mention of Article 52(1) of the Charter, although Article 3 of the Transfer of Undertakings Directive seems to be able to fit within the scope of the permissible restrictions envisaged in that provision.[231] Nor is there any reference to the fact that Article 16 only recognises the freedom to conduct business 'in accordance with Union law and national laws and practices'. Moreover, the Court fails to view the fundamental right contained in Article 16 of the Charter 'in relation to its social function'. The rights of the employees seem to be forgotten and no balancing of rights takes place.[232]

Since a conflict of two or more fundamental rights should be resolved by striking a fair balance between them,[233] it is interesting to look at whether the employees' rights protected by Article 3 of the Transfer of Undertakings Directive amount to fundamental social rights.

It has become increasingly accepted as a cornerstone of European employment law that rights of individual employees, concerning access to employment, conditions of work and job security, may have a fundamental character.[234] Chapter IV of the Charter, entitled 'Solidarity', contains provisions on individual employment, which are at the heart of employment law in Europe, such as e.g. workers' rights to information and consultation within the undertaking (Article 27), protection in the event of unjustified dismissal (Article 30) and fair and just working conditions (Article 31).[235] The Explanations to Articles 27 and 30 of the Charter make reference to the Transfer of Undertakings Directive, but the rights contained in those provisions are not relevant for the purpose of this thesis.[236] Article 31 of the Charter, however, covers the important issues of health, safety, dignity (paragraph 1) and working time (paragraph 2). It has been argued that the reference to 'dignity' in the text of Article 31(1) of the Charter allows for a broad interpretation of fair and just working conditions, even covering remuneration.[237]

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[230] *Sky Österreich* (n 211) paras 45-46. See also Joined Cases C-184/02 and C-223/02 *Spain and Finland v Parliament and Council* [2004] ECR I-7789, paras 51-52; Case C-544/10 *Deutsches Weintor* [2012] nyr, para 54; Case C-12/11 *McDonagh v Ryanair* [2013] nyr, para 60.
[231] Prassl (n 46) 443.
[232] Groussot, Pétursson and Pierce (n 202) 15.
[233] *Deutsches Weintor* (n 230) para 47; *McDonagh v Ryanair* (n 230) para 62. See also Usai (n 220) 1879.
[234] Bercusson (n 5) 370.
[235] ibid, 9.
[236] Nielsen (n 11) 423.
[237] Dorssemont (n 229) 55-56; Hellsten, Fourth (Synthesis) Article (n 168) 32.

Although it is not entirely certain that the rights of employees under Article 3 of the Transfer of Undertakings Directive can be considered to fall within the scope of Article 31(1) of the Charter, the possibility that the rights in Article 3(3) of the Directive would be seen as principles of European social law has not been ruled out. In *Dominguez*,[238] a case of 24 January 2012, the Court e.g. held that 'the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law', without mentioning Article 31(2) of the Charter in this respect.[239]

In this context, mention should be made of the European Social Charter, adopted by the Council of Europe in 1961 and revised in 1996 (often called the 'social counterpart' of the EHCR) and also of the Community Social Charter. Reference is made to those Charters in Article 151 TFEU, the Preamble to the TEU and the Preamble to the Charter, and they constitute the main sources of the social provisions of the Charter.[240]

The European Social Charter contains provisions on, *inter alia*, the right to just conditions of work (Article 2) and the right to a fair remuneration (Article 4). The Community Social Charter includes a large number of specific rights of individual employment, such as on employment and remuneration (Articles 4-6) and improvement of living and working conditions (Articles 7-9).[241]

Although the Community Social Charter and the European Social Charter are not legally binding, the references to them in primary Union law give them greater weight than soft law normally has.[242] Those Charters, thus, form important tools for interpretation purposes in Union law, and have shown their value as such in the Court's case law.[243] As for the Community Social Charter specifically it has proved to have legal consequences for the interpretation of Union secondary legislation and it has been argued that it supplements the Charter of Fundamental Rights when legislation is adopted covering social issues not

[238] Case C-282/10 *Dominguez* [2012] nyr, para 16.
[239] See also Case C-173/99 *BECTU* [2001] ECR I-4881, para 47; Case C-116/08 *Meerts* [2009] ECR I-10063, para 42.
[240] Dorssemont (n 229) 55-56; Kollonay-Lehoczky, Lörcher and Schömann (n 203) 75, 85; Petra Herzfeld Olsson, 'The ILO Acquis and EU Labour Law' in Mia Rönnmar (ed), *Labour Law, Fundamental Rights and Social Europe* (Swedish Studies in European Law Volume 4, Hart Publishing 2011) 37.
[241] Bercusson (n 5) 370; Nielsen (n 11) 70-71.
[242] Nielsen (n 11) 120; Örjan Edström, 'The Right to Collective Action – in Particular the Right to Strike – as a Fundamental Right' in Mia Rönnmar (ed), *Labour Law, Fundamental Rights and Social Europe* (Swedish Studies in European Law Volume 4, Hart Publishing 2011) 61.
[243] Hellsten, Fourth (Synthesis) Article (n 168) 35-36.

mentioned in the Charter.[244] In this context it is important to note that the Transfer of Undertakings Directive does refer to the Community Social Charter in its Preamble.[245]

In the light of the above-mentioned, it seems odd, to say the least, that the Court in *Mark Alemo-Herron* does not refer to the employees' rights, which are presumably of a fundamental nature, in the context of its interpretation of Article 16 of the Charter, and no balancing of rights takes place.

5.4. The Tension between Social and Economic Rights in the Light of Recent Developments – in Particular the Changes Brought about by the Lisbon Treaty

The previous chapter highlighted the Court's failure in *Mark Alemo-Herron* to engage in a proper balancing of interests and to give sufficient weight to social rights of employees. In that case the tension concerned the (presumably) fundamental *social* (human) rights of employees versus the fundamental *economic* rights of employers (as undertakings). The freedom of movement was not at stake, since no cross-border element was present, and the case did not concern the tension between national interests and the competences of the Union. Rather, *Mark Alemo-Herron* represented a conflict between *social* and *economic* rights in a horizontal, internal situation. In this light, it is appropriate to look at the issue of the tension between economic and social rights and interests in a broader context.

In the past, social policy issues have remained subordinated to economic integration in the Union.[246] Chapter 2.1 of this thesis, however, demonstrates how the emphasis on social objectives and employees protection has increased steadily since the foundation of the European Economic Community. It has been held that the evolution of social policy at Union level comprises ever more rights for individuals and the pro-worker interpretation of those rights by the Court of Justice.[247] The Union is, thus, no longer seen as a predominantly economic organisation and European integration is no longer a purely economic project. On the contrary, the Union has shown that it is an organisation that takes its social dimension seriously, of which European employment law forms a central part, and that has reached a fairly balanced mutual relationship between economic and social factors.[248]

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[244] O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' (n 204) 320; Kollonay-Lehoczky, Lörcher and Schömann (n 203) 64, 75, 85; Olsson (n 240) 40.
[245] Recital 5.
[246] Tuori (n 6) 2.
[247] Barnard, *EU Employment Law* (n 29) 45.
[248] Bercusson (n 5) 5; Hellsten, Fourth (Synthesis) Article (n 168) 88, 90.

In that context, reference must also be made to some of the Court's judgments, which confirm the above-mentioned dedication to social objectives. In *Defrenne II*,[249] a judgment from 1976, the Court found that Article 119 EEC[250] on the principle of equal pay for men and women 'forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty.'[251] In *Albany*,[252] from 1999, the Court emphasised the social policy objectives, found in Article 2 and 3 of the EC Treaty, and held that those were to be given at least equal weight to competition policy objectives.[253] Furthermore, in *Viking*[254] and *Laval*,[255] the Court referred to the social purpose of the Union and found that free movement provisions must be balanced against the objectives pursued by social policy, such as improved living and working conditions, proper social protection and dialogue between management and labour.[256] It is worth noting that it has been argued that teleological interpretation and the dual social and economic aim in the field of social policy has dominated the Court's case law in the field ever since the *Defrenne II* judgment.[257]

It is, thus, clear that the importance of social policy in the Union has increased steadily during the past decades. It has, however, been argued that a decisive breakthrough in terms of social rights was made with the Lisbon Treaty. First of all, the Lisbon Treaty made a significant impact by giving the Charter of Fundamental Rights the same legal value as the Treaties, which entails the recognition of social and employment rights on an equal footing with the economic ones.[258] It has been said that the recognition of the legally binding status of the Charter will inevitably shape Union social and employment law in the future, as it may serve to reinforce the Court's teleological perspective in social and employment cases and influence the Court's balancing of social and economic objectives underpinning much of secondary legislation.[259] To support this view is that fact that the Charter appears to be based on the principle of indivisibility of fundamental rights, putting social, economic, civil and political

[249] Case C-43/75 *Defrenne v SABENA* [1976] ECR 00455.
[250] A similar provision is not in Article 157 TFEU.
[251] ibid, para 10.
[252] Case C-67/96 *Albany* [1999] ECR I-05751.
[253] ibid, para 54. See also Bercusson (n 5) 293.
[254] Case C-438/05 *Viking* [2007] ECR I-10779.
[255] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.
[256] *Viking* (n 254) para 79; *Laval un Partneri* (n 255) paras 104-105. See also Edström (n 242) 70; Tuori (n 6) 10.
[257] O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' (n 204) 321-322.
[258] Barnard, *EU Employment Law* (n 29) 27; Tuori (n 6) 1; Hellsten, Fourth (Synthesis) Article (n 168) 88.
[259] O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' (n 204) 323, 335.

rights on the same level. This can be inferred from the Charter's Preamble[260] and from the mere fact that including economic and social rights in the same document as civil and political rights is a novelty.[261]

However, there are also factors which suggest that the impact of the Charter in the social sphere is less significant than one might otherwise think. The distinction drawn between rights and principles, also reflected in Article 52(5) of the Charter, is said to represent the lesser status of social rights and to limit the possibilities of redressing the imbalance between the economic and social dimension in the Union. Article 52(5) of the Charter, by providing that 'principles' can only give rise to rights in so far as they are implemented by national law or Union law, was intended to ensure that the socio-economic principles, included mainly in the Solidarity Title, could not establish freestanding rights with direct effect.[262] Confusingly, however, neither the Charter nor the Explanations to it distinguish clearly which provisions contain rights and which contain principles and the issue has not been clarified by the Court's case law either.[263] It seems, though, that many of the employment related provisions in the Charter are vague and not directly effective.[264] In that context, reference can e.g. be made to *Association de médiation sociale*,[265] where the Court found that Article 27 of the Charter on the right to information and consultation within the undertaking was not specific enough to have direct effect.[266] On the other hand, it follows from the Court's case law that Article 16 of the Charter must be seen as a directly effective right.[267]

Another factor is that, while the Charter does allow for a stronger protection of social rights, the fact remains that both economic and social rights are now regarded as fundamental. It has even been argued that the Charter, in e.g. Article 15 and 16, has upgraded the economic

[260] Recital 2.
[261] Barnard, *EU Employment Law* (n 29) 28-29; Kollonay-Lehoczky, Lörcher and Schömann (n 203) 74; Dorssemont (n 229) 56.
[262] O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' (n 204) 318-319; Francesco Costamagna, 'The Internal Market and the Welfare State after the Lisbon Treaty' (2011) 4 OSE Paper Series 9.
[263] O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' (n 204) 333; Barnard, *EU Employment Law* (n 29) 28-29.
[264] Nielsen (n 11) 75.
[265] Case C-176/12 *Association de médiation sociale* [2014] nyr.
[266] ibid, para 48. See also Groussot, Pétursson and Pierce (n 202) 6.
[267] This can be inferred from cases such as *Deutsches Weintor*, *Sky Österreich; McDonagh v Ryanair*; and *Mark Alemo-Herron*. See also Groussot, Pétursson and Pierce (n 202) 6.

principles (the fundamental freedoms) to full-fledged fundamental rights. This impacts the balancing of economic and social rights and makes such balancing difficult for the Court.[268]

A second element which supports that the Lisbon Treaty has made a significant impact in the social sphere is that, through the new and amended provisions in Articles 2 and 3(3) TEU and Article 9 TFEU, it gave social policy a more prominent role in the values and objectives of the Union, as mentioned in chapter 2.1.[269] Article 2 TEU, inserted by the Lisbon Treaty, is the first provision that explicitly states the values of the Union in primary law. It comprises values which are relevant for social policy and, interestingly, the internal market or other economic values are not mentioned.[270] Article 3(3) TEU spells out the Union's social objectives and, in defining its economic objectives, refers to their social implications as well. The structure of the provision is said to indicate that the promotion of social objectives is an equally important goal of the Union as the establishment of the internal market.[271] Furthermore, the new reference to a 'social market economy', which is a catch-all expression intended to give simultaneous recognition to social and economic interests, is considered to be of specific importance.[272] Lastly, the new horizontal social clause in Article 9 TFEU requires the Union institutions, including the Court, to assess all their policies, laws and activities in light of the achievement of social goals. It can be said to represent a request to the Court to interpret Union law more in light of social objectives than it has done in the past.[273]

It is true that Articles 2 and 3(3) TEU and Article 9 TFEU do not confer directly effective rights for individuals nor create new competences for the Union, and they will require firm commitment on behalf of the Union. Those provisions are, however, not mere rhetoric, but legal norms that have legal consequences.[274] It has been argued that these provisions,

[268] O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' (n 204) 325; Dorssemont (n 229) 54; Groussot, Pétursson and Pierce (n 202) 16.
[269] Barnard, *EU Employment Law* (n 29) 27-28; Simon Deakin, 'The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy'' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 20, 38.
[270] Nielsen (n 11) 53; Tuori (n 6) 1.
[271] Tuori (n 6) 1; Deakin (n 269) 38-39.
[272] Nielsen (n 11) 56; Costamagna (n 262) 7.
[273] Pascale Vielle, 'How the Horizontal Social Clause can be made to Work: The Lessons of Gender Mainstreaming' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 105, 119.
[274] Dragana Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50 Common Market Law Review 1715; Costamagna (n 262) 14.

combined, may affect the balance between the economic and social dimension of the Union and contribute to a fundamental orientation towards social goals.[275]

In the light of what has been discussed in this chapter, the Court's failure in *Mark Alemo-Herron* to give weight to the social rights of the employees as against the economic right of the transferee becomes even more striking. The Court, in its aggressive interpretation of Article 16 of the Charter, makes no reference to Article 2 TEU, Article 3(3) TEU or Article 9 TFEU and ignores the fact that the Charter now also protects fundamental social rights, thereby failing to comply with the mandatory high level of social protection required after the entry into force of the Lisbon Treaty.[276]

[275] Costamagna (n 262) 5; Vielle (n 273) 105.
[276] See Groussot, Pétursson and Pierce (n 202) 15.

6. CONCLUSIONS

In this thesis the case law of the Court on Article 3(3) of the Transfer of Undertakings Directive has been scrutinised with the aim of assessing how the Court has managed to balance the interests of employees and employers (transferees) in the event of transfers of undertakings. Overall, the Court appears to have succeeded in reaching a fair balance between those competing interests inherent in the Directive. The obligations of the transferees contain reasonable limitations concerning which employees are protected and for how long. Furthermore, a leeway is given to the transferees to make amendments to the terms and conditions of the employment relationship, which are not connected with the transfer, and a dynamic interpretation is not required of static incorporation clauses. At the same time, however, the Court is fully aware of the importance of respecting the predominant aim of the Directive, i.e. to protect employees from being placed in a less favourable position solely as a result of the transfer.

The judgment in *Mark Alemo-Herron*, however, does not fit this description of the Court's case law as it, in the words of Prassl, 'constitutes a radical break with the existing regime' under the Directive.[277] The Court's judgment in *Mark Alemo-Herron* is flawed in many respects and can be criticised on many grounds.

Firstly, as regards the balancing of the employees' and transferee's interests within the context of the Directive itself, the Court's reasoning seems particularly one-sided, in favour of the transferee, despite the Court's talk of ensuring a fair balance. This does not comply with the predominant aim of the Directive of protecting employees. Secondly, although it is correct that the Directive must be interpreted in a manner consistent with the Charter, even though that results in establishing a ceiling of protection instead of a floor of protection, the Court's interpretation and application of Article 16 of the Charter appears to be very far-reaching and in little conformity with the previous case law on the provision.[278] That is particularly so considering the circumstances of the case and the flexibility of the collective bargaining system in the UK. Thirdly, with regard to the balancing of interests in the light of the Charter, the Court fails seriously since no balancing at all seems to take place and no weight is given to the rights of the employees, despite the fact that those rights presumably possess a fundamental status and are possibly even protected under the Charter. Interestingly, this conclusion leads to the peculiar situation that an ordinary application of English contract law

[277] Prassl (n 46) 440.
[278] Groussot, Pétursson and Pierce (n 202) 15; Prassl (n 46) 446.

gave significantly better protection for employees than the Charter of Fundamental Rights.[279] Finally, the Court's failure to give weight to the social rights of the employees as against the economic right of the transferee fits poorly with the evolution of increased emphasis on social objectives and employees' protection ever since the 1970s and fails to comply with the mandatory high level of social protection demanded by the Lisbon Treaty.

In the light of all this, it must be concluded that the Court fails in *Mark Alemo-Herron* in balancing the competing interests of employees and employers (transferees) inherent in the Transfer of Undertakings Directive. It is difficult to understand the reason for the Court's approach and whether there is a hidden agenda, since the Court's reasoning is sparse. One could speculate whether this judgment represents a change of direction and a general trend towards giving the rights and interests of employers increased weight. It is also uncertain whether this judgment is a reflection of the fact that social rights in the Charter are of lesser significance than economic rights or whether the changes brought about by the Lisbon Treaty will, in fact, have little impact. What is known is that the Court's judgment in *Mark Alemo-Herron* has already begun to assert its influence. The UK has adopted new TUPE Regulations with effect from 31 January 2014, which reflect that judgment and incorporate the static approach, i.e. the transferee is no longer bound by changes to collective agreements negotiated and agreed after the date of the transfer where the transferee is not a party to the process.[280] One must only hope, though, that the judgment in *Mark Alemo-Herron* will be seen as an isolated case, read on its facts, and that, in the future, more weight will be given by the Court to the fundamental social rights of employees as against the fundamental economic rights of employers.

[279] See Prassl (n 46) 445.

[280] Katie Russel, 'TUPE Amendments Regulations 2014' (*Lexology*, 22 January 2014) <http://www.lexology.com/library/detail.aspx?g=0dc088d9-d1a5-4d90-9040-d30df8f652a5> accessed 23 May 2014.

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