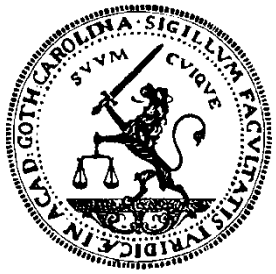

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The Prohibition of Dismissal in Sweden and Germany

A Comparative Study of the Scope of Article 4.1 in the Transfers of Undertakings Directive

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Contents

Summary

This study aims to clarify the current state of the law regarding the prohibition of dismissal in the context of transfers of undertakings in Sweden and Germany. The prohibition of dismissal originates from Article 4.1 of the Transfer Directive (2001/23/EC) and is an integral part of the European Union's employment protection framework, primarily aimed to protect employments by restricting dismissals grounded in transfers.

The study analyses the subject matter through a comparative perspective, as well as reflects on its results in light of the European Union's flexicurity strategy. In order to functionally compare the two jurisdictions, a broad account of the national employment protection systems has been employed, detailing primarily the requirements for ordinary dismissal, re-engagement norms, and the principles for selection in dismissal of employees. The underlying Union law is also thoroughly illuminated as the principle of primacy and the obligation of conform interpretation makes its understanding essential for the interpretation of national law.

The prohibition of dismissal as prescribed in Union law establishes an order where a transfer in itself must be the sole reason for dismissal in order for the prohibition to be invoked. The exemption for economic, technical and organisational reasons also detailed in Article 4.1 is in the study concluded to primarily constitute an illumination of the prohibition, intended to clarify that lawful grounds for dismissals of such character, already prescribed in the Member States national legal order, do not invoke the prohibition.

The German national implementation in § 613a para. 4 BGB closely adheres to the order prescribed by the Union. The Swedish implementation in 7 § 3 para. LAS in contrast, divergences from the Union order by constructing an absolute prohibition of dismissal, invoked at a point in time of the transfer process. The divergence from Union law favours employment protection over the freedom to conduct business and the managerial prerogative, potentially in conflict with the Directive's dual purpose as reformulated through the case *Alemo-Herron*, and in breach of the obligation to conform interpretation.

In light of flexicurity, the study concludes that the German implementation of the prohibition better balances the two interests of flexibility and security. The Swedish order, while it temporarily leads to slightly prolonged employments in the transfer situation, significantly infringes on the managerial prerogative and the flexibility of the transferor and transferee.

Sammanfattning

Studien syftar att klargöra gällande rätt kring uppsägningsförbudet vid verksamhetsövergång i svensk respektive tysk rätt. Uppsägningsförbudet reglerar arbetsgivares möjlighet att säga upp anställda i samband med företagsöverlåtelser och tillkom ursprungligen som del i Europeiska Unionens överlåtelsedirektiv (2001/23/EG). Överlåtelsedirektivet är ett centralt instrument i unionens regelverk kring anställningsskydd.

Studien anlägger ett komparativt perspektiv på materialet samt reflekterar kring den tyska och svenska implementeringen av uppsägningsförbudet i ljuset av unionsrätten och EU:s flexicuritystrategi. För att underbygga den funktionella komparationen har en övergripande genomgång av anställningsskyddet i svensk och tysk nationell rätt inkluderats, redogörande primärt för kraven kring ordinär uppsägning, återanställningsnormer och principer rörande turordning.

Den unionsrättsliga regleringen föreskriver ett begränsat uppsägningsförbud som enbart är tillämpbart i situationer där överlåtelsen i sig utgör enda skälet för uppsägning. Angående undantaget för ekonomiska, tekniska och organisatoriska skäl, konkluderar framställningen att undantaget primärt ämnar klargöra att uppsägningar grundade på någon av dessa grunder inte blockeras av uppsägningsförbudet, i den mån de tillåts i nationell rätt.

Den tyska implementeringen av förbudet genom § 613a para. 4 BGB följer till övervägande del ordningen föreskriven i EU-rätten. Den svenska implementeringen genom 7 § 3 para. LAS avviker däremot till viss del från det EU-rättsliga uppsägningsförbudet då bestämmelsen i svensk rätt har utformats som ett absolut förbud som inträder vid en given tidpunkt i överlåtelseprocessen. Avvikelsen från EU-rätten sker till förmån för anställningsskyddet på bekostnad av arbetsgivares näringsfrihet och arbetsledningsrätt, och därmed potentiellt i konflikt med direktivets dubbla syfte så som det omformulerats genom domen *Alemo-Herron*, samt skyldigheten att tillämpa EU-konform tolkning.

I ljuset av flexicuritystrategin utmynnar studien även i slutsatsen att den tyska implementeringen av uppsägningsförbudet bättre balanserar komponenterna flexibilitet och trygghet än den svenska implementeringen. Den svenska regleringen begränsar markant flexibiliteten genom inskränkningen av arbetsledningsrätten för överlåtare och förvärvare, samtidigt som den endast marginellt ökar tryggheten för arbetstagaren genom de något förlängda anställningarna i övergångssituationen.

Preface

Completing this study would not have been possible without the assistance of my supervisor Mia Rönnmar who throughout the semester has provided me with valuable insights and guidance. I would also like to thank Thomas for the detailed language review. Many thanks for your encouragement and support.

Sydney, January 2019
Johanna Wagner

Abbreviations

AD	Swedish Labour Court
AG	Advocate General
ALVA	General fixed-term employment in Sweden
BAG	German Federal Labour Court
BGB	Civil Code
CJEU	European Court of Justice
Commission	The European Commission
Ds	Ministry Publications Series
ECHR	The European Convention on Human Rights
EU	European Union
KSchG	The Act on Dismissal Protection
LAS	Employment Protection Act (1982:80)
MBL	The Co-Determination Act (1976:580)
Prop.	Government bill
SOU	Swedish Government Official Reports
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Charter	The Charter of Fundamental Rights of the European Union
Transfer Directive	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
TVG	Act on Collective Agreements
TzBfG	Act on Part-Time Work and Fixed-Term Contracts

1 Introduction

1.1 Topic and Background

Over the last few centuries, European labour markets have experienced numerous and significant changes. The creation of the EU, German reunification, and the 2008 financial crisis are a few examples of important events which have shaped the legal landscape of the Swedish and German labour markets today.[1] Additionally, globalisation and technological advancement have increased the interconnectivity of economies and cross-border activity, leading to a greater need and desire for flexibility in organising and restructuring enterprises in order to remain competitive.

One consequence of this altered landscape is the sharp rise in the number of transfers and mergers on a Union and national level.[2] This increase gained the attention of the Union in the late 1970's, and resulted in the Transfer Directive,[3] a legislative instrument aimed to strengthen the protection of employees in transfer situations throughout the Union.[4] The Directive balances the aim of strengthened employment protection with the managerial prerogative and the Union's underlying objective of economic integration. The Directive has since come to be implemented in all EU Member States, including Sweden and Germany. The implementation imposed a principally new legal structure into Swedish and German law, requiring legislative change in both jurisdictions.[5]

The Directive is centred around the idea that an employment relationship shall transfer automatically and unchanged from the previous employer (transferor) to the new employer (transferee) in case of a transfer of an undertaking. To ensure that the automatic transfer of employment is not circumvented, a *prohibition of dismissal* has also been constructed in the Directive, prohibiting dismissals due to such transfers.

Despite the many cases pertaining to the interpretation of the Transfer Directive, the scope of its prohibition of dismissal has not been properly

[1] See Izquierdo (2017) p. 49 f. regarding the impact of the financial crisis on European labour market policy.
[2] COM (74) 351 final p. 1.
[3] 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.
[4] Barnard (2012) p. 577 and COM (74) 351 final p. 1.
[5] Mulder (2004) p. 311 and Weiss (2010) p. 142.

clarified. The implementation of the prohibition into national law has also been subject to heavy debate in Sweden.[6] The uncertainty surrounding the prohibition has a significant and tangible impact on countless employees and employers throughout the EU, making the topic relevant from both a practical and theoretical perspective.

1.2 Purpose and Research Questions

This study aims to compare and contrast the current state of the law on the prohibition of dismissal in the context of transfers of undertakings in Sweden and Germany, as well as to compare and evaluate the national implementations in light of EU law, and in light of the EU's flexicurity strategy. The objective is to develop a thorough understanding of the different jurisdiction's content, application and development of the prohibition of dismissal.

The key research questions are:

- What is the structure and main content of the employment protection system in EU law, Swedish law, and German law?
- How is the prohibition of dismissal in the context of transfers of undertakings defined and interpreted in EU law, Swedish law and German law?
- To what extent are there discrepancies between the content, application and development of the prohibition of dismissal in EU law, German law and Swedish law?
- To what extent is the prohibition of dismissal in the context of transfers of undertakings in German and Swedish law compatible with the EU strategy "flexicurity"?

1.3 Current State of Research

The scope and application of the prohibition of dismissal in the EU has not been substantially reviewed in light of recent changes. Doctrine aimed to clarify and discuss the Transfer Directive often focuses on challenges pertaining to the application of the Directive or constitutes reviews of the Directive as a whole. While most large reviews, such as Barnard's,[7] are up-to-date and thorough, they do not illuminate the prohibition significantly.

[6] See for example Iseskog (2003) p. 42, Nordström (2001), Mulder (2004) p. 311 ff.
[7] Barnard (2012).

German doctrine, on the contrary, well highlights the German application of the prohibition in a national and Union perspective, primarily through comprehensive legal commentaries. Significant contributions regarding both the prohibition of dismissal specifically and its general context has among others come from Preis.[8]

The most comprehensive review of the prohibition of dismissal in Swedish law comes from Mulder through his doctoral thesis from 2004.[9] Others, such as Iseskog[10] and Nordström,[11] have also highlighted the application and complexity surrounding the prohibition, but their works proceed Mulder's and do not parallel its comprehension. A comparison of the Swedish and German application and implementation of the prohibition in light of Union law is, however, lacking in both jurisdiction, especially with the added perspective of flexicurity.

1.4 Methods and Materials

In order to achieve the purpose of the study, two separate methods have been employed. For chapters two, three and four, detailing the current state of the law in the EU and in each jurisdiction, the method of *legal dogmatics*[12] has been applied. This method is suitable for the purpose of reconstructing legal rules, realised through systemisation and assessment of accepted sources of law.[13] As such, selecting source material consciously is essential. The selection in this study has been based on the principles of sources of law in accordance with German and Swedish labour law tradition.[14] It is vital not to treat these distinct legal systems as *necessarily* having the same sources of law, but rather to independently research each one without prejudice. In my research of German law, a legal order foreign to me, I have tried to stay true to the words of Zweigert and Kötz:

> "A comparist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers [in the foreign jurisdiction] would treat as a source of law, and he must accord those sources the same relative weight and value they do."[15]

[8] Preis (2017).
[9] Mulder (2004).
[10] Iseskog (2003). Iseskog has also written additional works on transfers of undertakings, many proceeding the entry into the EU.
[11] Nordström (2001).
[12] Also known as the legal doctrinal method. The Swedish term is "rättsdogmatisk metod".
[13] Korling (2013) p. 21.
[14] In Swedish "rättskälleläran".
[15] Zweigert (1988) p. 32.

Among the Swedish sources of law, primary focus lies on legislation, comprised of constitutional laws,[16] ordinary laws and government decrees, followed by preparatory works and case law, as well as general uncodified principles.[17] The European Convention on Human Rights (ECHR) is now also an important source of law following its incorporation through the Constitution.[18]

It should be noted that the value of national preparatory works decreases when a norm originates from the European Union, as the preparatory work in such instances do not express the will of the national legislator but rather its interpretation of Union law. The value of such preparatory works must, however, be evaluated on a case by case basis as they often contain norms in addition to, or exceeding the norms mandated by the Union.[19]

Unique for labour law is the inclusion of collective and individual agreements as sources of law.[20] Collective agreements especially have played a significant role in the development of the Swedish labour market and model, where legislation has been restricted to few and basic areas.[21]

The primary source of law in Germany is the Constitution,[22] followed by ordinary federal and state legislation, and case law. Just as in Sweden, Germany considerers individual and collective agreements as sources of law in the labour law field,[23] however, legislation in Germany is generally more comprehensive leaving less to be addressed in such agreements. The ECHR has also been ratified as a federal statute.[24] Preparatory works are not widely available and rarely considered or used as a source of law in Germany.[25]

Both jurisdictions consider case law to be an important source of law despite neither country's precedents having a formally binding effect.[26] Generally, only judgments from the highest instances are considered legally

[16] The Swedish Constitution is made up of four fundamental laws; The Instrument of Government, The Act of Succession, The Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The Riksdag Act, detailing the proceedings of the parliament, holds an intermediate position between fundamental and ordinary law.
[17] Adlercreutz (2017) p. 57 ff, and Mulder (2004) p. 71 ff.
[18] See 2 ch. 19 § Instrument of Government. The Convention cannot be considered superior, or equal, to the four fundamental laws.
[19] Hettne (2014) p. 61 f.
[20] Adlercreutz (2017) p. 57 ff, and Mulder (2004) p. 71 ff.
[21] Sjödin (2015) p. 23 ff.
[22] The German Constitution is called "Grundgesetz" and often referred to as "The Basic Law" in English.
[23] Bogdan (1993) p. 195.
[24] Hoffmeister (2006) p. 727.
[25] Bogdan (1993) p. 196.
[26] Weiss (2010) p. 38 f. The exception to this is the Federal Constitutional Court of Germany, which does have formally binding precedents, se Stainer (2018) p. 121.

binding in consequent cases. Both countries also place some relevance on doctrine, although it is more frequently referred to in German judgments.[27] Germany's many legal commentaries are generally regarded of equal value as renowned doctrine.[28]

The sources of law of the EU must also be considered, as the prohibition of dismissal originates from Union law, and the *principle of primacy* states that national law must be set aside in favour of Union law in case of a norm conflict.[29] National law must also be interpreted in conformity with relevant Union legislation, principles and case law according to the *obligation of conform interpretation*, making an understanding of Union law essential.[30]

The central sources of law in the Union are its primary and secondary legislation. Primary legislation is made up of the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), with their corresponding protocols, and the Charter of Fundamental Rights of the European Union (the Charter) since 2009.[31, 32] EU's secondary legislation consists of regulations, directives, decisions, recommendations and opinions.

Unlike the Swedish source of law hierarchy, the European Union traditionally does not place heavy emphasis on its preparatory works. With an improved and clarified legislative process, however, their influence has increased.[33] While no clear decision has been expressed by the European Court of Justice (CJEU) regarding the weight preparatory works should be given, it stated in the case *Inuit* that "[t]he origins of a provision of European Union law may also provide information relevant to its interpretation".[34] While the statement cannot be interpreted as placing significant emphasis on the preparatory works, it does indicate that they should be considered as part of the context of a provision. It should be noted, however, that the Charter deviates from the rest of the Union legislation in this regard, as it explicitly shall be interpreted "with due regard to the explanations […] which drafted the Charter",[35] explanations akin to preparatory works.

[27] See for example Rönnmar (2004) and Bogdan (1993) p. 195.
[28] Bogdan (1993) p. 195.
[29] C-6/64 Costa v ENEL.
[30] See for example C-106/89 Marleasing SA or Bernitz (2018) p. 125.
[31] See for example European Parliament, *Sources and scope of European Union law*.
[32] Additionally, international agreements concluded by the Union are subordinate to its primary legislation but fall outside of the scope of this study.
[33] Hettne (2014) p. 57.
[34] C-583/11 Inuit p. 50.
[35] See the Preamble to the Charter.

Case law as a complement to Union legislation is a source of law of great importance. It contextualises and clarifies vague and purpose-oriented legislation, and its precedents must be followed by national courts.[36] Furthermore, some principles developed through court decisions have become *general principles*, extending their reach of influence to most parts of Union legislation.[37] The CJEU is not bound by its own precedents, but commonly follows them.[38] Older cases are, however, more likely to be disregarded due to political and economic changes.

Some judgments are complemented by an Advocate General (AG) opinion. The opinion is often well-reasoned and more extensive than the Court's, with reference to comparative studies of national law.[39] The Court is not bound to follow the opinion, but often does and if reference to the opinion is made in a decision, its value as a source of law is generally considered greater. Ordinarily, however, the opinion of the Advocate General should not be regarded as higher than legal doctrine.[40]

Doctrine as a source of law has not gained the same status in the EU as in Sweden and Germany, likely due to EU-doctrine being much more voluminous and more difficult to access due to language barriers, limiting its worth.[41]

The second method employed in this study is the *comparative method* combined with a *functional approach*.[42] The method is based on the idea that only that which can be compared is of value to study, and "in law the only things which are comparable are those which fulfil the same function."[43] In practical terms the method aims to compare functions of rules, rather than rules seemingly systematically or linguistically linked.

An additional aspect of the functional approach is to go beyond the purely legal context of a function. While legal dogmatics help determine established law, the merit and effectiveness of a function cannot be accurately evaluated without knowing its social, cultural and political context.[44] For example, even if one is aware of the function of collective

[36] Hettne (2014) p. 48.
[37] Hettne (2014) p. 48.
[38] Nyström (2017) p. 38 ff.
[39] Mulder (2004) p. 85.
[40] Mulder (2004) p. 86.
[41] Hettne (2014) p. 63.
[42] Zweigert (1988) p. 31. It is generally considered the primary method of comparative law.
[43] Zweigert (1988) p. 31.
[44] Blanpain (2014) p. 3 and p. 23.

agreements in a labour market, their effectiveness cannot be evaluated without knowing the percentage of the labour force covered by them.
A short overview of the industrial relations in each jurisdiction has therefore been included. The overview is loosely inspired by Dunlop's theory of industrial relations systems, a theory suggesting that an industrial relations system "at any one time […] is composed of certain *actors*, certain *contexts*, an *ideology* that binds the industrial relations system together, and a *body of rules* to govern the actors [italics added]."[45] While nowhere near exhaustive, the overview aims to provide the necessary information to follow the reasoning and conclusions of the study.

1.5 Prohibition of Dismissal in Light of Flexicurity

In addition to the comparative element of the study, a *flexicurity* perspective will be applied to the results of the legal dogmatic review on the current state of the law.

Over the past years, the flexicurity strategy has gained significant traction in the EU. The strategy aims to enhance economic growth and productivity by balancing the interests of *flexibility* (of the labour market) and *security* (of employees), traditionally thought of as competing. In the strategy, however, the interests are not viewed as opposing, but rather as components to a mutually beneficial positive-sum game.[46]

The Commission and the Member States have agreed on four inter-related components of flexicurity, namely:

a) flexible and reliable contractual arrangements;
b) efficient active labour market policies to strengthen transition security;
c) systematic and responsive life-long learning; and
d) modern social security systems that also contribute to raising mobility in the labour market.[47]

The first component of flexible and reliable contractual agreements is most relevant to this study. This component targets the question of how to balance employment protection of "insiders" (employees with permanent

[45] Dunlop (1993) p. 47.
[46] Wilthagen (2013) p. 113.
[47] COM (2007) 359 final p. 5.

contracts) and the interest of "outsiders" (unemployed or temporarily employed individuals) to enter the labour market, as well as employers' need for flexibility in form of a managerial prerogative allowing for restructuring and reorganisation of the work force. All components are, however, mutually supportive and overlap to some extent. Instead of trying to promote the strategy through a "one-size fits all"-harmonising legislation, the Commission has created four "pathways" intended to encourage improvement on these flexicurity-components.[48]

While a single policy, rule or measure can be of flexicurity character, the strategy is primarily intended to promote a balanced over-arching system and does not require all measures in themselves to be "correctly" balanced between flexibility and security, as long as the system as a whole is well adjusted.

For the purpose of this study, the strategy will be considered an established aspiration of the Union, for both its own policies and path forward, as well as Member States' law. The purpose of applying a flexicurity perspective to the results of the study is not to evaluate the prohibition of dismissal as a stand-alone flexicurity measure. Instead, the aim is to evaluate the results *in light of* the strategy, to analyse to what extent the prohibition is compatible with this "new" Union strategy, introduced twenty years after the first Transfer Directive,[49] and to use it to forecast the future of the prohibition, as "[the principles of flexicurity] will strongly underline the involvement of the EU in securing Europe's social and economic future" according to the European Expert Group on Flexicurity.[50]

1.6 Language and Terminology

The comparative nature of the study requires research and source material in several different languages. As languages from the same language family often contain similar words, it is easy to be fooled into assuming they carry the same meaning.[51] To avoid such mistakes, key terms have been kept in

[48] European Expert Group on Flexicurity (2007) p. 5.
[49] In 1997 the first Green Paper attempting to balance flexibility and security was introduced, COM (97) 128 final.
[50] European Expert Group on Flexicurity (2007) p. 4. The group's main task was to advise the Commission on preconditions for flexicurity, various starting positions and flexicurity pathways.
[51] One example borrowed from Blanpain (2014) p. 17, is the English word "eventually". In English it means "in the end" or "ultimately", while the similar French word éventellement" or the Swedish "eventuellt", both mean "possibly". Such a mistake could completely change the meaning of a conclusion.

their original language in corresponding footnotes or brackets, allowing the reader to independently evaluate my translations and contextualisations.

The translated terminology has also been borrowed from official translations and established doctrine whenever possible. The legal citation model follows the corresponding jurisdiction, with an overall Swedish system for doctrine and other sources.

Certain choices regarding the terminology should also be highlighted. The most central term in the study is "prohibition of dismissal". The observant reader will notice that the Directive itself does not use this phrase. In doctrine, variations such as "termination prohibition", "protection against dismissal" and "dismissal prohibition" are used without apparent consistency.[52] The "prohibition of dismissal" has been chosen as it best avoids confusion with other types of protections against dismissals. It also corresponds well with the Swedish version "uppsägningsförbudet" and the German "Kündigungs-verbot".

Another term of importance is the choice "Transfer Directive" over "Transfers of Undertakings Directive" or "Acquired Rights Directive". The choice is purely stylistic.[53] It should also be noted that what today is the European Union is referred to as the "EU" or the "Union" throughout the study, despite having other names previously.

1.7 Outline and Delimitations

The study can be divided into three parts. The first part contains the introductory chapter, aimed to explain the scope of the study and the aims intended to be achieved. The second part contains a chapter of each "dimension", detailing the current state of the law in the EU, Sweden and Germany respectively. The Union and the two national jurisdictions are treated slightly differently. The EU dimension contains a longer section detailing the framework of the Directive, intended to be relevant for all three dimensions. The Swedish and German chapters only briefly describe the additional implemented provisions from the Directive which aim to illuminate only possible discrepancies between EU law and national law.

In order to properly compare the function of the prohibition of dismissal and to build the foundation for an evaluation from a flexicurity perspective, the

[52] In addition to the chosen "prohibition of dismissal".
[53] "Acquired Rights Directive" is however mainly a UK term.

surrounding employment protection systems of each dimension have been described thoroughly.

The Swedish and the German chapters include a comparison of the results with the underlying Union law. As the study is comparative, these two chapters are also roughly equal in length, and aim to follow the same structure while still staying true to their different character in accordance with the functional method.

The third part of the study contains the analysis and is divided into two sections. The first discusses the results of the study through a comparative perspective. The section ties together the previous discussion sections and summarises the current state of the law in Sweden, Germany and the EU. The second part of the analysis evaluates the results in light of the flexicurity strategy.

Certain delimitations have also been made in order to provide a greater sense of focus for the study. Regarding the German dimension, the study excludes any discussion of the regulation for career public servants ("Beamte"), as their employment is regulated as a specific part of public law ("Beamtenrecht") rather than labour law. Disputes regarding their employment are therefore settled in administrate courts rather than labour courts. This delimitation does not exclude all public employees, as there are both blue and white-collar workers employed in the public sector covered under ordinary labour law.[54] Dismissals for other than economic reasons have also not been discussed in depth as it lacks relevance to the application of the prohibition of dismissal.

[54] Weiss (2010) p. 25.

2 The EU Dimension

2.1 Regulation on Employment Protection

Social policy within the Union, including employment protection, has developed greatly over the years. Originally the treaty governing the constitutional basis of the Union, placed economic and social progress on equal footing.[55] In practice, however, the treaty lacked the authority to mandate social but not economic policy, resulting in a decoupling of the two interests and a regulation imbalance in favour of economic integration.[56] At the time, Member States largely considered social policy, and especially labour policy, to be a purely national matter.[57]

During the early 1970's, however, social policy gained priority in the Union as "greater prosperity [had] not resolved the social problems of the Community, and indeed in some cases it [had] exacerbated them."[58] An important step to combat the problems was the "Social Action Programme", a strategy aimed to improve the neglected social policy of the Union by harmonising social legislation in certain areas.[59, 60] One area targeted was the lack of employment protection in connection to transfers of undertakings, considered important as the number of concentrations continuously increased,[61] resulting in extensive lay-offs.[62] Concern regarding the decreased employment security led to the adoption of the first Transfer Directive (77/187/EEC).[63]

Two other restructuring directives were also adopted under the umbrella of the Social Action Programme.[64] The first was the Collective Redundancies Directive (75/129/EEC), a directive detailing the procedures and information employers are obliged to disclose and follow when laying off twenty or more employees.[65] The second was the Insolvency Protection

[55] See recital 3 of the Treaty of Rome.
[56] Barnard (2012) p. 7-8.
[57] Barnard (2012) p. 7.
[58] COM (73) 1600 p. 13 point 2.
[59] COM (73) 1600 p. 13 point 4.
[60] Barnard (2012) p. 9.
[61] COM (74) 351 final p. 1 and recital 2 of the preamble in the Transfer Directive.
[62] See Mulder (2004) p. 119, and COM (74) 351 final p. 1.
[63] 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.
[64] Nyström (2017) p. 289.
[65] The Directive is now known as the Council Directive 1998/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

Directive (80/987/EEC), aimed at protecting employees in the event of employer insolvency.[66]

Since the adoption of the Social Action Programme, the Union has taken further steps towards promoting social integration. Most notably through the adoption of the Charter and the introduction of the new Article 3.3 in the TFEU with the Treaty of Lisbon in 2009. This Article states that the Union "shall work for the sustainable development of Europe based on […] *social market economy*, aiming at full employment and social progress" [italics added]. The Article highlighted the added emphasis on social policy, departing from the reality of the early stages of the Union in which economic integration was the dominant focus.

The introduction of the Charter as a legally binding instrument of the same legal value as TEU and TFEU has given labour rights and employment protection a solid foundation in Union primary legislation. The relevant provisions can primarily be found under Title IV named "Solidarity". It comprises eleven articles, regulating both rights and protections of employees, as well as obligations and restrictions on employers. For the purposes of this study Article 30, prescribing protection in the event of unjustified dismissal, is of most relevance. Article 30 draws on Article 24 of the revised European Social Charter. Even with the accompanying explanations, there is little additional information as to the reach of Article 30. Advocate General Mengozzi's opinion in *Mono Car Styling*, however, provides some guidance to its scope by stating that protection under the Article cannot be awarded to any kind of irregularity that a dismissal might involve; but rather protection is limited to a "serious irregularity" in the decision to dismiss.[67]

Another provision of relevance in the Charter is Article 16, which establishes the freedom to conduct business. The Article is based on CJEU's case law and is of importance from an employment protection perspective, as the freedom to conduct business includes the managerial prerogative and exercising the right to terminate employees.[68]

Since the adoption of the restructuring directives, the Union's secondary legislation surrounding employment protection has developed further. An important act is the Fixed-term Work Directive (99/70/EC),[69] regulating the

[66] The Directive is now known as the Council Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.
[67] Opinion of AG Mengozzi in C-12/08 Mono Car Styling p. 97.
[68] See for example C-4/73 Nold and C-230/78 Eridiana.
[69] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

rights of workers in atypical employments, ensuring them a minimum level of employment protection. The same employment protecting objective can be found in the related Part-time Work Directive (97/81/EC),[70] and the later Temporary Agency Work Directive (08/104/EC).[71]

The EU also promotes employment protection through furthering equal treatment. "Already" through the Rome Treaty 1957,[72] the principle of equal pay between men and women was established in Union law. Many of the equal treatment directives contain provisions banning dismissals rooted in discriminatory practices, primarily through the Equality Framework Directive 2000/78/EC,[73] the Race Equality Directive 2000/43/EC,[74] and the Equal Treatment Directive 2006/54/EC[75], regulating equal treatment between men and women. By virtue of the structure of the Union and its legislative process, there is no over-arching employment protection system, only stand-alone legislative acts.

2.2 Regulation on Transfers of Undertakings

2.2.1 Core Elements of the Transfer Directive

2.2.1.1 Introduction

While the Transfer Directive was adopted in 1977, the Directive was revised through 98/50/EEC, and the current Directive in force is the consolidated version 2001/23/EC. Case law established before the consolidation remains relevant,[76] as the new Directive primarily codified case law and restructured norms.[77] The Directive itself is one of the most litigated in the Union,[78] with over eighty cases pertaining to just the consolidated version. The following

[70] Council Directive 1997/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.
[71] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
[72] Article 119 of the Treaty of Rome.
[73] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The Directive stipulates equal treatment regardless of age, disability, sexual orientation, religion or belief.
[74] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[75] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
[76] Mulder (2004) p. 123.
[77] Nyström (2017) p. 295.
[78] Mulder (2004) p. 117.

section will account for the core components of the Directive by describing its aim and harmonisation with national law, discussing its applicability and the structure of its key provisions. This section will provide the necessary framework needed to understand section 2.2.2, detailing the prohibition of dismissal in the EU and the subsequent national dimensions in chapter three and four.

2.2.1.2 Aim

Establishing the aim of the Directive is not necessarily straightforward. The explicit aim of the Transfer Directive, articulated in its preamble is to provide "protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded".[79] No other aims are mentioned in the preamble or elsewhere in the Directive. The preamble as such is not binding to the same degree as an Article, but as the stated purpose has been upheld by the Court in several cases, it gives more weight to the assertion.[80] Despite the Directive being explicitly worker protective, it must be noted that it was adopted as a derogation from the Unions primary purpose of economic integration at the time of the initial adoption.[81] There is consequently an inherent conflict between worker protection and managerial prerogative and economic integration within the Directive.

The tension and balance of the two interests has been illuminated in a few recent Court judgments. In the case *Werhof*, the court indirectly but clearly took the interests of the employer into account, stating that the interests of a "transferee […] to make the adjustments and changes necessary to carry on his operations, cannot be disregarded".[82]

The reasoning is taken even further in the heavily debated judgment *Alemo-Herron*. The case primarily concerned whether "dynamic clauses" fall under the protection of automatic transfer of Article 3, but also touched upon the aim of the Directive.[83] In the judgment, the Court plainly stated that the Directive does not aim solely to safeguard the interests of employees, but to ensure a fair balance between employee and transferee interests.[84] The Court further stated that, despite the express aim of the Directive being employment protection, it must be interpreted in a manner consistent with

[79] Recital 3 in the preamble of Transfer Directives. The recital has remained the same in all versions of the Directive.
[80] See for example C-324/86 Daddy's Dance Hall p. 9 and C-287/86 Ny Mølle Kro p. 12.
[81] Barnard (2012) p. 8-9.
[82] C-499/04 Werhof p. 31. The case concerns the automatic transfer of dynamic contractual clauses, mainly Article 3 of the Directive.
[83] Dynamic clauses in an employee contract prescribe adherence to future changes of the collective agreement applicable between the parties.
[84] C-426/11 Alemo-Herron p. 25.

the fundamental rights set out by the Charter. In particular, employment protection must be weighed against the freedom to conduct business, set out in Article 16 of the Charter.[85] While the consideration of the rights of the Charter was not unexpected, the degree to which the freedom to conduct business extended was surprising to many, as the Transfer Directive previously had been viewed as explicitly worker protective, designed to counter the impact of the Union's unbalanced focus on economic integration and market liberalisation.

The later case *Asklepios*[86] ties in the judgment of *Alemo-Herron* and reinforces the weight of Article 16 of the Charter against the employment protecting aim of the Directive.[87] While the judgment nuances the criticised judgment in *Alemo-Herron* slightly in the matter of dynamic clauses, it nonetheless reinforces the consideration of dual interests in the Transfer Directive.

This trend towards a dual aim can also be found in the Commission's reports. In 2007 the report stated that "[b]y 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",[88] while no such aim of "balancing" was mentioned in the earlier report from 1992.[89]

2.2.1.3 Partial Harmonisation

Member States are obliged to transpose Union Directives "as to the results [of the Directive] be achieved", but the method of implementation is at their discretion.[90] The degree of harmonisation ranges from partial to full harmonisation. When a Directive calls for partial harmonisation Member States are permitted to exceed the minimum standards required by the Directive, as long as the additional national norms are not in conflict with the purpose of the Directive.[91] A full harmonisation Directive dictates both the minimum and maximum standards a Member State can implement, leaving significantly less room for national variety.

[85] C-426/11 Alemo-Herron p. 30-31.
[86] Joined cases C-680/15 and C-681/15 *Asklepios*.
[87] Joined cases C-680/15 and C-681/15 *Asklepios*, p. 22-23.
[88] COM (2007) 334 final.
[89] SEC (92) 857 final.
[90] Article 288 TFEU. See also Chalmers (2014) p. 111.
[91] Bernitz (2018) p. 272. See also C-324/86 Daddy's Dance Hall p. 14, and Article 8 of the Transfer Directive.

According to Article 8 of the Transfer Directive, the Directive "shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees."[92] The Article has been interpreted as the Directive prescribing partial harmonisation, and thereby allowing provisions more favourable to employees.[93]

Alemo-Herron, however, casts a degree of ambiguity over this matter. If the aim of the Transfer Directive is dual, implementing additional provisions more favourable to employees might be considered infringing on the opposing aim of safeguarding employer interests. Thus, instead of the Directive constituting a floor upon which Member States can freely add additional employee friendly provisions, it could be inferred from the judgment that the Directive also constitutes a ceiling for employment protection regulation, implying the Directive should be regarded as a full harmonisation directive.

2.2.1.4 Scope and Application

According to Article 1.1(a), the Directive applies to "any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger". In order to invoke the rights prescribed by the Directive, actions undertaken by an employer must therefore qualify as a *transfer*. The consolidated Directive has clarified the term through Article 1.1(b), stating that a transfer in the meaning of the Directive, occurs when there is "a *transfer* of an *economic entity* which *retains its identity*" [italics added].

An *economic entity* is according to the Directive "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary",[94] in case law interpreted to mean any economic entity organised on a stable basis, through any grouping of persons and assets pursuing a specific objective through economic activity, regardless of its legal basis and method of financing.[95]

Pursuing economic activity does not necessarily mean to operate for profit, as is stated in Article 1.1(c). This applies to both private and public undertakings. However, activity concerning administrative reorganisation or

[92] Article 7 of the original version of the Directive.
[93] See for example Mulder (2004) p. 116 or Prassl (2013) p. 444 f.
[94] Article 1.1(b) of the Transfer Directive.
[95] C-101/10 Scattolon p. 42.

the transfer of administrative functions between public and administrative authorities is not considered pursuing economic activity,[96] if the activity can be regarded as an *exercise of public authority*.[97] Such activity is thus excepted from the application of the Directive.

The extent of this exception can be highlighted through the contrasting cases *Henke*[98] and *Mayeur*.[99] In *Henke*, a secretary employed by a German municipality was dismissed after the municipality formed an administrative collectivity[100] together with several other municipalities. Administrative functions were transferred to the new collectivity, eliminating the need for Mrs. Henke's position. In *Mayeur*, a non-profit organisation was tasked with coordinating the promotion activities of the City of Metz. Mr. Mayeur oversaw the promotion activities at the non-profit but was dismissed after the City reclaimed the task of handling the promotion and the non-profit was dissolved.

In *Henke* the Court did not consider the Directive applicable as the dismissal was a result of the transfer of administrative functions, derived from exercising public law powers.[101] The Court, however, found the Directive applicable in *Mayeur*, reasoning that the transfer of the promotion activities was not an administrative function, but rather regular economic activity undertaken by a public office.[102]

When to consider an economic entity *transferred* has been interpreted broadly, and includes variations of contracting out, subcontracting, privatisation, and ordinary transfers though contractual agreement.[103] In the case *Allen* the Court expressed the view that "any legal change in the person of the employer" can be considered a transfer.[104] The view has been slightly nuanced in the latter case *Temco*, where the Court stated that a transfer needs to be "part of the web of contractual relations even if they are indirect".[105] The Directive also applies to *mergers* according to Article 1.1(a). A merger in the context of the Directive occurs when there is a

[96] Article 1.1(c) 2nd sentence of the Transfer Directive.
[97] C-175/99 Mayeur p. 39.
[98] C-298/94 Henke.
[99] C-175/99 Mayeur.
[100] In German "Verwaltungsgemeinschaft".
[101] See C-298/94 Henke p. 17.
[102] See C-175/99 Mayeur p. 35 and forward.
[103] For contracting out, see for example C-209/91 Rask and joined cases C-73/96 and C-247/96 Sánchez Hidalgo. For subcontracting, see for example C-51/00 Temco and C-234/98 Allen. For privatisation, see for example C-4/01 Martin and C-164/00 Beckman. The summery is inspired by Barnard (2012) p. 584-589.
[104] C-234/98 Allen p. 17.
[105] C-51/00 Temco p. 32.

change in the identity of the employer and the new employer retains all or some of the assets of the company.[106, 107]

Lastly, the Directive's applicability requires the entity transferred to *retain its identity*. In the case *Spijkers*, the Court established a set of factors to be considered when assessing if an entity has retained its identity, namely:

- the type of business;
- the transfer of tangible and intangible assets;
- the value of its intangible assets;
- the transfer of employees;
- the transfer of customers; and
- the degree of similarity between activities before and after the transfer.[108]

The factors should be considered in a holistic manner, with no one factor being decisive. The precise weight to be given to each criterion has, however, given rise to difficulty for national courts. According to Barnard, the Court's weighting of the factors has shifted from a labour law approach, with a focus on the "activity" transferred (that is, the similarity of the business activity before and after the transfer), to a focus on whether the economic entity has been transferred (that is, focus on the transfer of assets and employees).[109] With the new approach, in order to evaluate if an economic entity has retained its identity, the Court has stated that in the case of an asset-based business, a transfer in the sense of the Directive requires significant tangible or intangible assets to be transferred.[110] In the case of a non-asset based business, the Court instead has expressed that the identity is considered retained only if the transferee takes over the majority of the employees and their skills.[111]

To summarise, the application of the Transfer Directive requires an economic entity to be transferred while retaining its identity. If such is present, the Directive and its employment protection norms apply.

[106] Barnard (2012) p. 589-590. See also Nyström (2011) p. 261.
[107] If only the shares transfer ownership, the Directive does not apply as it is not regarded as a change in the legal identity of the employer. This despite the reality that many times new ownership comes with equally major restructurings.
[108] C-24/85 Spijkers p. 13.
[109] See Barnard (2012) p. 592 f.
[110] C-13/95 Ayse Süzen p. 23.
[111] Joined cases C-73/96 and C-247/96 Sánchez Hidalgo p. 32.

2.2.1.5 Key Substantive Provisions

The Transfer Directive prescribes protection for employees under three pillars.[112] The first pillar stipulates an automatic transfer of the employment relationship from the transferor to the transferee and is detailed in Article 3 of the Directive. The automatic transfer means the transferee steps into the role of the transferor and takes over their rights and duties towards employees,[113] including rights arisen from individual contracts and collective agreements.[114] In other words, the Directive does not in itself regulate the rights awarded to affected employees, but rather protects the continuation of the rights from one employer to the next. Therefore, the actual rights which transfer to the new employer are decided in the national employment protection regime of each Member State along with any applicable individual and collective agreement. The scope of the rights transferred is determined by the contractual relationship between the parties at the time of the transfer.[115]

The second pillar consists of the prohibition of dismissal, prohibiting a transferor or transferee from dismissing employees in the event of a transfer, detailed in Article 4. The prohibition aims to ensure employers do not circumvent the protection awarded in Article 3. The nuances and applicability of the prohibition are the focus of this study and its EU dimension will be discussed further in chapter 2.2.2. The third pillar details what and how information must be shared with employees affected by a transfer and their representatives, detailed in Article 7.

To understand the impact of the Directive, the definition of the term *employee* is essential. According to Article 2, the term shall be determined in accordance with national law.[116] However, part-time, fixed-term and temporary workers cannot be excluded according to Article 2.2 of the Directive.

It is considered settled case law that the rules of the directives, in particular those of protective character, are mandatory and derogation from them in a manner unfavourable to employees is not permitted.[117]

[112] The division into pillars is inspired by Barnard (2012).
[113] C-362/89 d'Urso.
[114] Article 3 of the Transfer Directive.
[115] C-19/83 Wendelboe, C-287/86 Ny Mølle Kro.
[116] See Article 2.1(c) and 2.1(d).
[117] See for example C-305/94 Rotsart de Hertaing p. 16-17 and C-324/86 Daddy's Dance Hall p. 14.

2.2.2 Prohibition of Dismissal in the Directive

2.2.2.1 Introduction

The *prohibition of dismissal* as established in Article 4.1 of the Transfer Directive, is at its core a limitation of the managerial prerogative, as it restricts the possibility to unilaterally terminate employment. The prohibition aims to hinder employers from circumventing the protection of automatic transfer of the employment contract prescribed in Article 3, and reads as follows:

> "The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."[118]

The phrasing of the Article clearly establishes that a transfer *in itself* cannot be a reason to justify a dismissal, except for economical, technical or organisational reasons. To understand the scope of the prohibition the relevant questions become what constitutes grounds because of the transfer itself, and what grounds fall under the exemption economical, technical and organisational reasons.

In addition to the prohibition of dismissal in 4.1, Article 4.2 also prescribes that substantial changes to working conditions to the detriment of the employee resulting in the termination of the employment contract, shall be regarded as a termination for which the employer is responsible.

2.2.2.2 Extent of the Prohibition

While the Directive itself is heavily litigated, only few cases relate directly to the prohibition of dismissal. *Bork*[119] from 1987 was the first case in which the prohibition was somewhat clarified. In the case, the company PBI leased a wood factory with staff from Orehoved Trae.[120] When the lease expired, all employees were dismissed, and the factory closed done operations after the employees' period of notice. A week after closing, the factory was sold to Junckers Industrier who took possession two weeks later and reopened production. The new owners rehired the majority of the previous employees and did not take on any external staff.[121] The primary

[118] The phrasing has remained the same in all versions of the Directive.
[119] C-101/87 Bork.
[120] C-101/87 Bork p. 3.
[121] C-101/87 Bork p. 3-4.

question of the case was the applicability of the Directive despite the lack of contractual agreement between PBI and Junckers Industrier. Tangential to the main question was the question of whether the staff had been dismissed in conflict with Article 4.1.

In accordance with earlier case law,[122] the Court stated that the Directive applied regardless of whether a contractual agreement existed between PBI and the new owner. As such, any employee still employed at the time of the transfer and who was dismissed because of the transfer *in itself*, should be afforded protection of dismissal.[123] While the Court left it to the national court to make the necessary appraisal of the factual matrix in the specific case, *Bork* added reasoning regarding what constitutes a dismissal carried out on the grounds of the transfer *in itself*.

The Court stated that the "objective circumstances in which the dismissal took place" must be considered. Objective circumstances to consider are, for instance, the period of time between a dismissal and a transfer, whether a dismissed employee was later re-engaged by the transferee, or if production continued or ceased.[124] What constitutes an objective circumstance appears to be interpreted rather broadly, as the Court in *Bork* places significance on the fact that the dismissal and rehiring occurred over the Christmas and New Year period, which in the Court's opinion lessened the importance of the temporary closure as a closure during this time is not abnormal for a business.[125] It should also be noted that the Court did not attempt to provide an exhaustive description of what factors to considered, leaving room for interpretation on a case-by-case basis. The later judgment *Dethier Équipement* from 1994, affirms the significance of a close proximity in time between dismissal and transfer, regardless of any rehiring by the transferee.[126]

Further guidance to the application of the prohibition has been provided through the judgment in the case *Temco* from 2000, in which the Court again referenced the importance of considering the length of time between transfer and dismissal as established in *Bork*. The Court stated that dismissal only "a few days" before a transfer and reemployment was an "objective circumstance" to consider when evaluating if the dismissal was because of the transfer *in itself* and thus qualifying under Article 4.1.[127]

[122] See section 2.2.1.4 for case law references.
[123] C-101/87 Bork p. 18.
[124] C-101/87 Bork p. 18.
[125] C-101/87 Bork p. 16.
[126] C-319/94 Dethier Équipement p. 41.
[127] C-51/00 Temco p. 28.

In 1997, the Commission published a memorandum covering the case law in associated with the Transfer Directive, meaning *Bork* and *Dethier Équipement* were considered. The memorandum emphasised that Article 4.1 only applies to dismissals where the *sole* reason for the dismissal is a transfer.[128] The requirement is not explicit in the text of the Directive, but has been expressed by all three cases, including *Temco* which came some years after the memorandum.[129]

The Court has also illuminated on the applicability of Article 4.2 regarding the substantial changes to working conditions to the detriment of employees. According to the early case *Europieces* from 1996, it should be a matter for national courts to determine if, factually, a case involves substantial enough changes for the Article to be applicable.[130]

Some guidance is, however, provided by the CJEU with respect to how national courts should view the Article. In *Merckx* from 1994,[131] a car retailer dismissed 50 of 64 employees following notice that their supplier and main shareholder would be working with another separate independent retailer. The remaining employees were transferred to the new retailer. Two of the transferred employees argued that the Directive was *not* applicable, as the events constituted closure of an undertaking rather than a transfer. The Court, in contrast, found the Directive to be applicable, stating that dismissal of the majority of staff does not preclude application of the Directive, and that a "change in the level of remuneration awarded" is a substantial change in working conditions within the meaning of Article 4.2. This statement was made tangential to the main questions and not discussed further.

In *Delahaye* from 2002, an employee had her pay reduced by 37% as a result of the transfer.[132] While the Court again left the assessment of the facts to the main proceeding in the national court, it stated the importance of considering other surrounding factors such as length of service and age of the employee. In the opinion of General Advocate Ruiz-Jarabo Colomer, the CJEU prescribes national courts to assess the situation from a subjective viewpoint, from the perspective of the employee in their financial, factual and legal context.[133]

[128] COM (97) 85 final p. 9.
[129] C-101/87 Bork p. 18, C-51/00 Temco, p. 28, C-319/94 Dethier Équipement p. 34.
[130] C-399/96 Europieces p. 43-44.
[131] Joined cases C-171/94 and C-172/94 Merckx and Neuhuys.
[132] C-425/02 Delahaye.
[133] Opinion of AG Ruiz-Jarabo Colomer in C-396/07 Juuri p. 40.

2.2.2.3 Extent of the Exemption

As stated in the introductory section, Article 4.1 prohibits dismissal due to a transfer *in itself*, except for dismissals for economic, technical or organisational reasons. The wording of the exemption is very broad, and there are currently only a few cases mentioning it. The only CJEU judgment directly discussing the application of the exemption is *Vigano* from 2007,[134] a case in which a transferee, after acquiring a number of stores from a transferor, closed down a number of them and dismissed their respective staff. The reason for closing the stores was a rental dispute, which prevented the transferee from taking over the lease agreements for the space the stores occupied. The Court reasoned:

> "[T]he possible termination of the contracts of employment would not be due solely to the transfer of the undertaking. It would be caused by additional circumstances such as the failure of the transferee and the landlords to agree a new lease, the impossibility of finding other commercial premises or the impossibility of transferring the staff to other stores. Those circumstances can be described as economic, technical or organisational reasons for the purposes of Article 4.1."

In short, the Court considered the exempting reasons applicable as the transfer was not the sole reason for the dismissal, but rather the underlying rental dispute. The reasoning comes across as slightly odd in light of the Court's previous judgments. If, according to the reasoning outlined in the previous section,[135] the Court requires a transfer *in itself* to be the *sole* reason for dismissal in order for the prohibition to be applicable, additional reasons such as a rental dispute ought to exclude the application of the prohibition simply because there are additional reasons other than *solely* the transfer, as the dismissal then can no longer be attributed to the transfer *in itself*. The fact that a rental dispute also can be categorised as an economic, technical or organisational reason should, by that token, not matter. Viewed this way, the exempting reasons are sooner a clarification of the first sentence of the prohibition, rather than an exception to it, and arguably superfluous and confusing.

This is to an extent in line with the reasoning of Advocate General Van Gerven in the case *d'Urso*:[136]

[134] C-313/07 Vigano.
[135] See section 2.2.2.2.
[136] C-362/89 d'Urso. The case itself concerned the application of the Transfer Directive and the automatic transfer of Article 3.1.

> "I do not share the view that the directive allows any kind of dismissal on economic, technical or organizational grounds. The directive expressly prohibits such dismissals where they occur as a result of the transfer of the undertaking. It is only where the dismissals have already taken place, for example if they had already been decided on before the question of any transfer of the undertaking arose, that they come under that derogation."[137]

Similar to my reasoning above, Van Gerven does not subscribe to the assumption that the exempting reasons changes the scope of the prohibition. However, instead of regarding the exemption as a clarification of the prohibition, Van Gerven reasons that only dismissals which would have taken place regardless of a transfer are permitted by Article 4.1, as any other dismissals regardless of their reason, would inevitable be based on the transfer in itself.

Van Gerven's view lends itself to a wide application of the prohibition. It can, however, be discussed to what extent it is still relevant in light of *Vigano*. Clearly the Court does allow dismissals based on the exempting reasons, or at least requires the transfer in itself to be the sole reason for the dismissal in order for the prohibition to apply.[138] The wide application of the prohibition also contrasts the reformulated aim of the Directive, as expressed in *Alemo-Herron*. Van Gerven ought to prescribe to a far more employee friendly interpretation of the Directive than the judgment prescribes.

Two cases which shed light on who can exercise the exempting reasons are *Merckx* and *Dethier Équipement*. In *Merckx*, the Court states that the dismissals in relation to the transfer, might have taken place for economical, technical or organizational reasons".[139] It should be noted that neither party had argued for the exemption to be considered, nor was it part of the referred questions. The case has been interpreted to mean that transferors are allowed to dismiss employees before a transfer to the benefit of the transferee. This means that the prohibition and the exemption are applicable for dismissals carried out both before and after a transfer, by either the transferor or the transferee. Both parties are thus restricted by Article 4.1 in the same way, both regarding the prohibition and the exempting reasons. This reasoning has been confirmed again though the case *Dethier Équipement*.[140]

[137] Opinion of AG Van Gerven in C-362/89 d'Urso p. 35.
[138] It should be noted that the Court does not touch upon this reasoning in its judgment, but otherwise in large parts follow the AG opinion.
[139] Joined cases C-171/94 and C-172/94 Merckx and Neuhuys p. 26.
[140] C-319/94 Dethier Équipement p. 34.

2.3 Discussion

The employment protection regulation in the EU can be summarised as a fragmented system. While the Transfer Directive itself largely is a cohesive structure, the legislative body and corresponding case law of the Union is a patchwork of rules primarily because the EU lacks the competence of an ordinary legislator. The Union's labour law legislation is nevertheless an important complement to national law of the Member States, both through the harmonisation of certain areas and through the increased protection of fundamental rights set out in the Charter.

The prohibition of dismissal in the context of transfers of undertakings fits into the Union labour law "system" as part of the framework aimed to promote employment protection. The prohibition of dismissal in Union law focuses on the transfer *in itself* being *the sole reason* for dismissal. Evaluation of whether or not a dismissal is carried out with the sole reason being the transfer itself, should be done through analysing the *objective circumstances* in which the dismissal took place. The Court has emphasised the importance of considering the time period between the dismissal and the transfer, but also highlighted factors such as the rehiring of employees or the temporary halt in production. The scope of the exemption to the prohibition has not been clearly clarified through case law, leaving its application uncertain. In light of the recent cases *Vigano* and *Alemo-Herron,* a wider interpretation of the exempting reasons is likely to be favoured by the Court. It must, however, again be noted that *Alemo-Herron* specifically concerned the protection of dynamic clauses under Article 3, without mention of Article 4. The change in attitude towards the aim of the Directive is likely to have a reach extending beyond purely dynamic clauses.

The actual function of the prohibition of dismissal as an employment protective norm cannot be assessed further without a Member State context. As mentioned in section 2.2.1.5 the central term "employee" is left to be determined in national law. Similarly, the Court has left it up to national courts to determine what facts constitute substantial enough changes for Article 4.2. to be applicable. Such "gaps" in the Union legislation create a situation where the same Directive offers widely different levels of protection to different jurisdictions. As a caveat to the following discussion, it should be noted that the relevant Union case law is not recent. While it does not necessarily discredit its validity, or the validity of any conclusions drawn, it does poses the question to what extent the Court in the current political and economic setting would adhere to it.

3 The Swedish Dimension

3.1 Industrial Relations

The industrial relations system in Sweden is based around three central actors; unions, employer's organisations and the state. Swedish unions generally consist of national organisations supplemented by local divisions and workplace representatives, enabling an in-depth impact in each workplace and solid bargaining power on national level.[141] Sweden follows a single-channel model, where workers are exclusively represented by unions, and not, for example, works councils. Unions usually organise employees along sectoral or industry lines. The majority of unions are part one of the larger central-organisations.[142] The organisational rate has historically been high but is slowly declining. Currently 70 percent of all employees are members of a trade union, while 90 percent are covered by collective agreements.[143] Currently in Sweden, white-collar workers hold union memberships to a larger degree than blue-collar workers.[144]

Employers' organisations are collectives of companies and employers' associations, aimed at coordinating the behaviour of its members in matters of mutual interests. The organisational rate is also high, with between 76 and 87 percent of employers being members in 2016.[145]

The relationship between the social partners and the state has traditionally been characterised by non-intervention, self-regulation and autonomy of the social partners.[146] With the EU membership, however, the state's relevance through its legislative branch has increased. The relationship between the social partners is characterised by bipartisan negotiation to reach collective agreements, achieved through a two-tier system, where bargaining initially takes place at an industry level and later at a company level, using the framework established by the industry negotiations.

Collective agreements constitute an important source of labour law, as the semi-compelling character of much labour legislation permits derogations through collective agreements to both the benefit and detriment of the

[141] European Trade Union Institute, *Industrial relations In Sweden: Background Summary*.
[142] Schmidt (1997) p. 45.
[143] Kjellberg (2018) p. 7.
[144] 69 vs 73 percent. Kjellberg (2018) p. 17.
[145] The varying figure depends on the parameters included, oftentimes companies with no employees are excluded. Kjellberg (2018) p. 53 f.
[146] Rönnmar (2014) p. 3.

employee. Collective agreements are, therefore, an effective way of adjusting legislation to specific sectors or industries. They also set standards the employer must adhere to in individual agreements, and "fill out" such agreements where necessary.

A striking feature of Swedish collective agreements is that they are not only binding for the contracting parties and its members,[147] but employers are required to apply the agreement to all their employees, regardless of whether they have another union membership or none at all. This "normative and mandatory effect"[148] allows for a far-reaching application of collective agreements and explains the divergence between the numbers in union memberships and in employees covered by collective agreements. Without a collective or application agreement, unions lack significant influence over vital aspects of employee conditions, such as minimum wage.

3.2 Regulation on Employment Protection

3.2.1 Introduction

Employment protection in Sweden is centred around the Employment Protection Act (1982:80) (LAS).[149] The Act is structured around four main principles of employment protection, namely; 1) a mandatory employee definition, 2) a presumption of permanent employment, 3) a requirement of just cause for dismissal, and 4) priority in dismissal and re-employment.

The *mandatory employee definition* has been developed through case law and means that objective circumstances determine whether a contractual agreement qualifies as an employment contract or not, regardless of how the contractual parties have categorised or perceive the relationship.[150] Objective circumstances to consider include payment schemes, on whose behalf the work is carried out, who exercises control and management over the contracting party, and duration of the work. The Act is applicable to all persons qualifying as an employee with a small number of exceptions, the principal one being employees in management positions.[151]

[147] MBL § 26.
[148] Rönnmar (2014) p. 4.
[149] In Swedish the Act is called "Lag om anställningsskydd".
[150] Ds 2002:56 p. 112. The parties' perception can however be an objective circumstance to consider.
[151] In Swedish "Företagsledande ställning", stated in 1 § 1 p. LAS. Additionally, employed family members and household employees are excluded.

The *presumption of permanent employment* was introduced to Swedish law with the Employment Protection Act and means that the default employment relationship shall be open-ended.[152] Employment contracts of limited duration without a specific reason are however permitted since a reform in 2007,[153] which introduced general fixed-term employment ("ALVA")[154]. ALVA-employments can only be utilised for two years. If the employment relationship continues after the two-year mark, it automatically transforms to permanent employment. In Sweden currently, 13 percent of the workforce is employed on some type of temporary contract.[155]

The principles of the requirement of just cause for dismissal and priority in dismissal and re-employment will be discussed further in section 3.2.2 and 3.2.3.

The provisions in LAS are mandatory for the benefit of the employee and cannot be derogated from through individual contracts. However, certain provisions can be altered or disregarded through collective agreement due to the semi-compelling nature of Act.

In addition to LAS, another main piece of labour law legislation is the Co-Determination Act (1976:580) (MBL), detailing rules regarding employee influence in the workplace. By prescribing cooperation between employees, unions and employers, the Act is an important employment protection tool, and complement to LAS.

Certain employment protection norms are also provided through the Discrimination Act (2008:567). This Act aims to combat discrimination and promote equal rights and opportunities by prohibiting discrimination of employees and prospective employees. The prohibition covers the entire employment duration, from the hiring process to the termination of the employment relationship.[156]

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[152] 4 § LAS.
[153] 5 § 1 p. LAS. Before the reform employment contracts of limited duration could only be concluded for specific purposes, such as for seasonal work or substitute positions.
[154] Short for "allmän visstidsanställning".
[155] European Commission via Eurostat (2017). Slightly higher than the EU average of 11 percent.
[156] There are additional acts relating to labour law in Sweden, but they mostly regulate *employee* protection rather than *employment* protections, by prescribing norms for vacation and working time, parental leave, and workplace environment. See arbetsmiljölagen (1977:1160), arbetstidslagen (1982:673), semesterlagen (1977:480), föräldraledighetslagen (1995:584) and studieledighetslagen (1974:981).

3.2.2 Requirement of Just Cause for Dismissal in Redundancy

The requirement of *just cause* ("saklig grund") for dismissal, established through 7 § 1 para. LAS, is a cornerstone of Swedish employment protection. The requirement is mandatory and cannot be derogated from through individual or collective agreements.[157] The requirement applies when an employer unilaterally wishes to end an employment and requires that the grounds for dismissal are based on either circumstances related to the employee (known as *personal reasons*) or circumstances related to the enterprise (known as *shortage of work reasons* or *redundancy*) and are sufficient enough to constitute just cause.

Distinguishing between circumstances related to the employee and circumstances related to the enterprise is important in order to determine what obligations fall on an employer. For example, the two-month-rule[158] and the obligation to disclose dismissals in advance[159] come into play for dismissals due to circumstances related to the employee. For circumstances related to the enterprise, rules regarding priority in dismissal and re-employment, prescribed in 22 § and 25 § respectively, must be adhered to by the employer. The importance of the latter two as part of the employment protection is discussed further in section 3.2.3.

LAS also allows for summary dismissal, but as it is only permissible when an employee has seriously neglected their duties, it is always considered for personal reasons.[160] Dismissals for personal reasons will in this study only be discussed to the degree it highlights dismissals for shortage of work reasons as the prohibition only targets dismissals in relation to a transfer.[161]

Circumstances related to the enterprise is typically exemplified as a decreased production resulting in a decreased need for staff, but is defined negatively as all dismissals *not* based on circumstances related to the employee. The dismissal ground therefore comprises all organisational or economic reasons for a reduction or change in the work force. As such, the requirement of just cause does not hamper the ability of well-functioning and successful businesses to restructure. It has been established through case

[157] Ds 2002:56 p. 162.
[158] The two-month-rule states that circumstances the employer has known for more than two months cannot be the sole ground for dismissal, see 7 § 4 para. LAS.
[159] See 30 § LAS.
[160] 18 § LAS.
[161] For more information regarding dismissals due to personal reasons, see for example Adlercreutz (2013) ch. 7.

law that dismissals as a response to an employee refusing to accept unilateral changes to their employment contract, falls within the definition of circumstances related to the enterprise.[162] The inclusion of such dismissals under the definition has been controversial, but derives from the idea that while there might be no shortage of work *in general* in such a situation, the employer in question is short on work *with the old employment conditions*.[163] Similarly, grounds for just cause have been found when an employer dismisses permanent employees in favour of fixed-term or temporary workers.[164] Such dismissals are often referred to as *re-regulation dismissals* ("omregleringsuppsägning").

The deciding factor for determining whether a dismissal should be considered carried out for personal reasons or shortage of work reasons is if the issue at hand can be solved through measures targeting only a specific employee (indicating personal reasons) or whether the measures could target any employee (indicating shortage of work reasons).[165]

As a general rule, discretion lies with the employer to decide if there are circumstances related to the enterprise which demand a reduction of the work force.[166] A stated shortage of work reason must nevertheless be real and not fictitious or used as a way of circumventing the regulatory framework for dismissals due to personal reasons, often more complex and narrowly applicable.[167]

To avoid abuse of the framework, the Swedish Labour Court (AD) has the power to investigate the reasons for a dismissal. Case law has clarified that it is sufficient for an employee to show the *probability* of fictitious shortage of work reasons. If achieved, the burden of proof shifts to the employer.[168] It should, however, be noted that the underlying economic or structural reasons do not have to be well-reasoned or rational, but simply real.[169] It must also be recognised that if there are shortage of work reasons sufficient enough to satisfy the just cause requirement, it does not matter if an employer also wishes to dismiss an employee due to personal reasons, as long as the shortage of work is real and decisive for the dismissal.[170]

[162] See for example AD 1993 nr 61, AD 1994 nr 122 och AD 2012 nr 67.
[163] AD 1993 nr 61.
[164] AD 2017 nr 56.
[165] Ds 2002:56 p. 165.
[166] Adlercreutz (2017) p. 123.
[167] See for example AD 2006 nr 92.
[168] AD 1976 nr 26.
[169] See for example AD 2006 nr 92 or AD 1997 nr 215.
[170] AD 2006 nr 68 and Ds 2002:56 p. 166.

If an employee is dismissed without just cause, the dismissal can be nullified at the request of the affected employee according to 34 § LAS. Such a claim must be brought forward within two weeks of the dismissal.[171] The evaluation regarding whether a dismissal is carried out without just cause is carried out by analysing the surrounding circumstances around the time of the dismissal.

Dismissals due to circumstances relating to the enterprise are further restricted by rules of relocation, established in 7 § 2 para. LAS. Relocation must always be considered before dismissing an employee for shortage of work reasons. In order for relocation to be a valid option, however, there needs to be an open position for which the employee is qualified, seldom the case when there is a shortage of work. The obligation to relocate primarily concerns the workplace where the employee is situated, but can extend to the whole company if necessary, although never as far as the entire corporate group. If possible, the relocated position shall match the employee's previous job in terms of pay and duties. If an employee turns down a reasonable offer of relocation, the employer is considered having fulfilled their obligation and a dismissal of the employee will be considered of just cause.[172]

3.2.3 Priority in Dismissal and Re-employment

Complementing the framework of just cause is the concept of priority in dismissal and re-employment.[173] *Priority in dismissal* is governed by 22 § LAS which establishes the requirement for employers to follow an order of priority based on the employees' length of service when dismissing them for shortage of work reasons; the so-called "last in – first out principle". Length of service is determined simply based on the length of employment, without regard to the character of employment, tasks performed or hours.[174] In case of a transfer of an undertaking, the affected employee retains his or her accrued length of service.[175] The rules of priority in dismissal and re-employment can be derogated from through collective agreements.[176]

[171] 40 § LAS.
[172] AD 2009 nr 50.
[173] In Swedish the terms are "turordning" and "företrädesrätt till återanställning". In English they are also referred to as the "seniority rules".
[174] SOU 1993:32 p. 449. If two employees have the same length of service, seniority in age will be the decisive factor.
[175] 3 § 2 p. LAS.
[176] SOU 1993:32 p. 442.

The order of priority shall be set within each operational unit[177] of an enterprise, resulting in several "priority lists" within one company.[178] One operational unit may also have several priority lists, as one office or factory often has personnel with wildly different duties and qualifications. Unless they are somewhat interchangeable, two employees ordinarily cannot be on the same list. Employees in every operational unit are also divided into different lists based on what collective agreement they belong to, meaning that blue collar and white collar worker typically are placed on different lists.[179] If the employer does not have a collective agreement with any trade union, the priority list encompasses all employees of the operational unit.[180] Dismissal are then carried out according to the lists in the operational units affected by the shortage of work.

For employers with ten or fewer employees, up to two employees "of special importance for the continued operation" can be excluded from the priority lists and thereby continue their employment regardless of their seniority.[181]

There is an important correlation between priority in dismissal and relocation. Ordinarily when relocating an employee in accordance with 7 § 2 para. LAS, the relocation can only occur if there is an available and suitable position open (as mentioned in section 3.2.2). When relocation happens in a shortage of work context, however, all positions (in the affected unit) are considered open, and employers can freely relocate employees to suitable positions, without regard to the priority rules prescribed by 22 § LAS. It is not until any relocation has been carried out, that the priority lists of 22 § are created and must be adhered to. This application of LAS emanates from the case AD 2011 nr 30 and gives employers significant discretion in deciding what employees to retain, despite the rigid system of priority lists.

Priority in re-employment is established in 25-27 §§ LAS, and mandates that employees dismissed due to circumstances related to the enterprise shall have priority to be rehired over previously unengaged persons. In 26 § it is established that the order of re-employment follows the same priority list as for dismissal. Priority is awarded to employees with a minimum total length of service of twelve months during the last three years, if they are qualified for the open position.[182] Generally, priority applies to the operational unit

[177] An operational unit is ordinarily regarded as a geographic unit of the company, such as an office, a factory, or a store. See SOU 1993:32 p. 452 and AD 2006 nr 15.
[178] 22 § 3 para. LAS.
[179] SOU 1993:32 p. 453.
[180] SOU 1993:32 p. 453.
[181] 22 § 2 para. LAS.
[182] 25 § LAS.

the employee previously belonged to but can be extended to multiple units if they are located in the same geographical area. In such cases, priority is limited to cover the area of the applicable collective agreement.[183]

An employer is typically bound by priority in re-employment for nine months from the day of dismissal.[184] Any offer of re-employment must be reasonable for it to be considered valid, but if the employee turns down a reasonable offer the employer is allowed to by-pass them on the list. If the company has been transferred to a new employer during the nine months, the right to priority can be directed towards the new employer.[185]

The idea behind the rules of priority in re-employment is that they as far as possible, should correspond to the rules of priority in dismissal in order to combat employers from circumventing them.[186] The rules of priority in re-employment are, however, of limited use as employment protection, as employers are not hindered from organising their business in such a way that priority in re-employment becomes obsolete.[187] For example, the rules do not make out a general prohibition on using temporary agency workers during the nine-month period, despite an established priority.[188] Only employer actions which, with regard to the circumstances in the individual case, are seen as indecorous[189] constitute a circumvention of the rules, and are thereby unlawful.[190] The Court does not expand further on what could be considered indecorous behaviour, but in the later judgment AD 2007 nr 72, the Labour Court stated that actions carried out with the purpose of circumventing LAS would be considered indecorous.

3.3 Prohibition of Dismissal in LAS

3.3.1 Introduction

When Sweden entered the European Union, the Employment Protection Act was revised and altered to conform to Union law. The revision, among other things, resulted in the creation of 7 § 3 para. LAS, a provision transposing the prohibition of dismissal into Swedish law. Prior to the addition of EU

[183] 25 § 3 para. LAS. This must however be requested by the union when negotiating according to MBL.
[184] 25 § para. 2 LAS.
[185] 25 § para. 2 LAS.
[186] SOU 1993:32 p. 455.
[187] SOU 1993:32 p. 456.
[188] AD 1980 nr 54, confirmed again in AD 2003 nr 4.
[189] The term used in the Swedish judgment is “otillbörliga”.
[190] AD 1980 nr 54.

law, Swedish law considered transfers of undertakings just cause for dismissals as a circumstance related to the enterprise.[191] The transposed prohibition, however, prescribes the opposite approach and reads as follows:

> "In the event of such transfer of an undertaking, business, or part of a business as stated in 6 b §, the transfer in itself shall not constitute objective grounds for dismissal. However, this prohibition shall not preclude dismissal which take place for financial, technical, or organisational reasons, including changes to the workforce." [192]

The phrasing of the paragraph is similar to the phrasing of Article 4.1 of the Directive and follows the same structure of prescribing a clear prohibition and exemption. It also includes a reference to 6 b § LAS, a paragraph detailing the automatic transfer of the employment relationship, corresponding to Article 3 of the Directive, and the actual qualification of what constitutes a transfer, equivalent of the applicability in Article 1.1 of the Transfer Directive.

Given that 6 b § LAS is a result of the implemented Directive, it must be interpreted conform to Union law, and in accordance with the Transfer Directive and its case law. The application area stipulated through 6 b § LAS is, however, wider than the area prescribed by the Directive, as the last sentence of the paragraph extends its application also to public sector employees. At the time of transposition, it was uncertain to what degree employees in the public sector were covered under the Directive. The Swedish legislator, however, in a pursuit to equalise the employment terms for the public and private sector, decided to explicitly include public employees under 6 b §.[193] Any employee qualifying for protection under LAS is therefore also covered by 6 b § (and thereby the prohibition of dismissal).

The scope of the Directive has since been clarified to include most public employees through the consolidated version in 1.1(c) and its underlying case law. The *Henk*-exception for the transfer of administrative functions between public and administrative authorities that can be regarded as an

[191] SOU 1994:83 p. 84.
[192] It must be noted the phrasing of the Swedish paragraph and the Swedish version of the Transfer Directive are more similar than the presented English versions. The original phrasing is "Vid en sådan övergång av ett företag, en verksamhet eller en del av en verksamhet som sägs i 6 b § skall övergången i sig inte utgöra saklig grund för att säga upp arbetstagaren. Detta förbud skall dock inte hindra uppsägningar som sker av ekonomiska, tekniska eller organisatoriska skäl där förändringar i arbetsstyrkan ingår." The translation is based on Regeringskansliet's unofficial English version and Zeteo's English translation.
[193] Prop. 1994/95:102 p. 80.

exercise of public authority, does not, however, have an equivalent in the Swedish regulation, making 6 b § broader in comparison.

When the matter has been brought before the Swedish Labour Court, the Court has stated that the broader Swedish implementation is in line with the Directive's character as a partially harmonising directive, as the wider application serves an employment protection purpose.[194] The Court has therefore not taken issue with the derogation from the Directive. The matter has not been tried before the CJEU.

Unlike the Transfer Directive, the Swedish implementation does not explicitly mention how to regard substantial changes to working conditions to the detriment of an employee, as prescribed by Article 4.2 of the Directive.

3.3.2 Extent of the Prohibition

According to the Swedish Government Official Report (SOU), the Swedish prohibition of dismissal should match the Union's, and thereby be given a limited reach. The SOU interpreted the Directive to mean that only dismissals where a transfer in itself was the reason, or more specifically, where the transfer itself was the *invoked reason* for dismissal, were to come under the prohibition's protection.[195] The report further reasoned that dismissals for shortage of work reasons therefore ought to be allowed under the prohibition throughout a transfer process, for both transferors or transferees. The SOU consequently did not regard the prohibition as principally against letting a transferor carry out dismissals on the behalf of a transferee, or to rationalise or reconstruct a company to make it more attractive for a potential transfer. The report's reasoning is along the lines of that expressed by the Commission's memorandum.[196] The SOU however makes no mention of the transfer in itself needing to be the *sole* reason for the dismissal for the prohibition to be applicable.

The Government bill ("proposition")[197] took a different approach to the prohibition, however, considering its application wider than the SOU. The bill considered dismissals due to shortage of work reasons arisen before a transfer were at hand permittable, as such dismissals would have taken place

[194] AD 1999 p. 21.
[195] SOU 1994:83 p. 87.
[196] See COM (97) 85 final and section 2.2.2.
[197] The bill was adopted by the Swedish parliament.

regardless if a transfer would be carried out or not.[198] However, any dismissals actioned by the transferor in order to avoid future redundancy at a transferee, were not regard as by the bill permittable under the prohibition as such dismissals would be carried out because of a transfer *in itself*.

The bill considered the restriction applicable even if there had not yet been a decision made regarding a transfer, as long as there were some plans surrounding it.[199] This approach limits a transferor's possibility to "trim the fat" before a potential sale or to carry out dismissals on the behalf of a transferee. If dismissals need to be carried out to reduce personnel, as a transfer would lead to an excessive work force, such dismissals should be dealt with after the transfer by the transferee. The transferee is also where priority lists should be created.[200] This wider approach advocated for through the bill makes the prohibition applicable to all dismissals after a certain point in the decision-making process, introducing a time-aspect to the prohibition under which there is an *absolute prohibition*.[201]

While the preparatory works are older and their significance as a source of law is reduced as the prohibition of dismissal originates from Union law,[202] the Labour Court repeatedly references the Government bill in its judgment, legitimising and reinforcing its interpretation.

One such judgment is AD 1999 nr 21, in which parts of the Swedish National Police Board's[203] duties were transferred to the Migration Authority after a parliamentary decision.[204] The Migration Authority refused to take on the affected employees from the Police Board, citing shortage of work reasons. The Court found that as the dismissals had been carried out by the new employer, they were not in conflict with 7 § 3 para. LAS. The judgment correlates the view expressed in the proposition that the transferee shall be the party to dismiss employee's. The judgment has, however, received a lot of criticism within the legal doctrine as conflicting with both Union and Swedish law, as the dismissals in reality took place before the actual transfer had been carried out.[205] The Labour Court in the case, however, considered the Migration Authority as the dismissing employer, as it was through and due to their actions the shortage of work situation had

[198] Prop. 1994/95:102 p. 44.
[199] Prop. 1994/95:102 p. 45.
[200] Prop. 1994/95:102 p. 47.
[201] As mentioned in section 1.7, dismissals for personal reasons are excluded from the study. They are however still allowed throughout the transfer process.
[202] See section 1.4 for this reasoning.
[203] In Swedish "Rikspolisstyrelsen".
[204] At the time called "Statens Invandrarverk", now known as "Migrationsverket".
[205] Mulder (2004) p. 321 f, and Nordström (2001) p. 204 ff.

arisen. Primarily and irrelevant of the controversy, the case is a good illustration of how the Court has chosen to follow the interpretation by the Government bill.

The Labour Court has further illuminated the extent of the prohibition predominantly through two cases. In the case AD 2009 nr 55, four workers were dismissed after multiple years of service, with their employer citing shortage of work reasons. Two days after their period of notice ended, the company was transferred in accordance with 6 b § to a joint-stock company ("aktiebolag"), held by the same two individuals owning the transferor company. Sixty percent of the shares were later sold to three new individuals, and together all five individuals made up the board of directors and worked in the store.

The question for the Court to answer was whether the dismissals had been carried out in conflict with the prohibition of dismissal. The Court referred to *Temco* and *Bork*, stating that while there is no fixed point during the transfer process which invokes the prohibition, as a general rule, plans to transfer a company invokes the prohibition. Such plans must have taken *relatively concrete shape*[206] at the *time of the dismissal* for the prohibition to be invoked. In the case, the Court did not consider any plans of transfer to have existed when the dismissals were carried out, as negotiations were initiated months after the dismissals took place (but during the employees' period of notice), rendering the dismissals legitimate. Again, the Court drew on the reasoning from the Government bill.

This case highlights an important flaw of the prohibition's ability to protect employment. According to the bill, the prohibition shall hinder dismissals taken for reconstructive purposes, as such dismissals shall be carried out by the transferee. While the Court did not consider the dismissals in this case to be for such purposes, the company did dismiss employees only to shortly thereafter reconstruct the business. The only difference between their lawful actions and actions under the prohibition was the timing of the planning. It highlights the fact that despite the widened approached taken to the prohibition in the Government bill (and through case law), the protective mechanism for employees is not necessarily notably stronger and can be subject to circumvention.[207]

In the case, the dismissed employees were also not re-employed even though the three new shareholders started working in the business during

[206] The original phrasing was "relativt fast form".
[207] It should be noted that circumvention not necessarily was the goal of the case at hand, but it serves as a good illustration.

their period of priority. The Court with support from its earlier case law reasoned that in joint-stock companies organised as partnerships,[208] as was the case here, the employer obligation of priority in re-employment does not exist.

The second case AD 2014 nr 1 concerned an employer contracted to service a nuclear plant. The contracted work was set to end on December 31st. Therefore, the employer dismissed all employees on July 31st, in order for their last day of notice to match the last day of the contract. During the period of notice, however, the company entered and won a bidding process for further work at the plant, resulting in a continuation of the work even after December 31st.

The Labour Court reasoned that the employer could not have foreseen if there would have been a shortage of work situation or a transfer situation. The inability to foresee the outcome at the time of the dismissals, the Court reasoned, made the application of the prohibition impossible. Only if it is clear *at the time of the dismissal*, that a transfer will happen during or in connection to the employees' period of notice, with regards to such circumstances *practically and with certainty can be observed*, the prohibition applies. The Court also interjected that actions which can indicate such circumstances include if contact has been made with potential buyers, or if a franchise agreement is terminated and the franchisor starts to look for a new franchisee to take over the business, despite no actual contact being made.

It must again be noted that the preparatory works are rather old and were written before much of the relevant Union case law. The cases AD 2014 nr 1 and AD 2009 nr 55, however, refer to *Temco* and *Dethier Équipement* as the reason the time aspect is essential. The fact that the time aspect is of completely different character is surprisingly never mentioned.

While there is no explicit equivalent to Article 4.2 of the Directive in the Swedish legislation, the legislator during the implementation of the Directive considered substantial changes to the working conditions to the detriment of an employee already a part of Swedish law, through the case law doctrine of *provoked dismissal*.[209] The Article requires such changes in a transfer situation to be equated to dismissal, meaning that any substantial changes to the working conditions shall be treated as a dismissal under the

[208] In Swedish the term is "kompanjonsbolag", meaning a joint-stock company in which a few shareholders actively participate in the daily running of the company, but not as employees in the sense of LAS.
[209] Prop. 1994/95:102 p. 48 and SOU 1994:83 p. 90 and p. 157.

prohibition. In a Swedish context, 7 § para. 3 LAS therefore includes any re-regulation dismissals under its prohibition of dismissal. What constitutes a substantial enough change in the working conditions for it to be qualify as a dismissal shall be decided in accordance with the Court's established case law on provoked dismissal.

3.3.3 Extent of the Exemption

As stated in the introduction, the prohibition shall not preclude dismissals taken place for "financial, technical, or organisational reasons, including changes to the workforce."[210]

The preparatory works say very little regarding the exemption. In the SOU, the exemption was not given much weight and was not considered to add additional meaning to the paragraph, but rather regarded as a clarification that dismissals for circumstances related to the enterprise were allowed throughout a transfer process.[211] Again, this is in line with the Commissions interpretation of the exemption and the more recent CJEU case *Vigano*.[212]

The Government bill does not explicitly mention the exemption, but also seems to share the Commission's view that the exemption is an expression for shortage of work reasons.[213] As the bill considers such dismissals unlawful after a certain point in time in the transfer process, dismissals motivated by the exemption during this time must then also be unlawful, a reasoning more in line with General Advocate Van Gerven.

There are no Labour Court cases explicitly addressing the extent of the exemption, but AD 1999 nr 21 corroborates the preparatory works' view of the exemption by using the terms shortage of work and the exemption synonymously.

3.4 Discussion

The employment protection system in Sweden can be summarised as a cohesive system regulated primarily through LAS, where the mandatory employee definition, the presumption of permanent employment, the

[210] 7 § 3 para. LAS.
[211] SOU 1994:83 p. 84 ff and p. 156.
[212] Compare to the Union dimension in section 2.2.2.3.
[213] Prop. 1994/95:102 p. 44 ff.

requirement for just cause and priority in dismissal and re-employment aims to both avoid arbitrary dismissals, and to reverse unnecessary dismissals.

The robustness of the system viewed through an employment protective lens can, nonetheless, be debated. As just cause for circumstances related to the enterprise has been interpreted rather broadly and includes re-regulation dismissal and dismissal of permanent employment in favour of temporary workers, and as the assessment of the need for structural changes is essentially exclusively in the hands of the employer, it is seemingly simply to circumvent the protective system. The combination of the exclusion of two employees in priority in dismissal and the relocation through 22 § before priority is set, further dissolves the unity of the system of employment protection. Additionally, it reduces foreseeability for the individual employee, despite the system as a whole prescribing to the simple principle of seniority. The rules of re-employment can also rather easily be circumvented through the use of temporary workers.

Having said that, circumventing the rules in reality requires effort and planning, and can be difficult if the employer is not willing or able to change the type of employment. A distinction must also be made between cases where the shortage of work is fictitious and where it is genuine. If it is fictitious and the dismissal really is for personal reasons, the Labour Court can disqualify the dismissal. If the shortage of work situation is genuine, an incorrect dismissal regards who to dismiss, not if to dismiss at all. The right to dismiss is however not in question in a genuine shortage of work situation. While the legislator has chosen to base the selection in dismissal (primarily) on the principle of seniority, the principle is not universal or even necessarily adhered to in Sweden as it can be derogated from through collective agreement and as the division of the workplace into small operational units in a way can be considered a derogation from the principle.

With the introduction of the EU and its fundamental principles, the state of the employment protection system in Sweden is also in part more protected than ever. Article 30 of the Charter for instance, ensures the adherence to the requirement of just cause.

The prohibition of dismissal in the context of transfers of undertakings fits into the employment protection system as an addition to the requirement of just cause. To summarise, the Swedish regulation does not permit dismissals because of a transfer *in itself*. Dismissals from the transferor on the behalf of the transferee are always because of the transfer in itself and therefore not permitted. As soon as there are *relatively concrete plans* to transfer a company, dismissals are also not permitted, creating an *absolute prohibition*

of dismissal at a given time in the transfer process. Whether or not there are relatively concrete plans is assessed based on circumstances employers *practically and with certainty can observe* and employer insight and aim at the *time of the dismissal*.

It is clear that the scope differs from the scope of Article 4.1 of the Transfer Directive. Not only is there an added element of point in time in the process where the prohibition becomes absolute, the Swedish regulation does not consider the transfer in itself having to be the *sole* reason for a transfer for the application of the prohibition. Through *Dethier Équipement* it is also clear that prohibition of dismissal in Article 4.1 applies to both transferors and transferees, unlike the Swedish regulation which has been interpreted to mean that a transferor is not allowed to dismiss employees before a transfer on behalf of a transferee.[214]

While the Swedish application is wider, it can be debated to what extent it provides a greater level of employee protection. On the one hand, the prohibition implements a time under which dismissals cannot be carried out, ensuring further employment for employees. Additionally, as an employee is transferred to a new employer they retain the right to have their accrued length of service considered when setting up priority lists, meaning that the transferring employees share priority lists with the current employees at the transferee.

On the other hand, if there is a genuine desire to restructure at the transferee, the absolute prohibition only prolongs employments slightly for many employees. Additionally, as each operational unit has their own priority lists, the continued employment of an employee from the transferor company is difficult to predict and they risk ending up on separate lists.

The absolute prohibition could also have the opposite effect where employers dismiss employees before there are relatively concrete plans and earlier than necessary in order to be able to restructure before the absolute prohibition can be invoked. As such, the additional employment protection afforded to employees through the prohibition of dismissal in Sweden is slight, and the order is foremost different. If the legislators aim was greater employment security or to be interpreted differently than Union law, it should arguably have been explicitly stated in the preparatory works, or at least by changing or diverging from the Directive text when phrasing the national paragraph. Instead, the order of the Swedish prohibition seems to aim to conform to the EU prohibition but also diverge without real reason,

[214] See section 2.2.2.3.

and there is thus no reason not to interpret the order in strict conformity with Union law. As such the divergence best lends itself to confusion and uncertainty for both employees and employers.

The disparity between national and Union law is not limited only to the prohibition but can additionally be found in the broader scope of application through the inclusion of all public employees under 6 b § LAS.[215]

[215] See section 2.2.1.4.

4 The German Dimension

4.1 Industrial Relations

The central actors in the German industrial relation system consist of the state on a federal and state level through its role as a legislator and through the judiciary, along with the social partners consisting of unions, works councils and employers' organisations. There is no statutory definition of a union in Germany, but their activity is regulated rather strictly.[216] They are traditionally organised along sector or industry lines,[217] and often belong to national central-organisations. Employee representation in the German industrial relations system is dualistic, with unions activity being complemented by works councils ("Betriebsrat").[218] While there is a distinct division between the two and their activity, unions exercise a heavy influence on works councils as memberships overlap and unions can nominate candidates for election to the councils. Works councils in Germany are exclusively made up of elected employee representatives, and act as a counterpart to management.[219]

Employer organisations operate on both a state and federal level, and employers ordinarily belong to both a national industry specific organisation at a federal level, and a multi-industry association on a state level.[220]

Collective agreements can be concluded by single trade unions or central-organisations, and single employers or employers' organisations. Predominantly, bargaining will be carried out on sectoral level between the central-organisations.[221] Today, collective bargaining covers virtually all areas of interest to employees, such as compensation, flexibility of working hours, job security and training.[222] Obligations established through collective agreement are only binding to the parties to the agreement.[223] Generally, and unlike Swedish collective agreements, they do not have an extended application to employees outside of the relevant union with the exception of "company norms".[224] Employers will however still often apply

[216] Weiss (2010) p. 183. Some main rules include party-political independence, and cannot incorporate members from the opposing side, see Preis (2003) p. 26.
[217] Preis (2017) p. 56 f.
[218] Weiss (2010) p. 222.
[219] Weiss (2010) p. 223.
[220] Weiss (2010) p. 176.
[221] Weiss (2010) p. 181.
[222] Weiss (2010) p. 182.
[223] Weiss (2010) p. 186.
[224] §§ 3-4 TVG.

a collective agreement in larger parts to all employees in the workplace,[225] for simplicity or to discourage further unionisation.[226] Collective agreements can be extended to all parties in an industry under the Collective Agreements Act by the federal or regional labour ministries.[227] Works councils are not allowed to conclude collective agreements, but work to ensure adherence to the agreements locally.[228]

Union membership has declined in Germany over the last decades, with the rate of employees employed at organised employers being 62 % in 2006,[229] and 66% of the work force being covered by collective agreements in 2012.[230]

The state's primary role in the German industrial relations system is as a legislator and interpreter of the law and collective agreements through the courts. As competence has been given to the federal legislator in the area of labour law, the vast majority of labour law norms are derived from the federal level.[231] The role of the legislator has increased as the power of the collective bargaining system steadily has decreased over the last decades, leading, among other things, to the introduction of a federal minimum wage in 2015. Union bargaining power in particular was deemed insufficient to protect the interests of employees, as collective agreements could not always guarantee a sustainable level of pay.[232]

The German labour court system consists of three instances, with the highest instance being the Federal Labour Court (BAG).[233] The Federal Constitutional Court[234] also plays a role in labour law matters as its precedents are binding for all German courts.

[225] Däubler (2002) p. 50.
[226] Weiss (2010) p. 187.
[227] Oesingmann (2016) p. 59 f.
[228] Funk (2003) p. 63.
[229] European Commission (2006) p. 37.
[230] Gartner (2012) *The role of wage setting institutions on wage cyclicality: Some unexpected patterns from Germany.*
[231] Weiss (2010) p. 38.
[232] Keller (2016) p. 26-27.
[233] In German "Bundesarbeitsgericht".
[234] In German "Bundesverfassungsericht".

4.2 Regulation on Employment Protection

4.2.1 Introduction

German labour law is to a large extent codified through federal legislation, but unlike most areas of German law it lacks a unified code despite several attempts to create one.[235] Relevant employment protection norms can instead be found throughout several different acts. Most pertinent to this study is the Civil Code (BGB),[236] and The Act on Dismissal Protection (KSchG).[237, 238] Similar to the Swedish legal system, Germany also regulates the relationship between the social partners through a Codetermination Act,[239] and the works councils through the Works Constitution Act[240].

The structure of German employment law predominantly revolves around the concepts of the mandatory employee definition and the presumption of permanent and full-time employment, along with the requirement of social justification for dismissal and selection in dismissal through social aspects, and reinstatement, discussed further down in the chapter.

As in Swedish law, the *mandatory employee definition* in Germany means that the objective circumstances determine if an agreement of employment has been concluded, regardless of the will and belief of the contracting parties.[241] The term employee has not been defined in statute but rather negatively in case law against the term *self-employed* ("Selbstständig").[242] As self-employment is characterised by the freedom to organise one's own work and working time, an employee is therefore characterised as a person in subordination to an employer. To make the distinction a number of factors need to be considered, such as the autonomy of the individual to refuse tasks, the enterprise's expectation of the individual's availability, and the individual's integration into the organisation.[243]

[235] Weiss (2010) p. 38.
[236] Bürgerliches Gesetzbuch 18.8.1896, RGBI. S. 195.
[237] Kündigungsschutzgesetz 10.8.1951, BGBI. I S. 499.
[238] As in the Swedish system, there are additional labour law regulations pertaining mostly to *employee* protection rather than *employment* protection. In Germany the main ones are Arbeitnehmerüberlassungsgesetz 7.8.1972, BGBI. I S. 1393 (Employee Leasing Act), Urlaubsgesetz 8.1.1963, BGBI. I S. 2 (Holidays Act), Mutterschutzgesetz 24.1.1952, BGBI. I S. 69 (Act on Maternity Protection) and Mindestlohngesetz 16.8.2014, BGBI I S. 1348 (Minimum Wage Act).
[239] Mitbestimmungsgesetz 4.5.1976, BGBI. I S. 642.
[240] Betriebsverfassungsgesetz 11.9.1952, BGBI. I S. 681.
[241] BAG 13.1.1983, 5 AZR 14/82.
[242] § 84 para. 1 Handelsgesetzbuch 10.5.1897 RGBI. S. 219 (The Commercial Code).
[243] See for example BAG 13.1.1983, 5 AZR 14/82.

German law also recognises a third category of workers called *employee-like persons* (“Arbeitsnehmerähnlich"), as an in-between category to classify self-employed individuals whose economic situation more resembles that of an employee rather than a self-employed person. The category offers some employment protection but is not covered by the KSchG or the prohibition of dismissal in BGB.[244] KSchG more importantly is also only applicable to employers with ten or more employees, who have been employed for a minimum of six months according to § 1 KSchG, [245] and excludes employees in a management position ("leitende Angestellte").[246]

German labour law is also based on the *presumption of permanent* (full-time) *employment*. In 2001, however, fixed-term work contracts[247] were introduced to harmonise the Fixed-term Work Directive 99/70/EC through the Act on Part-Time Work and Fixed-Term Contracts (TzBfG).[248, 249] Fixed-term contracts do not require dismissal due to the presumption that termination of the employment relationship occurs when the agreed upon period ends.[250]

According to German law, fixed-term contracts are only acceptable if the time limitation can be *justified by an objective reason*.[251] Examples of such reasons are listed in § 14 TzBfG, including when there is only a temporary internal demand for work, or the nature of the work justifies the limitation in time. The list is not exhaustive. An employer does not, however, have to provide an objective justification if the contract concluded spans less than two years, and if the contracting parties have *not* had an employment relationship prior to the fixed-term contract.[252] In Germany currently, 10 percent of employees are employed under some form of temporary contract.[253]

[244] Weiss (2010) p. 47.
[245] The provision targets full-time employees. For part-time employees, “employees whose regular working time does not exceed 20 hours weekly shall be counted as 0.5 of an employee and those whose working time does not exceed 30 hours weekly shall be counted as 0.75 of an employee”, see § 23 KSchG.
[246] See § 14 para. 2 and § 17 para. 5 KSchG.
[247] In German “befristete Arbeitsverhältnisse”.
[248] In German “Gesetz über Teilzeitarbeit und befristete Arbeitsverträge”, 21.12.2000, BGBI. I S. 1966.
[249] Weiss (2010) p. 51-52.
[250] § 16 TzBfG.
[251] § 14 para. 1 TzBfG.
[252] § 1 para. 2 TzBfG.
[253] European Commission via Eurostat (2017). The figure is slightly lower than the EU average of 11 percent.

4.2.2 Requirement of Social Justification for Dismissal in Redundancy

With the introduction of KSchG in 1951, Germany reversed the traditional dismissal structure and introduced an order where *ordinary dismissals* by default were unlawful.[254] Ordinary dismissals are those with notice, in contrast to extraordinary dismissals where no notice is required. Extraordinary dismissals can be equated to summary dismissals in the Swedish legal order but can be carried out for severe economic reasons in addition to circumstance related to the employee.[255]

Ordinary dismissals under KSchG require *social justification* ("Soziale Rechtfertigung") in order to be lawful. Under § 1 para. 2, three types of social justifications are prescribed as valid, namely 1) reasons relating to the employee's person, 2) the employee's conduct, and 3) economic reasons.[256] Reasons relating to the employee's person typically refer to an employee unable to perform the requirements of the job due to illness. Reasons relating to the conduct of the employee refer to employee misconduct, such as tardiness, criminal offences toward the employer or other employees and drug use.[257] Economic reasons refer both to measures taken by the employer in order to rationalise or restructure an organisation, and to measures taken as a reaction to external influences such as an economic crisis or a reduction in demand for the employer's goods. For a dismissal to be justified it must have become impossible for the employer to retain the dismissed employee due to the economic situation.[258] Decisions regarding the validity of restructuring or rationalisation measures are up to the employer itself to evaluate and are not subject to judicial review, as it is considered part of the managerial prerogative.[259] The onus, however, lies with the employer to prove the claimed strained economic situation, and the necessity of any dismissals following it if the dismissal is contested.[260]

German law also permits re-regulation dismissals ("Änderungs-kündigungen") in cases where an employer wants to unilaterally change the working conditions of an employee.[261] The dismissal is understood as a regular dismissal in combination with an offer to continue the employment under changed conditions. These dismissals must nevertheless still be

[254] Weiss (2010) p. 122.
[255] See § 626 BGB.
[256] § 1 KSchG.
[257] Weiss (2010) p. 127-128.
[258] Weiss (2010) p. 128.
[259] Erfurter commentary KSchG § 1 (2019) p. 422 f.
[260] BAG 30.4.1987, 2 AZR 184/86.
[261] See § 2 KSchG.

socially justifiable. Unique to German law is the possibility to *declare a reservation*, meaning the affected employee accepts the new employment on the condition that the validity of the dismissal is tried and accepted in court.

While the requirement of social justifications cannot be derogated from to the detriment of employees,[262] the social partners can exclude ordinary dismissal from application through collective agreement under certain circumstances. Such exclusions could, for example, apply to all workers employed for more than a number of years with the same employer, meaning that only extraordinary dismissals are allowed for them.[263]

German law also requires an employer to have exhausted the possibility of relocation before carrying out dismissals.[264] Acceptable relocation is a comparable position with similar working conditions to which the employee in question can move to immediately or after a reasonable level of training. If an employee agrees to relocate to an open position with worse conditions, the employer does not have social justification for a dismissal.[265] The possibility of relocation is subject to review.[266]

4.2.3 Selection in Dismissal through Social Aspects

The German selection in dismissal is based on the idea that those who suffer most from dismissal should be the last to be dismissed, forcing employers to take *social aspects* ("Socialauswahl") into account when formulating the order in which to dismiss employees.[267] The concept was developed through case law but in an effort to increase foreseeability,[268] the four criteria of seniority, age, a duty to support dependents and severe disability were introduced in legislation as sole social aspects to consider.[269]

How to weight the different criterion is essentially at the discretion of the employer. The Court has, however, stated the factor of age should only be given weight if there are objective reasons to consider it and should never constitute the decisive element.[270] Including other considerations is also

[262] Erfurter commentary KSchG § 1 (2019) p. 13-15.
[263] Weiss (2010) p. 135.
[264] See 1 § para. 2 KSchG.
[265] Weiss (2010) p. 129.
[266] Weiss (2010) p. 129 and BAG 22.5.1986, 2 AZR 612/85.
[267] 1 § para. 3 KSchG.
[268] Weiss (2010) p. 129.
[269] 1 § para. 4 KSchG.
[270] Preis (2017) p. 818.

opened up by KSchG, as its § 1 para. 3 only requires "sufficient consideration" of the social aspects.[271] The evaluation of the different social aspects can also be decided upon through collective agreement.[272] Additionally, employers can deviate from following the outcome of the weighted social aspects if particular employees' continued employment is in the operational interest of the employer, due to their knowledge, skill or performance, or in order to ensure a well-balanced personnel structure.[273] The scope of this exception has, notably, been interpreted strictly by the Court.[274]

An employee's social aspects are weighted against other employee's social aspects in the same "group". A group consists of horizontally compatible employees, meaning employees interchangeable with each other in terms of tasks and responsibility.[275]

4.2.4 Reinstatement

Under certain circumstances, dismissed employees have the right to *reinstatement* ("Wiedereinstellung") to their previous position. This concept establishes a recourse for nullification of previously legitimate dismissals in cases where the circumstances constituting the grounds for dismissal have changed in such a way that they no longer justify a dismissal. Reinstatement was originally developed through case law exclusively to correct dismissals based on false presumptions of criminal offences but has, since 1997, been extended to include ordinary dismissals for economic reasons.[276] In order for reinstatement to apply, the original dismissal must have been justified in accordance with § 1 KSchG, and the later change in circumstances not foreseen.[277] If reinstatement is at hand, the employee in question shall be re-employed with unchanged working conditions and preserve their accrued rights.[278]

In the case of a transfer, the continuation of an employment relationship against the current employer presupposes that the employer has not made any structural changes incompatible with reinstatement of the employee. The unchanged continuation of the employment relationship must also be

[271] In German "ausreichende Berücksichtigung".
[272] 1 § para. 4 KSchG.
[273] 1 § para. 3 KSchG.
[274] Erfurter commentary §1 KSchG (2019) p. 497 f.
[275] BAG 5.6.2008 NZA 2008, 1120 and Preis (2017) p. 812 ff.
[276] BAG 27.2.1997 NZA 1997, 757.
[277] See § 1 KSchG.
[278] Erfurter commentary BGB § 613a (2019) p. 163.

considered reasonable. Reinstatement may be unreasonable if, for example, the purchasing company requires a lower number of employees than the transferor did.[279] If a lessened demand for employees leads to only part of the previous work force being reinstated, the selection of employees to be reinstated shall be done with regards to the social aspects an employer normally must consider when selecting employees for dismissal.[280]

The right of reinstatement continues throughout the dismissed employee's period of notice. It is enough that the realisation of changed conditions has arisen during the period of notice for the right to be invoked, regardless of whether a transfer is carried out at a later point in time, after the period of notice has ended.[281]

4.3 Prohibition of Dismissal in BGB

4.3.1 Introduction

Like the majority of civil law jurisdictions, German law previously considered a transfer of an undertaking a lawful reason for dismissal.[282] This position gradually changed, and with the implementation of the Transfer Directive the opposite order is now prescribed. The prohibition of dismissal was transposed into § 613a para. 4 BGB, which reads as follows:

> "The termination of the employment relationship of an employee by the previous employer or by the new owner due to transfer of a business or a part of a business is ineffective. The right to terminate the employment relationship for other reasons is unaffected."[283]

The phrasing of the national implementation is relatively different from both the German and the English language version of the Directive. Instead of using the Directive's phrasing of "not constituting grounds", § 613a para. 4 uses the term "ineffective", inferring that dismissals against the prohibition are without effect. Additionally, the provision does not incorporate the exemption expressly, but rather states that reasons for termination other than those deemed "ineffective" shall remain unaffected.

[279] BAG 27.2.1997 NZA 1997, 757.
[280] BAG 4.12.1997 NZA 1998, 701.
[281] BAG 25.10.2007 NZA 2008, 357 and BAG 21.8.2008 NZA 2009, 29.
[282] Weiss (2010) p. 142.
[283] The translation is taken from the Federal Ministry of Justice and Consumer Protection in cooperation with juris GmbH. The original German version reads: "Die Kündigung des Arbeitsverhältnisses eines Arbeitnehmers durch den bisherigen Arbeitgeber oder durch den neuen Inhaber wegen des Übergangs eines Betriebs oder eines Betriebsteils ist unwirksam. Das Recht zur Kündigung des Arbeitsverhältnisses aus anderen Gründen bleibt unberührt."

In general, § 613a BGB does not use the words transferor and transferee as suggested by the Directive,[284] but rather "hitherto employer" and "new owner".[285] The difference in terminology however has no bearing on the meaning of the terms.[286]

The provision § 613a does not only transpose Article 4.1, but most components of the Directive such as Article 1 regarding the scope and applicability of the provisions, and Article 3 regarding the automatic transfer of the employment relationship.

The German scope of application of the transposed rules matches those prescribed by the Union. As the term "transfer" is not defined in the BGB provision, however, some uncertainty initially arose regarding the situations where a new contractor takes over after a previous contractor, without taking on any of the material or immaterial (such as staff) assets. Through the preliminary ruling by the CJEU in the case *Ayse Süzen*[287] after request by the German Federal Labour Court, it was clarified that the Directive does not apply when purely functions, without any corresponding assets, are transferred between contractors. The German Courts have accepted the CJEU's ruling.

The German regulation also applies to both the public and private sector.[288] Unlike Sweden, however, the German application follows the exception set out in *Henke* and Article 1.1(c), meaning the German regulation does not apply to transfers of administrative functions between public and administrative authorities, if the activity is regarded as an exercise of public authority.

It must also be noted that the prohibition of dismissal is independent from the general dismissal protection prescribed by the Act on Dismissal Protection (KSchG). This means that § 613a para. 4 BGB is applicable to *all employees*, as defined section in 4.2.1, without the exclusions of KSchG applying.[289] The prohibition also applies to both ordinary and extraordinary dismissals.[290]

[284] In German "Veräußerer" and "Erwerber".
[285] In German "bisherigen Arbeitgeber" and "neuer Inhaber".
[286] Sargeant (2006) p. 21.
[287] C-13/95 Ayse Süzen.
[288] Sargeant p. 10. The case C-298/94 *Henke* was also a German case referred to the CJEU.
[289] Erfurter commentary BGB § 613a (2019) p. 115.
[290] Erfurter commentary BGB § 613a (2019) p. 116.

Unlike the Transfer Directive, the German provision does not expressly implement Article 4.2 of the Directive, regarding how to categorise substantial changes to working conditions to the detriment of an employee.

4.3.2 Extent of the Prohibition

The German prohibition of dismissal is applicable if the dismissal in question is *due to* the transfer of a business (or part of a business). Just as in Sweden and the EU, the German implementation of the prohibition is only addressed by a small number of Federal Labour Court cases.

In line with the case law of CJEU, the Labour Court has reasoned that the Directive is not intended to protect employment to a greater degree under a transfer than under ordinary circumstances.[291] Thus, only dismissals *due to* the transfer *in itself* should be protected under § 613a para. 4 BGB, regardless of the proximity to the transfer.[292] The Court has further stated that in order for a dismissal to invoke the prohibition, the transfer must be the *primary reason* for dismissal, and not just an "external cause".[293] Following that reasoning, the Court has concluded that as the provision stands, the prohibition can be applicable even if the transfer is not the *sole reason* for dismissal.[294] If the additional reasons are external causes, they do not preclude the prohibition from applying, as the transfer in that case still is primary. However, if an employer bases a dismissal on several reasons, one of which is the transfer in itself, the prohibition applies if the other invoked reasons are do not fulfil the requirement of social justification.[295]

It must be noted that the employer's *declared* reasons for dismissal are not decisive in how a dismissal is qualified. Instead, the Court looks to the *actual* reasons for the dismissal.[296] It can, however, be difficult to separate the actual and the declared reason for the dismissal as the Court does not subject the validity of restructuring and rationalisation to judicial review,[297] leading to the prohibition being circumvented.

[291] BAG 18.7.1996 NZA 1997, 148.
[292] BAG 18.7.1996 NZA 1997, 148.
[293] In German "äußere Anlass", see BAG 16.5.2002 NZA 2003, 93, and 20.9.2006 NZA 2007, 387.
[294] BAG 27.9.1984, NZA 1985, 493 and BAG 27.10.2005, NZA 2006, 668.
[295] BAG 27.9.1984, NZA 1985, 493 and BAG 27.10.2005, NZA 2006, 668.
[296] BAG 28.4.1988 NZA 1989, 265.
[297] See section 4.2.2.

Such a circumvention was discussed by the Federal Labour Court in BAG NZA 1994, 686.[298] In the case, the Court stated that the closure of a business with subsequent dismissals, shortly followed by the resumption of operations and transfer of the business, was reason to believe the closure was not the *actual* reason for the dismissal, but a circumvention. Such chain-of-events indicate that the real reason for dismissal was the transfer and the closure and subsequent reopening of the business was a manoeuvre to circumvent the prohibition.[299]

It is the conditions at the point in time when notice of dismissal is given that shall be decisive when evaluating the employer's reasons.[300] This means that if a decision and intention to close down a business is *serious* and *final* when the dismissal takes place, the prohibition will not apply even if the business later ends up being transferred.[301]

The prohibition of dismissal is applicable to both the transferor and the transferee,[302] both before and after the transfer has taken place.[303] As the rights and obligations transfer from transferor to transferee first at the time of the transfer, the right to restructure and dismiss is only awarded to the current owner of the undertaking. Additionally, the prohibition extends to encompass contractual limitations, meaning that a coming or potential transfer cannot be the justification for employing someone on a fixed-term contract.[304] As employers do not need to provide an objective justification for fixed-term contracts under two years, the relevance of this is seemingly marginal.[305]

Just like the Swedish regulation, the German regulation lacks a provision explicitly transposing Article 4.2 of the Directive.[306] The norm established through Article 4.2 is nevertheless recognised as part of the prohibition, establishing that detrimental changes in the working conditions shall be considered dismissals, and affected by the prohibition of dismissal in the same way as other dismissals.[307] That means that German re-regulation dismissals are not permitted if a transfer is the sole and primary reason for re-regulation.

[298] BAG 9.2.1994, NZA 1994, 686.
[299] BAG 9.2.1994, NZA 1994, 686.
[300] BAG 19.6.1991, NZA 1991, 891.
[301] BAG 28.4.1988, NZA 1989, 265.
[302] Erfurter commentary BGB § 613a (2019) p. 117.
[303] BAG 27.10.2005, NZA 2006, 668.
[304] BAG 15.2.1995 NZA 1995, 987.
[305] See section 4.2.1.
[306] Sargeant (2006) p. 45.
[307] Preis (2017) p. 891.

4.3.3 Extent of "Other Reasons"

As mentioned in the introduction, 613a para. 4 BGB states that the "right to terminate [an] employment relationship for other reasons is unaffected". The provision greatly diverges from the phrasing "economic, technical or organisational reasons entailing changes in the workforce" expressed in Article 4.1 of the Directive. Through the phrasing of the provision, the German legislator clearly establishes an order where the ordinary rules for dismissal continue to be applicable,[308] meaning there is no hinderance for dismissals for such "other reasons" to be carried out continuously throughout the transfer process.

As the "other reasons" are made up of the regular dismissal regulations, regulated through KSchG, both ordinary and extraordinary dismissals for all three social justifications are allowed, including economic reasons. It also means that for employees exempted from protection against dismissal under KSchG, an employer is only required to show that the primary reason for dismissal *was not* the transfer, but something unrelated without having to regard the requirement of social justification.[309]

The Federal Labour Court has not opposed dismissals for reconstruction or rationalisation reasons from both the transferor or the transferee. If the aim of a dismissal is to restructure a business to make it more attractive in preparation for a potential transfer, the Court does not consider it in conflict with the prohibition but rather as a dismissal for "other reasons".[310]

4.4 Discussion

The employment protection in Germany can be summarised as a cohesive system regulated through several legislative acts, with the primary one being KSchG. The system is centred around employment protection through the mandatory employee definition, the presumption of permanent employment, the requirement of social justification and selection in dismissal through social aspects and reinstatement, components aiming to avoid arbitrary dismissals and reverse any dismissals later realised unnecessary.

One of the larger weaknesses of the German employment protection system is the applicability of KSchG. Businesses with ten or fewer employees are

[308] Erfurter commentary BGB § 613a (2019) p. 120.
[309] Erfurter commentary BGB § 613a (2019) p. 156.
[310] BAG 20.9.2006, NZA 2007, 387 and LAG MV 9.1.2013, NZA-RR 2013, 238 (case from Landesarbeitsgericht).

exempted from the Act's general rules of dismissal and do not, therefore, need to justify dismissals with regards to social aspects. In real terms, the exclusion means that around 90 percent of German employers are excluded from the framework, as the vast majority of businesses employ ten or fewer people.[311] It must here be noted that 90 percent of employers do *not* represent the same percentage of employees, and that the figure includes company constellations where the owner and founder is the sole employee.

The German system also lacks a proper and automatic re-engagement policy, instead relying on the right to claim reinstatement. The difference in most cases is to the detriment of the individual employee as it places the onus to act on the employee instead of the employer.

The prohibition of dismissal in the context of transfers of undertakings fits into the system as an addition to the requirement of social justification, applicable under certain circumstances. To summarise, the German regulation closely adheres to the Union's regulation and case law surrounding the prohibition. The applicability depends primarily on whether a transfer constitutes the *sole primary* reason for a dismissal, regardless of when the dismissal is carried out, in line with the CJEU's established case law.

The phrasing of the Labour Court case law differs slightly from the phrasing constructed by the CJEU, which does not use the word "primary". The difference in the wording has seemingly no divergent effect on the outcome of the application, as the prohibition in its German application cannot be invoked if another reason is sufficient enough to warrant dismissal, in line with the CJEU's reasoning regarding *sole reason*. It must be regarded as unlikely that the lack of the word "primary" implies that the Union would accept any reason, no matter its significance, as enough to set the prohibition aside. Instead, the German addition acts as a clarification but does not alter the extent or application of the prohibition of dismissal in Germany.

The exemption for other reasons is also in line with the reasoning that the exemption for economic, technical or organisational reasons is sooner a clarification of the scope of the prohibition stating that regular grounds for dismissal are not restricted, rather than an exception to the prohibition, in line with the outcome of *Vigano*.[312]

[311] Federal Statistical Office of Germany, *Unternehmensregister*. The figure is from 2017.
[312] See section 2.2.2.

5 Concluding Discussion

5.1 Introduction

The aim of the study has been to compare and contrast the current state of the law regarding the prohibition of dismissal in the context of transfers of undertakings in Sweden, Germany and the EU, as well as to compare and evaluate the national implementations in light of EU law, and in light of the EU's flexicurity strategy. With this aim in mind, the objective has been to develop a thorough understanding of the different dimensions' content, application and development of the prohibition of dismissal.

The methods applied to achieve the purpose of the study are the method of legal dogmatics and the comparative method in combination with a functional approach. The method of legal dogmatics has been employed to investigate the current state of the law in content and application, while the comparative method functions to investigate the functional difference between the national jurisdictions and the EU. In order to properly compare the two jurisdictions functionally, the fundamentals of each employment protection system have been extensively addressed.

The following analysis has been divided into two sections. The first one addresses the comparative perspective on the current state of the law regarding the national employment protection systems in general and the prohibition of dismissal in Sweden and Germany. The second part reviews the results of the study in light of flexicurity.

5.2 Adopting a Comparative Lens

The labour law and industrial relations systems in Sweden and Germany are fundamentally similar in several ways. Both systems comprise of relatively strong trade unions carrying out bi-partisan collective bargaining with employers and their organisations. In both jurisdictions, the states perform their judicial powers through specific labour courts and legislate on a primarily national and general level, allowing the social partners to fill in the framework with industry and locally specific norms. Both Sweden and Germany are members of the European Union and thereby bound by certain fundamental rights in the labour law field. Through the EU membership and

the decline in trade union memberships, the two jurisdictions also face similar challenges and development.[313]

The national frameworks of employment protection in Sweden and Germany are similar, but there are some central differences between them. One fundamental difference is the scope of application of the employment protective norms. Sweden employs a uniform employee definition throughout its employment protection framework, based on a mandatory employee definition and the presumption of permanent employment. Any individual categorised as an employee under LAS is afforded its employment protection.[314]

Germany also employs a mandatory employee definition and operates on the presumption of permanent employment. All employees in Germany, however, are not afforded the same employment protection, as persons employed for six months or less or employed at an employer with ten or fewer employees are excluded from ordinary dismissal protection under § 1 KSchG. The consequence of exclusion from KSchG is primarily the loss of the requirement of social justification for dismissal, meaning that such employees can be dismissed without a socially justified cause.[315]

The prohibition of dismissal in transfers of undertakings and the additional provisions from the Directive implemented in § 613a BGB are, however, not limited by such restrictions and apply to all employees. Nevertheless, the exception in § 1 KSchG likely still influences the effectiveness of the prohibition of dismissal in a transfer situation, as it is harder to argue that a dismissal is primarily due to a transfer if the alternative justifications to a dismissal must not be socially justifiable.

Germany also recognises the category *employee-like person* as an in-between category for self-employed individuals whose economic situation is more similar to that of an employee. The development of such a category can be considered both an extension of the employee definition, or a limitation of it, as other jurisdictions might simply include such individuals in their definition of an employee. In comparison to Sweden, the development of the category must be said to be an extension, as the factors for evaluation of who is an employee is very similar in both jurisdictions. The additional category would therefore primarily include individuals categorised as self-employed in Sweden.

[313] See section 3.1 and 4.1.
[314] See section 3.2.1.
[315] See section 4.2.1.

Nevertheless, the restriction in § 1 KSchG means that a large segment of the German labour market lacks significant protection against dismissal.[316] Additionally, as both jurisdictions have similar rules regarding fixed-term employment, where no specific reason must be given for fixed-term employment spanning less than two years, the exception in KSchG cannot be said to functionally cover those employees who fall under ALVA-employments in Sweden, especially not since the two countries statistically have comparable levels of temporary workers.[317] While a definitive answer would require quantitative research, the results of the study infer that the reach of the Swedish employee definition generally is wider and more inclusive. In the context of transfers of undertakings, the Swedish regulation has also been extended to include all public employees, unlike the German order which excludes employees affected by transfers of administrative functions between public and administrative authorities which can be regarded as an exercise of public authority (the *Henke*-exception).[318]

The Swedish requirement of just cause and the German requirement of social justification for dismissal are very similar, and largely ought to cover the same situations. Under circumstances related to the enterprise and economic reasons respectively, companies are free to dismiss employees based on both internal and external changes, regardless of the success of the company or the sensibility of the decision, so long as the decision and circumstances are real. The German regulation also infers the requirement that it must be impossible for the employer to retain the affected employee due to the changed economic situation, suggesting that the requirement of social justification in Germany is somewhat stricter than the Swedish requirement of just cause through circumstances related to the enterprise.[319]

The difference between the two jurisdiction is larger when comparing the priority order of dismissal, in Sweden based on the principle of seniority exclusively, while the order in Germany is decided through weighing four social aspects. Despite having defined the social aspects in law in an effort to increase foreseeability, the German order is still less predictable than a simple seniority principle, especially as they are continuously changing and as German employers are virtually unrestricted in how they balance the factors. The balance can, however, be specified through collective agreement, slightly increasing the foreseeability. By the same token, the

[316] As mentioned in section 4.4 the exception affects 90 percent of employers in Germany.
[317] Germany 10 percent and Sweden 13 percent. See section 4.2.1 and 3.2.1 above.
[318] Compare sections 3.3.1 and 4.3.1.
[319] Compare sections 3.2.2 and 4.2.2.

Swedish seniority principle can be derogated from through collective agreement, something that can both increase or decrease foreseeability.[320]

One of the most significant differences in the Swedish and German employment protection systems is the difference in re-engagement policy. Sweden prescribes a clear priority in re-employment giving dismissed employees the right to be rehired in the same order that they were dismissed. The German employment protection system does not offer a direct equivalent, but functionally, the right to claim reinstatement has the same effect in some respects. The biggest difference between the two is that reinstatement requires a claim to be directed towards the employer, while re-employment is an automatic right. The right to reinstatement is also only applicable if the grounds for dismissal no longer prevail, while the right to re-employment purely looks to whether there is an available position. Despite the difference in the legal construction, the reality of the two concepts in shortage of work situations often ought to be similar, as rehiring originating through claims of restatement must include consideration of social aspects.[321]

A dismissal can also be nullified in Sweden as prescribed through 34 § LAS, but the right is much narrower and can only be applied if there was no just cause for the dismissal at the time of the dismissal. If legitimate grounds for dismissal become invalid after the dismissal, an employee has no recourse through the nullification rules in Sweden.

The different approach to re-engagement has a real effect on employment protection and becomes relevant in cases such as AD 2014 nr 1, where the continued need for workers at the time of the dismissal could not be foreseen by the employer, as it depended on a pending tender.[322] Had the German concept of right to reinstatement applied in the case, the dismissed employees could have been reinstated as the knowledge of the outcome of the tender changed under their period of notice.

The prohibition of dismissal is, in and of itself, an employment protective norm, aimed to reduce dismissals in connection to transfers of undertakings. Prior to the introduction of the prohibition, both Germany and Sweden considered transfers a lawful ground for dismissal. The implementation of the prohibition, however, reversed the previous order, and it was introduced to complement the framework on unlawful dismissal in LAS and KSchG respectively.

[320] Compare sections 3.3.3 and 4.2.3.
[321] Compare sections 3.3.3 and 4.2.4.
[322] See section 3.3.2.

With regards to the current state of the law of the prohibition of dismissal specifically, it can be concluded that while the prohibition in Germany and Sweden fundamentally achieves the same function, implementation has been distinct in each jurisdiction. The underlying Union law prescribes an order where a transfer in itself as the sole reason for dismissal invokes the prohibition. The exemption for economic, technical and organisational reasons appears to primarily constitute an illumination of the prohibition, clarifying that lawful grounds for dismissals of such character already prescribed in the Member States' national legal order do not invoke the prohibition. Despite diverting from the phrasing of the original Article 4.1, the German implementation of the prohibition of dismissal more closely aligns with the Union and CJEU's interpretation than the Swedish implementation. While the Swedish implementation follows the Directive's Article 4.1 almost verbatim, Sweden has through preparatory works and case law introduced an absolute prohibition of dismissal for shortage of work reasons, prohibiting any dismissal from a particular point in time in the transfer process.[323]

The discrepancy in implementation raises the question of whether the Swedish divergence from the Directive is in line with Union law. As concluded above, the Directive has traditionally been considered of partial harmonisation, allowing implementation to differ from the original Directive so long as the minimum protection is achieved, and implementation is not in opposition to the aim of the Directive.[324] The introduction of *Alemo-Herron*, however, has put the both the singular aim of the Directive in question and its status as partially harmonising, meaning that a strengthening of the employee interests could be limited by the employer interests in Article 16 of the Charter.

Following the reasoning in section 3.4, it can be concluded that that the wider Swedish prohibition of dismissal does not necessarily infer a stronger employment protection than that prescribed by the Union. By imposing an absolute prohibition in time, however, the managerial prerogative is drastically restricted.

Considering the Union's general move towards recognising a dual aim of the Transfer Directive, such a derogation of employer freedom is likely to be considered in conflict with the Directive. Parts of the Swedish implementation has also led to a disregard of Union case law, such as the case *Dethier Équipement* which, contrary to the Swedish law, allows

[323] Compare sections 2.3, 3.3 and 4.3.
[324] See section 2.2.1.3 and 2.2.1.4.

transferors to dismiss employees on the behalf of transferees. The divergent application could be considered a breach of the obligation of conform interpretation.

The implementation of the prohibition additionally diverges through the disregard of the *Henke*-exception, increasing the scope of transfers covered by the Directive and the prohibition. While the divergence clearly has an employment protective purpose and effect, it has no effect on employer interests as the inclusion regards only public employees not in pursuit of economic activity.

5.3 Adopting a Flexicurity Lens

Over the years, the focus and nature of the European Union has shifted from a primarily economic collaboration to a highly integrated union with both economic and social ambitions. Amidst the changing landscape, the flexicurity strategy was introduced in an aspiration to promote a framework for a flexible yet secure labour market, without resorting to rigid legislation applied across all Member States. As the Union lacks a comprehensive mandate regarding labour policy and labour systems are wildly diverse across the EU, the flexicurity framework is designed to encourage Member States to individually introduce the four components of flexicurity into their labour market systems. Thus, the strategy is not directly imposed on the Member States, but demonstrates the direction and aspiration of Union policy, relevant in predicting how future legislation might take shape and how the Union currently values and balances opposing interests. As much of the relevant case law from the CJEU regarding the prohibition of dismissal is older, looking to other sources for guidance regarding the Union's prohibition of dismissal is beneficial.

As both the Transfer Directive and the national employment protection systems of Sweden and Germany precede the introduction of flexicurity, their construction have not been shaped by the strategy. Nevertheless, both the prohibition of dismissal and the employment protection systems are considered part of the strategy, characterised primarily under the flexicurity-component "flexible and reliable contractual arrangements". This component aims to balance the need of employment protection for employees with employers' need for flexibility in form of a managerial prerogative allowing for restructuring and reorganisation of the work force.[325]

[325] See section 1.5.

While the flexicurity strategy in general emphasises the mutual benefit of the flexibility and security, the prohibition of dismissal has been constructed to regard the need to protect employees in a transfer situation, and the need for employers to exercise their managerial prerogative as opposing interest for the prohibition to balance. Implementations of the prohibition can therefore vary between jurisdictions in the way they achieve balance between the two interests.

As mentioned above, the Swedish prohibition is significantly stricter than the regulation prescribed both by Germany and the Union, prescribing a far-reaching prohibition where dismissals for any economic reason are unlawful during a period in time. Because of the wider application of the prohibition, the Swedish regulation more sharply infringes on the freedom of employers to organise their business freely. The trade-off between the infringed managerial prerogative is a stronger employment protection for the employees employed at the transferor. As stated above, however, the effectiveness of the protection gained from the absolute prohibition is questionable. The German regulation, however, gives both the transferor and the transferee more freedom in dismissing employees during the transfer process for economic reasons.

Viewed in light of flexicurity, Sweden has chosen to emphasise the employment protective interest, or security, over flexibility in its prohibition of dismissal. As the prohibition of dismissal is merely one part of a larger labour market system, an imbalance is not necessarily incompatible with the strategy. The Swedish regulation, however, infringes on the interest of flexibility without effective gain of security, an order which cannot be said to be well suited with the strategy. In contrast, the German implementation of the prohibition of dismissal in light of flexicurity, better strikes a balance between the two interests as it promotes greater flexibility while still offering a similar level of security. Furthermore, this suggests that the German order is better suited to the developments of the Transfer Directive which, through *Vigano*, *Alemo-Herron*, *Werhof*, and *Asklepios* in an attempt to achieve a balance between employment protection and freedom to pursue economic activity, seems to be moving towards an increased overall emphasis on flexibility in the Transfer Directive.

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