

THE EVOLUTION OF EU PRIMARY LAW AND THE COURT OF JUSTICE'S INTERPRETATION OF WORKERS' RIGHTS
Focus on workers' rights relating to business restructurings

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1. INTRODUCTION

Since its creation in 1957, the European Communities have undergone a profound evolutionary process. While observing the changes that the amending Treaties have brought to the founding Treaty of Rome, it is immediately apparent that the original merely economic focus of the Communities has not only been enhanced, but has also been enriched with additional competences in other policy fields. Among these policy fields, the Treaties have laid the foundations for a social dimension of European integration.

The references to social values and workers' rights, that were minimal in the Treaty of Rome, have increased at every treaty modification, thus progressively entrusting the European institutions with the competence to adopt binding acts in the field of labour law and social rights, and the Court of Justice of the European Union (hereinafter, "the Court of Justice", or "the Court") with the legitimacy to act, within the limit of the conferred competences, as labour law adjudicator.¹

However, it is interesting to note that there is an apparent mismatch between the development of primary law and certain reasoning of the Court of Justice. Indeed, despite what the reinforced social outlook of the Treaties could suggest, the Court of Justice has in multiple instances followed arguments that resulted in business-oriented prerogatives prevailing over workers' rights, even if those rights were enshrined in EU primary or secondary law.²

These considerations raise the issue of the distance between the social dimension of that emerges from the EU treaties, and the *de facto* relevance of that same dimension that appears from the reasoning of the Court of Justice in situations of conflict between labour rights and business-oriented prerogatives.

The aim of this article is to cast some light on *whether, and eventually how, the evolution of the social dimension of EU primary law is reflected in the Court of Justice's reasoning*. The results of this investigation may provide new insights on the effective weight of the social references progressively introduced in the treaties.

The analysis is carried with a particular focus on the Court of Justice' interpretation of EU directives that establish workers' rights in the event of business restructurings: directive 2001/23/EC on transfers of undertakings, directive 98/59/EC on collective dismissals, and directive 2002/14/EC on the general framework for information and consultation rights.

¹ Roger Blanpain, *Institutional Changes and European Social Policies after the Treaty of Amsterdam* (Kluwer Law International 1998), Frank Hendrickx, 'European Labour Law after the Lisbon Treaty: (Re-visited) Assessment of Fundamental Social Rights' in Roger Blanpain and Frank Hendrickx (ed), *Labour Law between Change and Tradition - Liber Amicorum Antoine Jacobs*, vol 78 (Wolters Kluwer 2011), Bruno Veneziani, 'Lisbon Treaty and Labour Law: New Development but Old Traditions' in Roger Blanpain and Frank Hendrickx (ed), *Labour Law between Change and Tradition - Liber Amicorum Antoine Jacobs*, vol 78 (Wolters Kluwer 2011).

² Judgment of 18 December 2007, *Laval un Partneri*, C-341/05, ECLI:EU:C:2007:809; judgment of 11 December 2007, *Viking Line ABP*, C-438/05, ECLI:EU:C:2007:772; Judgment of 18 July 2013, *Alemo-Herron*, C-426/11, ECLI:EU:C:2013:521; Judgment of 14 March 2017, *Samira Achbita*, C-157/15, ECLI:EU:C:2016:382 among others.

The rationale behind the choice of these three directives consists in the fact that those rules directly affect the employer's freedom to organize and conduct its business, and ultimately, the employer's ability to pursue economic profits or minimize economic losses. The rights established in these directives represent indeed a limit to the room of manoeuvre of the employer, as they aim at reducing the negative impact that companies restructuring operations have on workers.³

The paper will consider the maturation of the social dimension in the EU treaties not in isolation, but in combination with policy documents of the European Commission (hereinafter, the Commission), being the Commission the EU institution that detains predominant role in steering EU policy making. On the one hand, those documents illustrate the (politically embedded) framework, the content and the implications of the policy choices which have defined the direction of European integration, and therefore they constitute important elements for the contextualization and interpretation of the Treaties' amendments. On the other hand, they provide indications on how the Commission, has perceives the role of social policy within the integration process.

In paragraph 1 the article presents the three directives on workers' rights and business restructurings, with a description of their rules and of the context in which they were conceived. Subsequently, paragraph 2 to 5 deal with the evolution of the Court of Justice's rulings on the directives. In particular, every paragraph analyses a different period⁴ of the Court of Justice's jurisprudence, and compare it with the evolution of social and labour rights as reflected in primary law and in the Commission's policy papers.

³ Catherine Barnard, 'Transfer of undertakings' in Oxford University Press (ed), *EU Employment Law* (2012); Roger Blanpain, 'Restructuring of Enterprises', *European Labour Law* (Kluwer Law International 2008); Giuseppe Santoro-Passarelli, 'The Transfer of Undertakings: Striking a Balance Between Individual Workers' Rights and Business Needs' (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 23

⁴ The periods contemplated by each paragraph correspond to three different "EU labour law eras" conventionally established for the purpose of this paper: paragraph 2 covers the period until 1992, when the Social Policy Protocol entered into force with the Maastricht Treaty; paragraph 3 covers the period from 1992 until 2008, when the Charter of Fundamental Rights of the EU acquired binding value; paragraph 4 covers the period from 2008 until present. The third part of the article (paragraph 6) presents critical observations on the way in which the evolution of primary law is reflected into the Court of Justice's interpretation.

2. DIRECTIVES ON WORKERS' RIGHTS IN THE EVENT OF BUSINESS RESTRUCTURINGS

The directives on transfers of undertakings,⁵ collective dismissals,⁶ and information and consultation rights⁷ have in common the fact that they address situations that are intimately connected with operations of business restructuring.

In particular, the rules established in these three directives impose serious limitations to the employers' freedom to conduct his business. As the next paragraphs illustrate, the Court of Justice's interpretation has in multiple occasions intervened to define the scope of such limitation.

The directives on collective redundancies and transfers of undertakings were the firsts to be adopted, in implementation of the first Social Action Programme 1974-1976,⁸ during the so-called "glorious years of European labour law".⁹ Directive 2002/14/EC on information and consultation rights was instead promulgated, after a long and tortuous legislative process,¹⁰ within a different and more recent context.

a. Directive on collective dismissals

Chronologically, the first directive was the one on collective dismissals (directive 75/129/EEC¹¹, now directive 98/59/EC).

This directive conjugated the aim of reinforcing workers' rights,¹² with the objective to create a level playing field for business actors, and consequently, to reduce distortion of competition within the single market. The legal basis of the directive was – and still is- article 100 TCEE, which addressed the fostering of market integration.¹³ Such a twofold aim is reflected in the Commission's explicit choice of justifying this measure on the ground that minimum harmonization on collective redundancies would result in the elimination of obstacles to the free movement (especially of services and establishment) and, at the same time, lead to a process of convergence towards social progress.¹⁴

⁵ Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, business or parts of undertakings or business

⁶ Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies

⁷ Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community

⁸ Social Action Programme COM(73)1600,

⁹ Blanpain, *Institutional Changes and European Social Policies after the Treaty of Amsterdam*

¹⁰ The first proposal for a Council Directive on procedures for information and consultation of employees was presented by the Commission in 1980 (OJ No L 297, 15.11.1990. Supplement 3/80, EC Bulletin)

¹¹ Directive 75/129/EEC of 22 Feb. 1975 OJ [1975] L 48.

¹² Opinion of the European Parliament, OJ No C19, 12.04.1973, p. 10, and Catherine Barnard, 'Collective Redundancies and Employees' Rights on the Employer's Insolvency' in Oxford University Press (ed), *EU Employment Law* (2012)

¹³ Was at time Article 100 TCEE, now Article 114 TFEU.

¹⁴ COM(72)1400final, Proposal for a Council Directive on the harmonization of the legislation of the Member States relating to redundancies

The rights conferred consisted in the attribution of two procedural obligations for the employer that is considering collective dismissals. Firstly, this employer has the duty to initiate a procedure for informing and consulting workers' representatives on the envisaged measures and on their repercussions for workers,¹⁵ and secondly, he has to notify a competent public authority on the projected redundancies¹⁶. The collective dismissals cannot have effect before at least 30 days from the date of such notification¹⁷.

The scope of application of the directive is defined by quantitative criteria relating to the number of workers dismissed and the workforce population within the firm's establishments.¹⁸ The directive provides exceptions in case of termination of the business activities as a result of a judicial decision, for instance in the context of bankruptcy proceedings.¹⁹

It is worth noting that the initial proposal of the Commission established that the competent public authority had the possibility *to refuse to authorize all or part of the dismissal notified [...] if the reasons [...] invoked by the employer are incorrect (or not existing)*.²⁰ However, this provision could not survive the vote in the Council, and, at the end, was not incorporated in the text of the directive.²¹ It was in any case considered that Member States were free to implement the directive in a way more favourable to employees, and to confer such power to the national authorities.²²

b. Directive on employees' acquired rights in case of transfers of undertakings

Similarly to the directive on collective dismissals, the directive on workers' acquired rights in case of transfers of undertakings (directive 77/187/EEC²³, now 2001/23/EC) had its legal base in Article 117 TCEE, on the single market, and was conceived with the dual intention to partially harmonize the the rules affecting the

¹⁵ Article 2 Directive 98/59/EC

¹⁶ Article 3 Directive 98/59/EC

¹⁷ Article 4 Directive 98/59/EC

¹⁸ Article 1 Directive 98/59/EC

¹⁹ Article 3 par 1 establishes that Member States may provide that in case of termination of the establishment activities as result of a judicial decision, the employer is obliged to notify the competent public authority in writing only if the latter so request. Similarly, according to Article 4, in these cases Member States do not need to impose the term of 30 days for the efficacy of the projected redundancies. The previous version of the directive (directive 129/1975/EC) even excluded establishments whose termination was the result of a judicial decision from the scope of application of the directive.

²⁰ This formulation found the support of the European Parliament and of the Economic and Social Committee. See: Opinion of the European Parliament, OJ No C19, 12.04.1973, p. 10 and Opinion of the Economic and Social Committee, OJ No C100, 22.11.1973, p. 11.

²¹ M. R. Freedland, 'Employment Protection: Redundancy Procedures and the EEC' (1976) 5 Industrial Law Journal 24, p. 27: particularly strong was the position of the UK that put a veto on the whole Commission's proposal (see The Times, February 18, 1974; E.I.R.R. No. 13 (January 1975) pp. 4-6. On the contrary, the introduction of the authorization of the public authority as a condition to pursue dismissal was supported by the representatives of France and The Netherlands, where the national authorities already had that competence.

²² *Infra*

²³ Directive 77/187/EEC of 5 Mar. 1977, OJ [1977] L 61/126.

single market²⁴ and to provide a more social dimension to the practice of business restructurings.²⁵ Directive 77/187/EEC²⁶ indeed set out rules that guaranteed the prerogative of the employer to restructure his business and, at the same time, realized an upwards convergence of the labour law rules protecting the workers affected by such restructurings.²⁷

The directive essentially established four core rights. First, in case of a transfer of undertaking (or part of undertaking), the employment relationship of the employees affected by the transfer is automatically taken over by the transferee, together with all the rights and obligations arising from such employment relationship.²⁸ Also, the collective agreement that was binding the transferor before the transfer continues to be applicable to the transferred employees until its expiration, substitution or termination (or, if the Member State so establishes, for a minimum period of one year subsequent to the transfer).²⁹

Second, the directive imposes a prohibition to dismiss for reasons connected to the transfer; only dismissals justified by economic, technological or organizational reasons are legitimate. Moreover, if after the transfer the employees suffer significant (detrimental) changes in their working conditions, their resignation would produce the same effects as if the employment contract was unlawfully terminated by the transferee.³⁰

Third, the status and the functions of employees' representatives and of worker's representation bodies shall, under certain conditions, be maintained after the transfer, within the transferee's undertaking.³¹

Fourth, the transfer triggers information and consultation rights, conferred both to the employees working for the transferor and for the transferee.³²

As the goal is to set minimum standards, Article 8 explicitly consents Member States to adopt measures that are more favourable to employees.³³

c. Directive on information and consultation rights

Directive 2002/14/EC establishing a legal framework for information and consultation rights, differently from the other two, found its legal base in the Social Policy Title.³⁴ The directive indeed aims, according to the

²⁴ Its legal basis was, and still is, Article 100 TCEE (now 114 TFEU) on the adoption of directives aimed at fostering the internal market.

²⁵ COM(74)351final - Proposal for a Directive of the Council on harmonization of the legislation of member states on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, subsequently modified by COM(75)429final - Amended proposal for a Council Directive.

²⁷ Barnard, 'Transfer of undertakings', Blanpain, 'Restructuring of Enterprises',

²⁸ Article 3.1 Directive 2001/23/EC

²⁹ Article 3.3 Directive 2001/23/EC

³⁰ Article 4 Directive 2001/23/EC

³¹ Article 6 Directive 2001/23/EC

³² Article 7 Directive 2001/23/EC

³³ Article 8 Directive 2001/23/EC

³⁴ The Commission proposal was originally based on Article 2(2) of the Social Protocol annex to the Treaty of Maastricht, and subsequently on Article 136 of the Treaty of Amsterdam, now Article 151 TFEU.

preamble and the Commission's proposal, to counterbalance the development of the internal market through the reinforcement of workers' rights.³⁵

However, and similarly to the directives on collective dismissals and on transfer, also in this case the functioning of the internal market is kept into account. The proposal indeed presented the importance of a framework on information and consultation rights also in light of its positive effects on the competitiveness of companies and on their ability to adapt to the challenges imposed by an always more globalised economy.³⁶ The argument was that the setting of a common ground on information and consultation rights not only would reduce the risk of regulatory competition and social dumping, but would also contribute to the creation of a cooperative climate within the company, which is favourable for the successful management of business restructurings.³⁷

The rules of the directive confer the employees with the rights to be informed and consulted in good time on a vast range of managerial decisions on the organization of the company, and on their repercussion on the working conditions.³⁸ The directive applies only in presence of a dimensional threshold³⁹ and allows few exceptions⁴⁰.

3. FIRST PERIOD: FROM THE ORIGINS UNTIL 1993

a. Social policy in primary law and in the policy documents

At its origins, the European Economic Community had a purely market-oriented purpose. The aim was to reach a fiscal and subsequently an economic space where business operators could freely move in order to pursue their economic interests.⁴¹

The Treaty of Rome contained only few referrals to social matters,⁴² and did not establish a concrete Community competence in the social field. Only Article 119 TEEC allowed the Council to adopt measures to promote the principle of non-discrimination on the ground of sex with respect to pay.

³⁵ COM(1998)612final - Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community and, respectively, recitals 2 and 11 of directive 2002/14/EC.

³⁶ *Ibid.*, and recitals 7 and 9 of the directive.

³⁷ Catherine Barnard, 'Worker Involvement in Decision-Making: Information, Consultation, and Worker Participation' in Oxford University Press (ed), *EU Employment Law* (2012) p. 685.

³⁸ Article 4 directive 2002/14/EC.

³⁹ Companies with more than 50 employees in the undertaking or 20 in the single establishment, Article 3 of the directive

⁴⁰ The exceptions concern confidential information (article 6) and undertakings that pursue directly and mainly political, religious, educational, scientific or artistic aims (article 3).

⁴¹ 'The First Milestone: Common Market Reaching End of First Stage' (December 1961) 50 Bulletin from the European Community

⁴² Article 117 TEEC defined the social objectives of the Communities; Article 118 prescribed a close collaboration of the Member States in the Social field. Moreover, the Preamble of the Treaty of Rome states that the establishment of the common market was to be connected with the *constant improvement of the living and working conditions of the(ir) people.*

However, the analysis of the policy documents adopted during the first period of existence of the European Economic Community reveals that the lack of proper consideration of social issues in the treaty did not imply that social progress and labour rights were irrelevant for the future of European integration.⁴³ The predominant view at the time was that social policy had to be developed autonomously from the economic dimension, and that the competence to adopt redistributive measures in the social field was exclusive competence of national legislators.⁴⁴

The dual polity that characterized this period of European integration (economic sphere at the supranational level, and social policy sphere at the national level) seems to have found inspiration in the ordoliberal ideology,⁴⁵ (which was the predominant ideology among economists in the post-war West Germany), and more particularly, in the notion of “Social Market Economy” theorized by Muller Armack.⁴⁶ Indeed if, according to the ordoliberal thinking, regulation should be put in place in order to discipline economic power and to prevent failures of the market, the establishment of a “social market economy” implies a step further. This concept refers to a system where the market is only one -although essential- of the elements that should govern society. Social progress can be reached only if the functioning of the market and the exercise of individual (economic) freedoms are counterbalanced by states’ policies directed at social redistribution and equilibration.⁴⁷

The launch of the Social Action Programme 1974-1976 and its implementation with the directives on collective dismissals and transfers of undertakings (among other legislative measures), represented an episode of upwards social convergence where the setting of minimum standards was motivated by the aim to counterbalance the social consequences of increasing economic liberalisation.⁴⁸ These two directives were conceived in a moment where simultaneous economic and social progress seemed to be possible, even in the absence of dedicated social policy competences in the Treaty.

However, from the mid-1970s onwards (coinciding with a period of economic and financial crisis), the analysis of the policy papers indicates that market-oriented concerns acquired a new, predominant, role within the evolution of the European Communities, that led to the progressively abandoning of the initial separation between economic and social policy spheres.⁴⁹

⁴³ Stefano Giubboni, 'Social Rights and Market Freedom in the European Constitution: a Re-Appraisal' (2010) 1 European Labour Law Journal 161

⁴⁴ Lionello Levi Sandri and Member of the EEC Commission, "*The role of social policy in European Integration*", *Speech to the General Meeting of the Belgian Association for Social Progress* (10 February 1964)

⁴⁵ Christian Joerges and Florian Rodl, "'Social Market Economy' as Europe's Social Model?" (2004) 8 EUI Working Paper Law

⁴⁶ Alexander Ebner, 'The intellectual foundations of the social market economy - Theory, policy, and implication for European integration' (2006) 33 Journal of Economic Studies 206

⁴⁷ Alfred Muller-Armack, 'The Principles of the Social Market Economy (1965)' in Peter Koslowski (ed), *The Social Market Economy: Theory and Ethics of the Economic Order* (Springer 1997)

⁴⁸ Community social policy programme: preliminary guidelines, SEC(71)6000 final; Social Action Programme COM(73)1600

⁴⁹ Commission of the European Communities, *The European Community's social policy*, 1978, Brussels), and H. Vredeling and Vice-president of the Commission of the European Communities, "*The Community role in the field of*

It appears indeed that social policy was endorsed with a renewed function, as it started to be seen as complementary and supportive of economic growth.⁵⁰ The need to strengthen productivity and competitiveness required that national labour law and welfare systems had to be adapted, in order to allow the European Communities to maintain its active role in a more and more globalized economic context.⁵¹ The mid-term Social Action Programme of 1984⁵² and in the Delors White Paper for completing the internal market⁵³ indicate that the Commission considered social measures as predominantly subordinated to the imperative of economic expansion of the European market. More explicitly, the “Working paper on the *social* dimension of the internal market”, expressly depicted social policy as ancillary to the pursuit of the maximization of economic growth.⁵⁴ It is in this spirit that the Single European Act (SEA) amended the Rome Treaty in 1986, and that the (non-binding) Charter of Fundamental Social Rights of Workers was adopted in 1989.

It is indeed meaningful to underline that, while the SEA boosted the realization of the single market, it did not introduce relevant innovations in the social policy field, except for the competence to adopt Community rules in the area of health and safety.⁵⁵

As for the 1989 Charter, its preamble shows that its social stances were (at least partially) justified by the market-oriented argument that the setting of social guarantees should be conceived in order to enhance the functioning of the internal market, rather than to counterbalance.⁵⁶

b. Case law

The analysis of the case law of the Court of Justice in these first years is mainly focused on the directive on transfers of undertakings, as the Court was called to interpret the directive on collective dismissals only once in this period and the directive on information and consultation was not in force yet.

1. DIRECTIVE ON TRANSFERS OF UNDERTAKINGS

social and employment policies", speech at the London Europe Society and at the Confederation of British Industry (9.02.1979, London)

⁵⁰ Patrick J. Hillery and Vice-President of the Commission of the European Communities, "*Does the Community need a social policy?*", speech to the *Financial Times* at the *Irish Times Conference "Europe after the Referendum"*, at the *Burlington Hotel, Dublin* (24.07.1975)

⁵¹ Vredeling and Communities, "*The Community role in the field of social and employment policies*", speech at the *London Europe Society and at the Confederation of British Industry*

⁵² Conclusion of the Council concerning a Community medium-term social action programme

⁵³ COM(85)310 final, *Completing the Internal Market*

⁵⁴ SEC(88)1148 final, "*Social Dimension of the Internal Market*", Working Paper of the Commission of the European Communities

⁵⁵ Article 118b.

⁵⁶ COM(89)471 final, *Community Charter of Fundamental Social Rights*, preamble: "*whereas the completion of the internal market is the most effective means of creating employment and ensuring maximum well-being in the Community; whereas employment development and creation must be given first priority in the completion of the internal market; whereas it is for the Community to take up the challenges of the future with regard to economic competitiveness...; whereas the social consensus contributes to the strengthening of the competitiveness of undertakings and of the economy as a whole and to the creation of employment...*"

The Court's interpretation was mainly characterized by the adoption of a non-formalistic reading of the scope of application, and by an extensive interpretation of the content of the rights conferred to the workers. By doing so, it seems that the Court tended to interpret the aim of the directive as essentially social, without giving particular consideration to the interest of the employer to perform their business in an economically convenient and profitable manner.⁵⁷

The Court of Justice's rulings on the scope of the directives

Concerning the scope of application, the Court adopted a flexible notion of the concept of "transfer".⁵⁸ In particular, it stressed out the relevance of the scheme underpinning the business operation, rather than the form of the contractual agreement between the transferor and the transferee.⁵⁹ In particular, a transfer occurs if when the legal or natural person that performs the managerial authority and that exercises the rights and obligations of the employer *vis-à-vis* the employees has changed.⁶⁰

The Court then clarified that the means through which the change of employer takes place are not relevant,⁶¹ and that an agreement between the transferor and the transferee is not necessary in order for the transfer to take place.⁶² The Court further specified that there is no need for a contractual relationship between the transferor and the transferee, so that also the situation where, for instance, the owner of an undertaking terminates a leasing contract with the first lessee and stipulates a new contract with a new lessee could be covered by the concept of transfer.⁶³

Moreover, in the *Spijkers* case,⁶⁴ the Court has further specified that the directive applies where the transferred entity is a *going concern that preserves its identity*. The Court then identified seven interpretative factors which shall be looked at to establish whether the identity of the transferred entity has been maintained: the type of undertaking or business, whether or not tangible assets such as buildings and movable property are transferred, the value of intangible assets at the time of transfer, whether or not the majority of the employees are taken over by the new employer, whether or not the customers are transferred, the degree of similarity

⁵⁷ Concerning the "purposive approach" of the Court of Justice: Barnard, 'Transfer of undertakings', Blanpain, 'Restructuring of Enterprises',

⁵⁸ Jo Hunt, 'The Court of Justice as a policy actor: the case of the Acquired Rights Directive*' (1998) 18 Legal Studies 336, Barnard, 'Transfer of undertakings',

⁵⁹ Judgment of 7 February 1985, Abels, C-135/83, ECLI:EU:C:1985:55

⁶⁰ Judgment of 17 December 1987, Ny Molle Kro, C-287/86, ECLI:EU:C:1987:573, then referred to in subsequent cases.

⁶¹ Ibid

⁶² In particular the owner of leased undertaking shall be considered the transferee even if he takes over the operation previously performed by the lessee following to a breach of the lease by the latter and as a result of an enforcement measures, Judgment of 17 December 1987, Ny Molle Kro, C-287/86, ECLI:EU:C:1987:573, and also similar in judgment of 5 May 1988, Berg, C-144/87, ECLI:EU:1988:236.

⁶³ The Court individuated a transfer also in the situation where the business is transferred from the first contractor of the transferor (first transferee) to another, second, contractor of the original transferor in judgment of 10 February 1988, Daddy's Dance Hall, C-324/86, ECLI:EU:C:1988:72, and similarly also in judgement of 15 June 1988, Bork International, C-101/87, ECLI:EU:C:1988:308

⁶⁴ Judgment of 18 March 1986, Spijkers, C-24/85, ECLI:EU:C:1986:127

between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended.

According to the Court, those criteria represent an interpretative support to discern whether a transfer took place, and they should not be considered in isolation, but within the overall context of the case.

The Court of Justice's interpretation of the rights that the directive confers to workers

In this first period, the Court of Justice appears consistent in providing an extensive interpretation of the rights that the directive confers to the transferred employees, in order to reflect the social purpose of the rules at stake.

For instance, the safeguard of the workers' prerogatives is read as the predominant purpose of the directive in the 1988 Daddy's Dance Hall case,⁶⁵ where the Court held that *the protection conferred by the mandatory provision of the directive is a matter of public policy*⁶⁶. This implies that neither the employees nor their representatives can waive their rights, even if, as a result of a new employment agreement, the employees would not be in a worse position with respect to their situation prior to the transfer.⁶⁷

The Court referred consistently to this precedent, and in multiple occasions repeated that the transfer of the employees' acquired rights does not depend on an eventual consent/agreement of the transferred employees,⁶⁸ as the aim of the directive is to guarantee that they do not suffer any detrimental consequences in reason of the transfer (for instance, the Court ruled that the composition of the wage cannot be modified by the transferee, even if the total amount remains unchanged).⁶⁹

The repercussions of such a strict interpretation of workers' rights on the employer's ability to conduct his business were not taken into consideration in the Courts' reasoning. What the Court instead consistently underlined is that *the purpose of the directive is to ensure that the rights resulting from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded*,⁷⁰ and that the transferee can only legitimately impose those modifications of the employment contract that, according to national law, would be allowed in situations other than transfers.⁷¹

The Court intervened also on the prohibition to dismiss in reason of the transfer established in Article 4. In that regards, it considered that, in order to verify whether the decision to dismiss was connected to the transfer the mere justification of the employer would not be sufficient, as all objective circumstances of the case should be taken into consideration.⁷² In particular, the Court held that also dismissals effected by the transferor with

⁶⁵ Judgment of 10 February 1988, Daddy's Dance Hall, C-324/86, ECLI:EU:C:1988:72

⁶⁶ Ibid, Par. 14

⁶⁷ Barnard, 'Transfer of undertakings', John McMullen, 'Some problems and themes in the application in Member States of Directive 2001/23/EC on transfer of undertakings' (2007) 23 International Journal of Comparative Labour Law and Industrial Relations 39

⁶⁸ Judgment of 5 May 1988, Berg, C-144/87, ECLI:EU:1988:236, judgment of 25 July 1991, D'Urso, C-362/89, ECLI:EU:C:1991:326

⁶⁹ Judgment of 12 November 1992, Watson Rask, C-209/91, ECLI:EU:C:1992:436

⁷⁰ Judgment of 10 February 1988, Daddy's Dance Hall, C-324/86, ECLI:EU:C:1988:72, par. 14

⁷¹ Ibid.

⁷² Judgment of 15 June 1988, Bork International, C-101/87, ECLI:EU:C:1988:308.

effect from a date *prior* of that of the transfer must be considered as a violation of Article 4 of the directive, if it can be proved that the dismissals were carried out solely in reason of the transfer.⁷³

Moreover, the Court specified that in case of dismissals contrary to the directive, the dismissed employees shall be regarded as if still in the employ of the undertaking, being their dismissals void.⁷⁴

2. DIRECTIVE ON COLLECTIVE DISMISSALS

In this first period, the Court of Justice interpreted the directive only in one occasions in the *Dansk v Nielsen* case.⁷⁵

Here the Court determined that the termination of the employment contract by the employees themselves following a bankruptcy proceeding whereby the employer was accorded with the suspension of the payment of his debts does not fall within the scope of the directive. The Court considered that, according to the wording of Article 1, the directive applies only when *dismissals are effected by the employer*. Moreover, the Court held that the objective of the directive is to reduce or avoid collective dismissals through a procedure of consultation and notice, and that such an objective would be frustrated where the termination of the employment contract is decided unilaterally by the workers. Indeed, in that case the employer is not be able to fulfil his obligations, and to seek, through consultation with the workers' representatives, solutions alternative to dismissals.⁷⁶

Secondly, the Court was asked whether the directive entails that the employer ought to contemplate redundancies, in view of the troublesome financial situation of the company, before initiating bankruptcy proceeding, and therefore setting aside the application of the directive. Once again, the Court relied on a textual interpretation, and decided that the described situation does not fall within the scope of the directive, as it does not compel the employer to contemplate collective redundancies in the event of financial difficulties. This interpretation was also underpinned by the consideration that the purpose of the directive is the safeguard of the workers' jobs, which is per se prevented in situations of insolvency of the business.⁷⁷

c. Considerations

It is interesting to note that the lack of substantial references to social policy or labour law in the Treaty of Rome did not prevent the Court of Justice from interpreting the rights provided by the directive on transfers of undertakings in an extensive manner, and from developing a flexible notion of the concept of “transfer”, unbound by formal requirements and contractual agreements among the parties.

The marginal status of social rights within primary law is therefore not reflected in the Court's reasoning, which casted light on the social aim of the transfer directive.

⁷³ Ibid, par. 18.

⁷⁴ Ibid, par. 12.

⁷⁵ Judgment of 12 February 1985, *Dansk v Nielsen*, C-284/83, ECLI:EU:C:1985:61

⁷⁶ Ibid, par. 10.

⁷⁷ Ibid, par. 10, and more extensively, Opinion of the Advocate General Lenz, p. 556.

It therefore seems that the market-oriented turn which was visible in the Commission policy documents did not affect the interpretation of the Court, which did not give signs of considering the interests of the employers and/or balancing them against the position of the workers.

It rather appears that the Court's interpretation was consistent with the spirit that characterized the context in which the directive was first conceived, when Community rules on workers' rights found their justification in the objective of developing the social dimension of European integration. This consideration appears valid also with respect to the (single) case law on collective dismissals, where the Court explicitly referred to the social objective of the directive, namely the continuity of the employment relationships of the transferred workers.

4. SECOND PERIOD: FROM THE MAASTRICHT TREATY UNTIL 2007

a. Social policy in primary law and in the policy documents

In November 1993 the Treaty of Maastricht entered into force. This treaty not only advanced the economic and monetary union,⁷⁸ but introduced a series of innovations in the field of social and labour rights that announced the abandoning of a mere economic Community, for the embracing of a more holistic Union.⁷⁹ The amended treaty indeed established that the “*Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of EU law*”.⁸⁰

Moreover, the adoption of the Social Policy Protocol in an Annex of the Treaty finally endowed the Union⁸¹ with the competence to promulgate legislation in the social policy area.

The role of the Union in the field of labour and social policies was further expanded in 1997 with the adoption of the Treaty of Amsterdam. This treaty introduced a new Employment Title⁸² that, while leaving traditional regulatory competences at the national level, institutionalized a system of coordination and monitoring of national employment policies. In addition, it integrated the content of the Social Policy Protocol in the main

⁷⁸ The main elements that indicate an advancement in the sector of economic and monetary integration are the following: Article B EU and Article 2(3) TEC consider now the realization of the monetary union among the objective of the Union; a Title VI dedicated to Economic and Monetary policy was added; and a Protocol on the Statute of the European System of Central Banks and of the European Central Bank was contextually adopted.

⁷⁹ Blanpain, *Institutional Changes and European Social Policies after the Treaty of Amsterdam* on the advancement introduced by the Treaty of Maastricht with respect to social policy.

⁸⁰ Article F TEU

⁸¹ From hereinafter, “Union” instead of “Community”.

⁸² Title VII of the TEC

body of the Treaty, in Title IX, where it further intervened by enhancing the role of the European Parliament and by increasing the policy fields that may be adopted with qualified majority voting.

If the role of social policy appeared to have acquired a certain autonomy within primary law, the analysis of the Commission's policy documents suggests that the treaty changes were still rooted in an understanding of social and labour law as mostly functional to the realization of economic growth.

Indeed, it stems out from the Commission White Paper on competitiveness, growth and employment,⁸³ and from the Green Paper (and afterwards White Paper)⁸⁴ on European Social Policy,⁸⁵ that the increased labour law references in the treaty constituted a mere aspect of an overall programme aimed at improving the European single market. It is clear from its consideration according to which *high social standards are a vital part of building a competitive economy*⁸⁶ that in a situation of conflict between workers' prerogatives and business interests, the Commission perspective is in favour of the latter.⁸⁷

The premises of the European social policy⁸⁸ and European employment strategy⁸⁹ therefore appeared to indicate that the efforts towards the (partial) harmonization of national systems, shall predominantly aim at the promotion of dynamic and responsive labour markets, fit for facing the challenges that a globalized liberal market imposes on European economy. It is indeed telling that even in those policy papers that specifically addressed the social dimension of the Union, the rhetoric focused on economic progress rather than on upwards social convergence.

In addition to embracing a more explicit neoliberal views, EU integration in the area of labour and social policies started being more and more characterized by a strategy of policy coordination predominantly based on peer monitoring (so-called *governance*, and more specifically referred to as "*open method of coordination*") rather than on the adoption of binding legislative acts.⁹⁰ Such a soft-law approach entailed that the Social Policy Title and the legislative competences established therein had been relied on by the EU legislative institutions only to a very limited extent.⁹¹

⁸³ Commission White Paper on Growth, competitiveness, and employment, COM(93)700 final

⁸⁴ White Paper COM(94)333 final, European Social Policy - A way forward for the Union

⁸⁵ COM(93)551 final, Green paper - European Social Policy, option for the future

⁸⁶ *ibid*

⁸⁷ White Paper COM(94)333 final, European Social Policy - A way forward for the Union

⁸⁸ Medium Term Social Action Programme 1995 - 1997 _ COM(95)134 final - Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions; Social Action Programme 1998-2000 _ COM(1998)259 final - Communication from the Commission, where the Commission presented the concept of "*flexicurity*".

⁸⁹ The connection between the coordination of the national employment policies and economic growth was further enhanced through the Lisbon Strategy in 2000: Lisbon European Council 23 and 24 March 2000, Presidency Conclusions.

⁹⁰ Green Paper COM(2006)708 final _ Modernising labour law to meet the challenges of the 21st century; COM(2008)418 final, "A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion"

⁹¹ Hendrickx, 'European Labour Law after the Lisbon Treaty: (Re-visited) Assessment of Fundamental Social Rights'

b. Case law

The analysis of the cases that were decided during this period indicate that the Court has given signs of departing from its predominantly social-oriented interpretation of the purpose of the directives.

1. DIRECTIVE ON TRANSFERS OF UNDERTAKINGS

Concerning the directive on transfer of undertakings, three groups of case law appear to be particularly meaningful: rulings on the scope of the directive vis-à-vis the type of business operations; rulings on the scope of the directive vis-à-vis the notion of transferred undertaking; and rulings that define the workers' rights.

Scope of the directive vis-à-vis the type of business operations

The Court interpreted the scope of application of the directive by maintaining the same non-formalistic approach identified in its previous rulings.⁹²

The Court indeed considered that a wide range of business reorganization operations could theoretically fall within the concept of transfer, regardless of the forms of the agreement among the transferor and the transferee. In the Collino case, for instance, the Court specified that the fact that the situation at stake was the result of an administrative concession of a service from the State administration to a private company did not prevent the directive from applying.⁹³

Moreover, the Court confirmed⁹⁴ that a transfer could take place also in absence of direct contractual relationship between the transferor and the transferee, so that the change of the legal entity providing a service, such as cleaning or catering,⁹⁵ or the procedures for the award of a public service contract (public procurement) may lead to a transfer.⁹⁶

Rulings on the scope of the directive vis-à-vis the notion of transferred undertaking

In the Spijkers case the Court had determined that the directive applies only when the transferred entity maintains its identity after the transfer, and has provided interpretative criteria for assessing whether such a condition has been fulfilled in practice. However, in certain situations this facts-checking exercise does not provide clear-cut answers. Doubts may especially rise when business operations only concern a specific activity, and therefore when the transfer consist either in the externalization of a part of an undertaking (for instance, the externalization of the cleaning service in a bank, or of the catering service in a hospital..), or in the change of the contractor responsible for such activity (for instance, the when a contractor stipulates a

⁹² Supra, Par. 3(b)

⁹³ Judgment of 14 September 2000, Collino, C-343/98, ECLI:EU:C:2000:441

⁹⁴ judgment of 10 February 1988, Daddy's Dance Hall, C-324/86, ECLI:EU:C:1988:72

⁹⁵ Judgment of 19 May 1992, Redmond Stichting, C-29/91, ECLI:EU:C:1992:220, judgment of 11 March 1997, Suzen, C-12/95, ECLI:EU:C:1997:141, and *Temco Service Industries SA v Samir Imzilyen and Others*, [2002] ECR I-00969

⁹⁶

Judgment of 25 January 2001, Liikenne, C-172/99, ECLI:EU:C:2001:59

contract for the provision of a service with provider A, and subsequently terminates such contract and stipulate a new one, for the same service, with provider B).⁹⁷

In the Rask case the Court was asked for the first time to determine at which conditions the externalization of a (catering) service could be considered a transfer of a part of undertaking.⁹⁸ In this occasion, the Court ruled that the identity of the transferred entity must be determined in light of “*all the facts characterizing the transaction in question*”, *including* the Spijkers factors.⁹⁹ The Court also confirmed that “*all those circumstances are merely individual factors in the overall assessment [...] and cannot therefore be considered in isolation*”. Basically, all the factual elements are relevant, and none of them is more relevant than others.

The Court repeated this reasoning in the Redmond Stichting case, where the issue raised from the decision of a municipality to transfer subsidies from one foundation engaged in assisting drug addicts to another. Here, the Court analysed the factual context and concluded that the transferred undertaking in question had retained its identity. This conclusion was not altered by the consideration that neither the personnel nor material assets were taken over by the new contractor. In particular, the Court held that “*as regard the movables, the fact that they were not transferred does not seem in itself to prevent the directive from applying, and it is for the national court to appraise their importance by incorporating them in the overall assessment*”.¹⁰⁰

The ‘holistic’ approach vis-à-vis the criteria established in the Spijkers case was once again confirmed by the Court in the Schmidt case,¹⁰¹ which concerned the outsourcing of a cleaning service, originally performed by only one employee. In that occasion, the Court explained that the protection of workers’ rights cannot be made dependant on the absence of a single factor, which is not decisive on its own. Therefore, “*the fact that in its case law the Court includes the transfer of [...] assets among the various factors to be taken into account by a national courts [...] does not support the conclusion that the absence of these factors precludes the existence of a transfer*”¹⁰². Also, the application of the directive is not affected by the number of employees assigned to the part of the undertaking subject of transfer.¹⁰³

In the case at stake, it was the similarity of the cleaning activity performed before and after the transfer that induced the Court to determine that a transfer of (a part of) an undertaking had taken place.¹⁰⁴

With these mentioned rulings, the Court essentially established that the mere fact that an activity had stopped being performed by a legal entity and was, subsequently, entrusted to a new provider may fall within the scope

⁹⁷ Ronald M. Beltzer, 'The transfer of undertakings and the importance of taking over personnel - a vicious circle' (2007) 23 International Journal of Comparative Labour Law and Industrial Relations 16

⁹⁸ Judgment of 12 November 1992, Watson Rask, C-209/91, ECLI:EU:C:1992:436

⁹⁹ Ibid, par. 19.

¹⁰⁰ Ibid, par. 29.

¹⁰¹ Judgment of 14 April 1994, Schmidt, C-392/92, ECLI:EU:C:1994:134

¹⁰² Ibid. par. 16

¹⁰³ Ibid. par. 15.

¹⁰⁴ Ibid. par. 17

of application of the directive, even in absence of the take over of personnel or assets. Basically, the employees' protection would apply in all cases of change of provider, where the performed activity remains the same or similar after the transfer.¹⁰⁵

This interpretative approach raised serious concerns among business providers, especially those typically entrusted of providing services for only a fixed period of time, as the Court's extensive interpretation of the directive would result in detrimental repercussions on the competitive advantage of these business providers, which is in most cases mainly based on the cost of labour.

It is interesting to note that these business-oriented concerns seem to have reached the Commission and somehow influenced its 1994 proposal for amending the transfer directive.¹⁰⁶ This proposal intervened on the scope of application, and re-defined the concept of "transfer" in a manner that ruled out the interpretation of the Court. The Commission indeed introduced a distinction between the *transfer of an activity accompanied by the transfer of an economic entity which retains its identity* and *the transfer of only an activity [...] whether or not it was previously carried out directly*, and specified that only in the first case the directive would apply.¹⁰⁷ In other words, a change of the service provider which would merely consist of the take over of an activity would not anymore fall within the scope of application of the directive.

However, this revision could not find sufficient support during the legislative process,¹⁰⁸ and at the end it was withdrawn from the text of the amending directive.

At first, the Commission's intention to restrict the application of the directive did not seem to have impact on the reasoning of the Court, which in the *Merckx en Neuhuys* case, decided in 1996, considered equally all the *Spijkers* criteria and considered that a transfer occurred even in absence of the take over of the majority of the employees or of any material or immaterial assets.¹⁰⁹ However, one year later, in the *Suzen* case,¹¹⁰ the Court used a wording that curiously recalled the Commission's abortive proposal¹¹¹ and ruled that "*the mere fact that the service provided by the old and the new awardees of a contract is similar does not [...] support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it*"¹¹². Indeed, the Court, clearly departing from the previous jurisprudence considered that "*the directive*

¹⁰⁵ Beltzer, 'The transfer of undertakings and the importance of taking over personnel - a vicious circle'

¹⁰⁶ COM(94)300final Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts or businesses

¹⁰⁷ Article 1(1) of the proposal.

¹⁰⁸ 96/C 100/06 Opinion of the Committee of Regions; 95/C 133/07 Opinion of the Economic and Social Committee. In response to criticism the Commission submitted a new proposal.

¹⁰⁹ Judgment of 7 March 1996, *Merckx en Neuhuys*, joined cases C-174/94 and C-172/94, ECLI:EU:C:1996:87, concerning a car manufactory company changing the economic entity entrusted of the dealership for a certain geographic area.

¹¹⁰ Judgment of 11 March 1997, *Suzen*, C-13/95, ECLI:EU:C:1997:141

¹¹¹ *Supra*, par. 2

¹¹² *Ibid*, par. 15

*does not apply [...] if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce*¹¹³.

More specifically, the Court held that in case of labour intensive sectors, such as the cleaning service at stake, where the economic activity can be performed without relevant tangible assets, the identity of the undertaking is maintained only if the major part of the personnel is acquired by the new contractor.

This reasoning was then confirmed in subsequent rulings concerning the change of service providers in the cleaning sector.¹¹⁴

In 2001, with the *Liikenne* case,¹¹⁵ the Court specified that asset reliant businesses, such as the transport sector, are based on material capital, and that in these cases the identity of the transferred entity is maintained only if the new contractor takes over the majority of the material assets.¹¹⁶

In the light of this line of rulings, certain *Spijkers* criteria (namely the transfer of assets or of personnel) are more relevant than others, depending on the nature of the business. This interpretation has since then been consistently followed by the Court of Justice.¹¹⁷

By conferring particular relevance to the acquisition of the material assets or/and the personnel, the Court showed a certain sensibility for the concerns of the business providers, which are now allowed to adjust their business operation in a way to avoid the application of the directive (for instance by not re-employing the same personnel, or not using the same material assets).¹¹⁸

It is however important to note that in the *Sodexo* case¹¹⁹ the Court set a limit to the room of manoeuvre of the employers. In this case, on the provision of a catering service in a hospital, the Court considered that when two subsequent catering service providers use in turn the same material assets which belong to the contractor (the hospital), and when the performed activity is asset-based (as in the case at stake), a transfer of undertaking occurs.

Definition of the content of the workers' rights

The Court of Justice seems to have gradually changed its approach also with respect to the definition of the worker's acquired rights.

¹¹³ *Ibid*, par. 23.

¹¹⁴ Judgment of 10 December 1998, *Hernandez Vidal*, joined cases C-127/96, C-229/96 and C-74/97, ECLI:EU:C:1998:594, and Judgment of 10 December 1998, *Sanchez Hidalgo*, joined cases C-173/96 and C-247/96, ECLI:EU:C:1998:595, among others.

¹¹⁵ Judgment of 25 January 2001, *Liikenne*, C-172/99, ECLI:EU:C:2001:59

¹¹⁶ *Ibid*, par. 39.

¹¹⁷ Judgment of 10 December 1998, C-173/96, *Sánchez Hidalgo*, ECLI:EU:C:1998:595; judgment of 28 February 2017, *Ferrera da Silva*, ECLI:EU:C:2015:565; CLECE, judgment of 13 December 2012, CLECE, C-63/09, ECLI:EU:C:

¹¹⁸ McMullen, 'Some problems and themes in the application in Member States of Directive 2001/23/EC on transfer of undertakings', in John McMullen, 'Recent CJEU case law on the transfer of asset-reliant undertakings' (2016) 45 *Industrial Law Journal* 455. McMullen also notes that by effect of this interpretation, workers employed in a sector where assets are particularly expensive or rare (for instance, planes) are better protected than in other sectors.

¹¹⁹ Judgment of 20 November 2003, *Sodexo*, C-340/01, ECLI:EU:C:2003:629;

Indeed, in some rulings, the rigidity of the Court in ensuring that the transferred employees would not suffer *any* change in their working conditions¹²⁰ left space¹²¹ to a more flexible interpretation.

In the Boor case, the Court held that the directive allowed the transferee, legal person governed by public law, to reduce the amount of remuneration of the transferred employees, in order to comply with the national rules in force in the public sector.¹²² Moreover, in the Juuri case, the Court considered compatible with the directive an agreement among the transferor, the transferee and the social partners where they stipulated that the transferred employees would not be covered by any collective agreement subsequent to the transfer. This was deemed possible because the transfer itself was given effect exactly the day after the expiration of the collective agreement applicable to the transferor, even if a renewed version of the collective agreement – negotiated months before the transfer - was to take place immediately after.¹²³

The result of these rulings is to allow that for reason of the transfer the employees might suffer, at least to some extent, a deterioration in their working conditions, and therefore they appear in stark contrast with the originally more protective approach of the Court.

2. DIRECTIVE ON COLLECTIVE DISMISSALS

Concerning the directive on collective dismissals, the analysis of the case law reveals a quite ambivalent interpretation of the Court.

In some cases the Court's reasoning had the effect of reinforcing the social orientation of the directive, while in other cases the Court has been open to accept national measures that have the effect of limiting the exercise of the rights conferred by the directive.

Cases where the Court reinforced the social orientation of the directive

In the Rockfon case¹²⁴ and in the Athinaiki case¹²⁵ the Court gave an extensive reading to the scope of the directive, by ruling that the concept of “establishment”, in relation to which the threshold for applying the directive is calculated, does not require the presence of a management which can independently effect collective redundancies. Rather, ‘establishment’ merely refers to the unit where the workers perform their activity. Such a broad interpretation consented, in the proceeding at stake, to meet the conditions covered by the directive, thus enabling the dismissed workers to rely on the rights conferred therein.

The rights of the dismissed workers resulted also reinforced as the Court ruled that the consultation and notification procedures shall be carried out by the employer before he actually takes and formalizes the

¹²⁰ Supra, par. 3(b)

¹²¹ Judgment of 7 March 1996, Merckx and Neuhuys, Joint Cases C-11/94 and C-172/94, ECLI:EU:C:1996:87, where the Court confirmed that a change in the level of remuneration consists in a substantial change in the working conditions that legitimates the termination of the contract

¹²² Judgment of 11 November 2004, Boor, C-425/02, ECLI:EU:C:2004:706

¹²³ Judgment of 27 November 2008, Juuri, C-396/07, ECLI:EU:C:2008:656

¹²⁴ Judgment of 7 December 1995, Rockfon A/S, C-168/96, ECLI:EU:C:1995:420

¹²⁵ Judgment of 15 February 2007, Athinaiki, C-20/05, ECLI:EU:C:2007:101

decision to pursue collective dismissals. The reasoning of the Court was based on the consideration that the directive aims at mitigating the social impact of collective dismissals on the employees.¹²⁶

Cases where the Court accepted limitation to the rights conferred by the directive

The scope of the directive has been considered by the Court as not imposing on the employer any obligations in situations where the employer did not *contemplate* the redundancies.¹²⁷ This covers also the circumstance in which the employer, for his own negligence or misevaluation of the gravity of his business' problems, did not properly consider the possibility to pursue collective dismissals, so that the declaration of bankruptcy of the company coincides with moment in which the employees are faced with the fact of the loss of their job. Such an interpretation of the Court leaves those employees without possibility to claim further damages to their negligent employer.¹²⁸

Moreover, the Court interpreted the directive as not establishing rights that could be individually enforced, but rather rights that could be claimed only at the initiative of the workers' representatives.¹²⁹

3. DIRECTIVE ON INFORMATION AND CONSULTATIONS RIGHTS

Concerning the directive on information and consultation rights, only few cases were ruled in this period. Nevertheless, it is important to note that in the CGT case the Court stated that the directive could not be interpreted as allowing a category of workers (in particular, workers under the age of 26) to be excluded from the calculation of the threshold that defines the scope of application of the directive.¹³⁰

c. Considerations

The analysis of the rulings has shown that, overall, the Court did not maintain, or at least not in a coherent manner, the same social orientation that characterized its reasoning in the first period of activity. In some decisions (on change of service providers and on the workers' acquired rights in case of transfer, and in certain case law on collective dismissals), the Court seems indeed to have gradually embarked on a rationalisation of the content of the rights conferred to the workers, in light of more market-oriented considerations.

In relation to the development of the EU treaties, it is interesting to note that those cases, where the Court appears to be more open to business concerns, do not easily fit with the progressive advancement of the social dimension of European integration that the evolution of EU primary law would suggest.

¹²⁶ Judgment of 27 January 2005, *Junk*, C-188/03, ECLI:EU:C:2005:59

¹²⁷ Judgment of 7 December 1995, *Rockfon A/S*, C-168/96, ECLI:EU:C:1995:420, judgment of 10 December 2009, *Ovivo Rodriguez Mayor*, C-323/08, ECLI:EU:C:2009:770 (comment in Barnard, 'Collective Redundancies and Employees' Rights on the Employer's Insolvency',)

¹²⁸ *ibid*, p. 635

¹²⁹ Judgment of 16 July 2009, *Monocar*, C-12/08, ECLI:EU:C:2009:466

¹³⁰ Judgment of 18 January 2007, *CGT*, C-385/05 CGT, ECLI:EU:C:2007:37

It is instead possible to identify a sort of alignment between those rulings and the role of EU social policy as reflected in the position of the European Commission stemming out from the analysed policy documents.¹³¹ In this regard, it is particularly unveiling that the Court has opted for a more business-friendly approach towards the application of the transfer directives on change of service provision soon after the Commission, in its abortive amending proposal, indicated the opportunity of such an interpretative change.¹³²

Another finding of the analysis of the case law is that the Court has generally maintained an extensive interpretation of the scope of application both of the directive on collective dismissal, and of the directive on transfer of undertakings, albeit limitedly to its scope vis-à-vis the type of business operations.

This trend, contrary to the above described one, might be read in correlation with the expansion of the social dimension of EU primary law, but also with the promotion of a level playing field and the functioning of the common market as the policy papers underline.

5. THIRD PERIOD: FROM THE LISBON TREATY UNTIL PRESENT TIME

a. Social policy in primary law and in the policy documents

The entry into force of the Lisbon Treaty coincided with a significant advancement of EU primary law with respect to social and labour rights.

Among the most relevant innovations, the Treaty gave the Charter of Fundamental Rights of the EU binding value. It is important to note that the social and labour rights included in Title IV (“Solidarity”) seemed to have acquired the same status of other categories of rights in the Charter.¹³³ Indeed, it was considered that *the text [of the Charter] recalls the indivisible rights of all inhabitants of the European Union, covering all civil, political, economic, social and cultural rights.*¹³⁴

The treaty also introduced the possibility for the EU to accede the European Convention of Human Rights in Article 6 TEU, and included the term ‘*social market economy*’ (which recalls the theories of Muller-Armack)¹³⁵ among the objectives of the EU in Article 3 TEU. Moreover, the Treaty introduced a new social clause in Article 19 TFEU, consisting in a horizontal provision requiring the EU institutions and the Member States to

¹³¹ Hunt, 'The Court of Justice as a policy actor: the case of the Acquired Rights Directive*'

¹³² Supra, par 4(b)

¹³³ Veronica Papa, 'The dark side of fundamental rights adjudication? The Court, the Charter and the asymmetric interpretation of fundamental rights in the AMS case and beyond' (2015) 6 European Labour Law Journal 190

¹³⁴ Reading Guide to the Charter of Fundamental Rights of the European Union – Preface, p. 7 (issued in occasion of the conference of INGOs of the Council of Europe).

¹³⁵ Supra, par 3(a).

promote a high level of employment, adequate social protection and to fight against social exclusion while drafting and implementing EU and national law.¹³⁶

The increased attention to social rights indicates a renewed support for the development of the social dimension of European integration;¹³⁷ however, and once again, the analysis of the policy documents provides a different understanding of the status of social policy within the EU.

Indeed, the Europe 2020 Strategy¹³⁸ reaffirmed the previous tendency to rely on governance (or soft-law) mechanisms rather than on binding legislative acts, and accentuated the importance to establish cooperation on national social and labour policies in order to support their convergence towards the attainment of higher, more competitive, economic performances.¹³⁹

The functional character of EU social policy with respect to economic progress is also reflected in the way the formula ‘social market economy’ is referred to by the Commission, which stated that the *social market economy [shall be realized] by putting business and Europeans back at the heart of the market in order to restore confidence,*¹⁴⁰ and that *the human dimension of the social market economy must help to build confidence within and ensure the good performance of the large internal market*¹⁴¹. It is then quite evident that the meaning that Commission attaches to the concept of social market economy appears to be quite distant from the original concept theorized by Muller-Armack, according to which social values have an autonomous relevance.

Finally, it should be mentioned that in April 2017 the Commission has officially presented the (non-binding) EU Pillar of Social Rights, then adopted by the Parliament and the Council, and proclaimed in a non-binding form in November of the same year.¹⁴² This initiative, despite deserving the credit to have directed renewed attention to social and labour issues within the EU, does not seem adequate for actually strengthening the protection of social rights *vis-à-vis* the consequences of an always more globalised, digitalised and liberal economy¹⁴³ (and for therefore its content was criticized by the European Economic and Social Committee,¹⁴⁴

¹³⁶ Article 9 TFEU

¹³⁷ Niklas Bruun and Isabelle Schomann, *The Lisbon Treaty and Social Europe* (Hart Publishing 2012); Hendrickx, 'European Labour Law after the Lisbon Treaty: (Re-visited) Assessment of Fundamental Social Rights'

¹³⁸ Europe 2020 Integrated guidelines for the economic and employment policies of the Member States: recommendation for a Council Recommendation on broad guidelines for the economic policies of the Member States and of the Union [COM(2010)193 final] and proposal for a Council Decision on guidelines for the employment policies of the Member States [SEC(2010)488 final]

¹³⁹ European Commission, Communication on the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth COM(2010)2020 final #137

¹⁴⁰ COM(2010)608 final, Communication from the Commission to the European Parliament, The Council, the Economic and Social Committee and the Committee of Regions, " Towards a Single Market Act - For a highly competitive social market economy (50 proposals for improving our work, business and exchanges with one another) "

¹⁴¹ *ibid*

¹⁴² Proposal for an interinstitutional proclamation endorsing the European Pillar of Social Rights, COM(2017)0251 final

¹⁴³ *ibid*

¹⁴⁴ Opinion of the European Economic and Social Committee on the Communication from the Commission on Launching a consultation on a European Pillar of Social Rights [COM(2016)127final], SOC/542

the European Parliament¹⁴⁵ and the ETUC¹⁴⁶). Moreover, it does not take back the conception of social policy as prevalently a factor within the process of fostering market integration¹⁴⁷: the promotion of flexible labour contracts,¹⁴⁸ and the consideration that *the establishment of a European Pillar of Social Rights should be part of wider efforts to build a more inclusive and sustainable growth model by improving Europe's competitiveness*¹⁴⁹ are indeed quite telling.

b. Case law

The case law of the Court of Justice in the period that has followed the entry into force of the Lisbon Treaty provides quite meaningful indications on the weight that the Court attaches to (the analysed) social rights. In particular, it is interesting to note that the Court has in multiple times referred to the EU Charter of fundamental rights, not in order to underpin the social aim of the directives, but rather to resize it.

1. DIRECTIVE ON TRANSFER OF UNDERTAKINGS

The Court's decisions on transfers of undertakings have had a twofold effect. On the one hand, the Court has further enlarged the scope of application of the directive, and on the other hand has limited the protection conferred to the workers by referring to the employer's freedom to conduct its business.

The extensive interpretation of the scope of the directive

The Court's expansive interpretation of the scope of the directive is particularly evident in the Albron case.¹⁵⁰ In this ruling, the definition of "transferor employer" and "transferred employee" were adapted to the situation emerging from complex corporate structures where the (traditional) functions of the employer are shared between a central employer, that stipulates the contracts with the employees, and another company belonging to the same group (the so-called non contractual employer), where the workers were seconded.¹⁵¹

¹⁴⁵ A European Pillar of Social Rights, European Parliament Resolution of 19 January 2017 (2016/2095(INI))

¹⁴⁶ Klaus Lorcher and Isabelle Schoemann, *The European Pillar of Social Rights: Critical Legal Analysis and Proposals (Report 139)* (ETUI Brussels, 2016)

¹⁴⁷ Ibid, *'economic and social progress are intertwined, and the establishment of a European Pillar of Social Rights should be part of a wide efforts to build a more inclusive and sustainable growth model by improving Europe's competitiveness and making it a better place to invest create jobs and foster social cohesion'*. Moreover, in In the preparatory works the Commission stated that *social policy should also be conceived as a productive factor*: Launching a consultation on a European Pillar of Social Rights, Communication from the Commission, COM(2016)127 final

¹⁴⁸ Point 5 "secure and adaptable employment", 'the necessary flexibility for employers to adapt swiftly to changes in the economic context shall be ensured', in the Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017)251final.

¹⁴⁹ Ibid, Preamble.

¹⁵⁰ Judgment of 21 October 2010, Albron catering, C-242/09, ECLI:EU:C:2010:625

¹⁵¹ Sarah De Groof, 'The Scope of the Transfer of Undertakings Directive Further Enlarged Through the Heineken-Case' (2010) 1 European Labour Law Journal

The Court ruled that not only the employees working directly in contact with their contractual employer, but also the employees seconded to a non-contractual employer are covered by the directive in case the business where they work (as a result of a secondment or not) is transferred to another undertaking.

The extensive interpretation of the directive is also evident in the Court's narrow understanding of the exception established in the directive, according to which its rules do not apply in the context of reorganization of public administration.¹⁵²

Moreover, in the Amatori case,¹⁵³ the directive was deemed to cover the situation where the transferred part of the undertaking did not constitute a functionally autonomous economic entity existing before the transfer, and also where the transferor (a State-owned company) after the transfer still exercised extensive control over the transferee (private company).

The reasoning of this case reflects a more flexible consideration of the concept of identity of the transferred economic activity with respect to the earlier Spijkers case. It is also worth noting that this interpretation had the effect of dismissing the allegation of the worker, which opposed to the transfer and lost his status of public servant after the transfer.

Case law on workers' rights and on the employer's freedom to conduct his business

It is curious to note that Court has in more occasions referred to the EU Charter of Fundamental Rights, and more specifically to Article 16 (the freedom to conduct a business)¹⁵⁴ with the aim of defining a limit to the protection that workers can receive in case of transfers.

In the Alemo-Herron case the Court gave a narrow interpretation of the directive's rules according to which for reason of the transfer *all* the rights arising from the employment contract should be transferred to the transferee.¹⁵⁵ Indeed the Court held that when this employment contract contains a clause such as "*during your employment with [...], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [trade union]*" (so-called dynamic clause) the transferee would only be bound by the collective agreement in force at the moment of the transfer and not by any future agreement. Basically, the Court stated that dynamic clauses incorporated in the employment contract of transferred workers should be interpreted statically.¹⁵⁶

¹⁵² Judgment of 6 September 2011, Scattolon, C-108/10, ECLI:EU:C:2011:542

¹⁵³ Judgment of 6 March 2014, Amatori, C-458/12, ECLI:EU:C:2014:124

¹⁵⁴ *The freedom to conduct a business in accordance with Community law and national laws and practices is recognised*

¹⁵⁵ Article 3(1) Directive 2001/23/EC

¹⁵⁶ Patrick Rémy, 'L'arrêt Alemo-Herron de la CJUE et la directive transfert' (décembre 2013) 12 *Revue de Droit du Travail*. It is interesting to note that in the situation at stake, where a (dynamic) clause included in the employment contract of the transferred workers is transferred as well as part of the employment contract itself, seems to fall within the scope of the directive, and precisely of article 3 (the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee). Therefore it should not be considered a "more favourable provision" with respect to the rules provided by the directive itself.

Moreover, in order to justify its reasoning, the Court argued that the fact that the transferee would have been bound by a collective agreement that he was not able to negotiate (as he could not participate to the negotiation with the trade union) constituted a violation of his freedom to conduct a business, declared in Article 16 of the EU Charter. According to the Court, the worker's argument that the directive explicitly consents Member States to adopt implementing legislation that is more protective for the employees¹⁵⁷ (as the Court interpreted British law) does not go so far to allow a situation where the transferee is not able of *determining changes in the working conditions of its employees with a view to its future economic activity*.¹⁵⁸

The Court seems thus to adopt a market-oriented interpretation, distant from its previous reasoning in Daddy's Dance Hall case,¹⁵⁹ and which is reflected in its consideration that the aim of the directive is to set a *balance between the protection of the employee and the interests of the transferee employer*.¹⁶⁰

This ruling had quite disruptive effects on the British tradition of industrial relations, where it was through "incorporation clauses", like the one at issue in the case, that collective agreements could become applicable to individual employment contracts.¹⁶¹

Also in subsequent rulings the Court held that the purpose of the directive is to establish a balance between social protection and business interests, and that the safeguard of workers' rights shall not go so far as to undermine the employers' freedom of conducting a business. Accordingly, in the *Österreichischer Gewerkschaftsbund* case,¹⁶² the Court stated that it is clear from the objective of the directive that the *transferee must be in a position to make adjustments and changes necessary to carry on its operations*.¹⁶³

In the recent *Asklepios* case,¹⁶⁴ the Court faced again the situation of a transfer operation where the employment contract contained a "dynamic clause".

Similarly to the *Alemo-Herron* case, the Court interpreted national legislation as a measure that went beyond the rules of the directive, being more favourable to employees, and that therefore had to be balanced against the interest of the employer to preserve its freedom to conduct his business, defined in Article 16 of the Charter.

¹⁵⁷ Article 8 Directive 2001/23/EC

¹⁵⁸ Par 33 and 34 judgment of 18 July 2013, *Alemo-Herron*, C-426/11, ECLI:EU:C:2013:521. However, the Court did not consider that the directive does not per se prohibit future re-negotiation of the employment contract of the transferred employees, including the content of such dynamic clauses, and that therefore the transferee's freedom to conduct his business was not actually affected in its existence.

¹⁵⁹ *Supra*, Par. 3(2)

¹⁶⁰ Part 25 judgment of 18 July 2013, *Alemo-Herron*, C-426/11, ECLI:EU:C:2013:521

¹⁶¹ Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfer of undertakings and the Protection of Employer Rights in EU Labour Law Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd*' (2013) 42 *Industrial Law Journal* ; Rebecca Zahn, 'The Court of Justice of the European Union and transfer of undertakings, implications for collective labour rights' (2015) 6 *European Labour Law Journal* 72; the author illustrate that as a consequence of this case British regulation implementing directive 2001/23/EC was modified also that *as any rights, powers, duties and liabilities in relation to any provision of a collective agreement will not transfer to the transferee if the collective agreement is concluded after the date of the transfer if 'the transferee is not a participant in the collective bargaining for that provision*

¹⁶² Judgment of 11 September 2014, *Österreichischer Gewerkschaftsbund*, C-328/13, ECLI:EU:C:2014:2197

¹⁶³ *Ibid*, Par 29

¹⁶⁴ Judgment of 27 April 2017, *Asklepios*, C-680/15 and C-681/15, ECLI:EU:C:2017:317

It is however interesting to note that, differently from the *Alemo-Herron* decision, the Court considered that in the situation at stake Article 16 was not violated. The Court this time paid attention to the fact that the transferee, subsequent to the transfer, was still in the possibility to negotiated different working conditions with the transferred employees and their representatives¹⁶⁵).

2. DIRECTIVE ON COLLECTIVE DISMISSALS

Similarly to the case law on transfers of undertakings, the Court has showed the tendency to rule in favour of an extensive interpretation of the scope of application of the directive on collective dismissals and, at the same time, to consider the employer's freedom to conduct his business as a possible limit to the workers' protection.

The extensive interpretation of the scope of the directive

The Court broadened the scope of application of the directive, by specifying that professional categories that do not fit in the traditional concept of "employee", such as directors¹⁶⁶ or trainees¹⁶⁷, are nevertheless covered by the rights conferred by the directive.

Moreover, in the *Rivera* case,¹⁶⁸ the Court established that the definition of redundancy should also include the situation where the employer – unilaterally and to the detriment of the employee – introduces significant changes to essential elements of the employment contract, for reasons not related to the individual worker concerned.¹⁶⁹

Case law on the employer's freedom to conduct his business

Article 16 of the EU Charter was referred to by the Court in the *Iraklis* case,¹⁷⁰ where the Court ruled that also in case of collective dismissals, workers' rights could be limited on the ground of market-related considerations.

Here the Court decided that the Greek legislation that endowed a public authority with the power to scrutinize and eventually not authorize collective dismissals was not compatible with the directive. At first, the Court referred to the concept of social market economy¹⁷¹ in order to explain that the power of a public authority to scrutinize the legitimacy of the employer's decision to dismissal is not, *per se*, contrary to EU law, as it pursue the goal to support employment and employees' protection, which is indeed considered a legitimate aim recognized by the treaty. However, the Court then considered that the law at stake resulted in a restriction of the freedom of establishment (the employer was a Greek subsidiary of a French multinational) that could not be justified on the ground of public interests, because the power conferred to the national authority was based

¹⁶⁵ Article 4(2) directive 2001/23/EC

¹⁶⁶ Judgment of 13 February 2014, *Commission v Italy*, C-596/12, ECLI:EU:C:2017:77

¹⁶⁷ Judgment of 9 July 2015, *Ender Balkaya*, C-229/14

¹⁶⁸ Judgment of 11 November 2015, *Rivera*, C-422/14

¹⁶⁹ Par 54 Judgment of 11 November 2015, *Rivera*, C-422/14

¹⁷⁰ Judgment of 21 December 2016, *Anonymi*, C-201/15, ECLI:EU:C:2016:972

¹⁷¹ Par 76 of Judgment of 21 December 2016, *Anonymi*, C-201/15, ECLI:EU:C:2016:972

on criteria that were considered too vague and arbitrary. In particular, such criteria violated the principle of proportionality and therefore contradicted not only the freedom of establishment, but also the freedom to conduct a business, provided by Article 16 of the Charter, which shall be always respected in case of implementation of EU law.¹⁷²

It is then finally curious to note that this ruling partially intervenes on the decision taken during the first drafting of the directive, whereby the Member States were left free to entrust a public authority with the power to control the legitimacy of the projected redundancies as such a discretionary power is now deemed to find a limitation in the freedom of the employer to conduct his business.

3. DIRECTIVE ON INFORMATION AND CONSULTATION RIGHTS

In the AMS case the Court gave an interesting ruling that has reduced the expectations concerning the relevance of the Charter with respect to the worker's right to information and consultation (established in Article 27 Charter).¹⁷³

Here the Court was confronted with a situation where the national measure implementing the directive was evidently not in compliance with the directive itself, as it wrongfully excluded certain categories of workers from the scope of the information and consultation rights. The Court was asked whether the workers that were unlawfully excluded from the protection could claim the direct applicability of Article 27 of the EU Charter against their employer, in order to obtain the withdrawal of the incorrect national provision. The reliance on the Charter appeared necessary in view of the consolidated jurisprudence on the absence of direct effect of directives among private parties.

Firstly, the Court considered that Article 27 should not be considered a right, but a principle (pursuant to the distinction in Article 52(2) of the Charter), which implies that in order to be *judicially cognisable* it should be implemented and specified through national or EU law.

Secondly, and differently from its previous jurisprudence,¹⁷⁴ the Court considered that in the case at stake the fundamental principle enshrined in Article 27 could not have direct (horizontal) effect, in support of the workers' plea. Indeed, the Court adopted the view that the directive's rules that were violated by national law were not given specific expression to Article 27, and that consequently that it could not be invoked in order to prevent the application of a national law.

The result of this ruling is that the Charter could not provide an actual support, as far as information and consultation rights are involved, to protect workers in case of incomplete or wrongful national legislation.

¹⁷² Par 93 of Judgment of 21 December 2016, *Anonymi*, C-201/15, ECLI:EU:C:2016:972

¹⁷³ Papa, 'The dark side of fundamental rights adjudication? The Court, the Charter and the asymmetric interpretation of fundamental rights in the AMS case and beyond'

¹⁷⁴ Judgment of 19 January 2010, *Seda Kucukdeveci*, C-555/07, ECLI:EU:C:2010:21; Judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709

c. Considerations

The analysis of the case law shows a feature that connects all three directives, consisting in the – at least potential - relevance of the EU Charter of Fundamental Rights for defining the scope and the enforceability of the rights conferred by the directives.

In the case of collective dismissals and of transfers, this observation appears connected with the tendency of the Court to interpret those directives as aimed at establishing a fair balance between workers' rights and employer's business interests. It is indeed in the context of this balancing exercise that the EU Charter appears determinant in establishing whether a national measure, which the Court considers more protective than the rules of the directives themselves, is compatible with EU law.¹⁷⁵ It therefore seems that the Court has started to read the rules of the directive in the light of the EU Charter and, at the same time, through a market-oriented lens, thus leading to a progressive transformation of the nature of the directives: from a floor of rights, to a potential ceiling.¹⁷⁶

Similarly, in the case of information and consultation the interpretation of the Charter was relevant in order to determine the (lack of the) enforceability of the workers' rights against their employer.¹⁷⁷

It is moreover interesting to note that while confronting the interpretation of the Court on the Charter's provisions on information and consultation rights of workers (Article 27) on the one hand, and on the employer's freedom to conduct his business (Article 16) on the other, it is possible to identify a certain asymmetry in favour of the latter.

Article 27 was judged to be a principle and not a right, and therefore enforceable only in presence of specific implementing measures. In addition, the Court refused to consider the rules of directive 2002/14/EC, which *actually* concerns information and consultation rights, as an adequate specification of that principle. Therefore Article 27 was not conferred with direct effect.

Article 16 was instead interpreted by the Court as having the potential of exercising direct effect in support of the employer's claims, against the requests of the workers. National rules (being on dynamic clauses, or on the power of the public authority to not authorize dismissals) that limit the freedom of the employer to conduct his business¹⁷⁸ can therefore be challenged by the employer, as he can rely on Article 16 of the EU Charter to contest the enforceability of the rights that those national rules confer to workers.

¹⁷⁵ Zahn, 'The Court of Justice of the European Union and transfer of undertakings, implications for collective labour rights'

¹⁷⁶ Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfer of undertakings and the Protection of Employer Rights in EU Labour Law Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* '

¹⁷⁷ Papa, 'The dark side of fundamental rights adjudication? The Court, the Charter and the asymmetric interpretation of fundamental rights in the AMS case and beyond'

¹⁷⁸ See the reflection of the metamorphosis of the freedom to conduct a business following to the Court interpretation: from freedom from domination, to freedom from interference, in Eduardo Gill-Pedro, 'Freedom to conduct business in EU law: freedom from interference or freedom from domination?' (2017) 9 *European Journal of Legal Studies* 103

Moreover, it is possible to identify in the reasoning of the Court elements of consistency with the analysis of the social dimension of EU integration as stemming out the Lisbon Treaty and of the Commission's policy documents

Firstly, the case law shows that the Court has maintained its broad interpretation of the scope of application, both of the directive on transfers of undertakings and of the directive on collective dismissals. This may be, again, read in light of the fact that an expansive view on the harmonization of national legislation coincides with the fostering of the approximation of the rules applicable to business operators, and therefore is beneficial for the functioning of the internal market.

Secondly, the Court has considered the EU Charter and the notion of social market economy not to reinforce workers' rights in situations of company reorganization, but rather to support the need of balancing those rights with market-related prerogatives. The references to those provisions of EU primary law that at a first glance appear to promote the definition of a proper social dimension of EU integration, were read by the Court in a way that reflected the functionalism of EU social policy to economic growth, as defined in the Commission's policy documents.

A further alignment of the Court's reasoning with the content of those policy documents, and with the relationship between social policy and market prerogatives illustrated therein, lies in the evolution of the Court's interpretation on the purpose of the directives. If originally the Court considered those directives as oriented at protecting workers' rights in case of business restructurings, now the directives are read as promoting a coexistence between workers' rights and employers' freedoms.

The general and underlying perception of the Court's reasoning seems to be that, in case of company restructurings, workers can rely on the directives and on other social references established in the treaty in so far as the exercise of their rights does not conflict with business considerations (such as the employer's ability to conduct his business without intrusion in its discretion). Moreover, it results that a claim based on Article 16 of the Charter may be more likely successful than a claim based on Article 27.

6. CONCLUSION

The analysis of this paper aimed at investigating whether the development of the case law of the Court of Justice on workers' rights in case of business restructuring reflected - and in case, to which extent - the evolution of social policy in the EU treaties. The social references in the treaties have been considered in combination with the accompanying policy documents of the Commission, where EU social policy is further elaborated and contextualized within the broader process of EU integration.

A first element that emerged from the analysis is that the strengthening of a social dimension in EU primary law did not result in a more protective interpretation of the rights conferred by the directives. On the contrary, the purpose of the directives (especially on transfers of undertaking and on collective dismissals) was conceived as more and more conciliating towards business-oriented concerns.

Nevertheless, it should be noted that the Court maintained in all the three analysed periods an overall broad interpretation of the type of business operation falling within the scope of the directive. It could be legitimate to wonder, however, whether the application of the directives to a broad variety of factual circumstances but accompanied by a weakened interpretation of the conferred workers' rights adequately reflects the maturation of EU social policy that the evolution of the treaties suggests.

A second consideration is that the reasoning of the Court seems to have progressively got aligned with an interpretation of EU social policy as essentially connected to economic progress, such as the one emerging from the Commission's policy documents. This appears from the balancing exercise between the rights of the workers and the prerogative of the employers that the Court carries out in its most recent rulings.