

**Reducing the Impact of the European Union’s Invisible Hand on the Economy
by Limiting the Application of the Transfer of Undertakings Provision**

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I. Introduction

One of the most important yet controversial areas of discussion in European Union Law is employment law and its interaction with social policy, specifically in reference to the “transfer of undertakings” provisions, or the rights guaranteed to employees when the businesses of their employers are sold, merged, or acquired.

In Europe, workers have significantly more government mandated job security than their counterparts in the United States. With the exception of a few national laws, the individual rights of American workers are preserved by labor union agreements, state statutes, and private contracts. To the contrary, each country in the European Union (hereinafter “EU”) has implemented its own national laws to safeguard the rights and livelihoods of its employees. In the event of a transfer of undertakings or business to another employer as a result of a legal transfer or merger of businesses, employees’ rights are protected by these national laws implementing the EU’s Acquired Rights Directive,¹ which was drafted by the Directorate General V, an agency of the EU Commission.²

This article evaluates the EU’s Acquired Rights Directive as a whole and as it was enacted in the United Kingdom and Germany. This analysis additionally focuses on how European courts and parliaments have interpreted and expanded the Acquired Rights Directive to

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¹ Council Directive 77/187/EEC [hereinafter "Acquired Rights Directive"] was amended by Council Directive 98/50/EC in 1998. In 2001, Council Directive 2001/23/EC repealed and codified Council Directive 77/187/EEC and Council Directive 98/50/EC, but the “codification concerns a number of formal aspects of the text only, with no implications for their content which remains unchanged”. 2000 O.J. (C 367) 21.

² Angela R. Broughton et al., *International Legal Developments in Review: 1998 Business Regulation*, 33

create new rights for European workers. Ultimately, this paper determines that the transfer of undertakings provision should be construed more narrowly in the future to reduce the invisible hand of the government on corporations.

With the current and anticipated changes in the global economy, corporations must have more flexibility to make important decisions regarding the efficiency of operations and the financial bottom line without the strong interference of government regulations. This is especially true in light of the globalization of manufacturing and agricultural production, the continued development of the services sector³ and the critical role all businesses have in maintaining overall economic health. While it is extremely important to protect the rights of European employees and to preserve their jobs, it is arguably equally or more important to facilitate the growth and efficiency of businesses, resulting in the addition of more European workers to corporate payrolls, the reduction of unemployment, and more long term sustainable economic growth in Europe. Narrowly construing the Acquired Rights Directive to apply to fewer situations involving corporate transfers should accomplish these objectives.

This position is supported by the fact that despite the existence of the Acquired Rights Directive and its broad interpretation by European courts, each country's transfer of undertakings legislation contains loopholes and exceptions to allow corporate employers to circumvent strict employment laws. This is true both in England, where there is a reluctance to follow European social and employment policy, and in Germany, where workers are staunchly protected. While it is clear that American employment laws may never succeed in Europe, where there is a proud social history of protecting employment rights, the American laws serve as a good example of

INT'L LAW 291, 298 (1999).

³ "In the second half of the twentieth century the global productive system was transformed . . . One reason is that the production of goods is dispersed to smaller facilities around the world, to subcontractors, suppliers, and casual workers, many of whom cut, sew and punch data at home. But the main reason is that more and more of the world's work is not in manufacturing." RICHARD J. BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATION AND THE NEW WORLD ORDER* 259 (1994).

how the free market provides ample employment opportunities while still protecting its workers, which is, after all, the primary intent of the Acquired Rights Directive.⁴

II. Background of Employment Law in the United States and Europe

The basic common law rule in the United States is that all employment occurs on an at-will basis, unless there is a specific provision to the contrary. Employment at-will means that “an employee may be dismissed at any time for any reason, or for no reason.”⁵ Courts have developed three exceptions to this rule to protect the rights of individual employees. These exceptions are: contractual provisions in employee handbooks;⁶ discharges that violate public policy;⁷ and in some states, discharges without cause.⁸ While these exceptions are important for guaranteeing the rights of individuals⁹ in the workplace, they have not been applied to collective dismissals resulting from a sale, acquisition or merger of the corporation. At-will employment laws in the US enable the majority of companies to collectively dismiss employees without notice

⁴ In addition to the primary aim of the Transfers of Undertakings Directive which was to ensure that employees do not forfeit rights acquired by their employer before a transfer occurs, “Protection against dismissal by reason of a transfer was included [in the Transfers of Undertakings Directive] so as to prevent avoidance of the primary rule of automatic transfer of the employment relationship from transferor to transferee.” Bob Hepple, *European Rules on Dismissal Law?*, 18 COMP. LAB. L.J. 204, 220 (1997).

⁵ Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1035 (1995).

⁶ “[C]ontractual protection may be found in employee handbooks provided by employers, but this protection may be undercut by provisions disclaiming that the handbook is intended to create any contract rights.” Summers, *supra* note 5, at 1035.

⁷ “[D]ischarges [that violate public policy] may make the employer liable in tort, but courts generally only recognize liability based on public policies enacted by legislative bodies. *Id.*”

⁸ “[A] few states hold that discharge without cause of employees with many years of service may violate the implied covenant of good faith and fair dealing. However this covenant is generally not recognized.” *Id.*

⁹ For instance, the U.S. Court of Appeals for the First Circuit recently applied the public policy exception to the employment at-will doctrine to protect an employee (a chemist) who was discharged from the laboratory where she worked because of her refusal to illegally alter lab reports. The Court found that the falsification of such reports could jeopardize her professional license, placing her in a precarious position to choose between her license and her job. *Negron v. Caleb Brett U.S.A., Inc.*, 212 F.3d 666 (1st Cir. 2000).

or severance pay.¹⁰ The Supreme Court held that these decisions “go to the core of entrepreneurial control,”¹¹ stating that if the enterprise is transferred to another employer, the employees have no right to continued employment and the successor has no further obligations. These policies have allowed many instances of mass dismissals resulting from a sale, acquisition or merger of a company. In one incident, a department store that had been acquired by another company posted a Monday morning notice on its locked doors notifying employees of their termination; in another, a factory that had been sold, sounded a fire alarm so its employees would evacuate the premises whereupon they received an announcement of their termination.¹²

While at-will employment laws in the US may seem severe to workers because they place the burden of mass dislocation on them, these policies foster free market competition in our corporate sector, ensuring that labor remains a cost of production¹³ as determined by the needs of the corporation. By allowing the employer to manage the costs of employment when participating in a merger or acquisition, corporations can employ qualified persons at competitive rates in accordance with market conditions. Legislating that corporations should bear the burden of having employees in terms of unnecessary financial costs or limited freedom of operations contributes to more unemployment because companies would be reluctant to hire workers for whose jobs and incomes they must account in the future. This could inevitably discourage the

¹⁰ Approximately 85% of employees in the private sector have “only fragmentary protection from arbitrary individual dismissal and essentially no protection from collective dismissals. In cases of plant closings or mass dismissals, employees seldom have a right to notice and no right to severance pay.” Summers, *supra* note 5, at 1036. Some employees have limited protection from mass dismissal that is provided by collective bargaining agreements between unions and corporate employers. But, protection of these employees is generally limited to discharge without just cause; the existence of just cause is determined by an arbitrator, and just cause clauses protect only against arbitrary individual discharge. COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) 40:1 (1992). In regard to mass dismissals, few collective agreements require notice to employees of more than three days and less than half of the agreements provide for severance pay. *Id.* at 53:2.

¹¹ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (Stewart, J., concurring).

¹² Summers, *supra* note 5, at 1037.

¹³ “Labor is a factor of production. The price which the seller of labor can obtain on the market depends on the data of the market.” LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 619 (1949).

use of mergers and acquisitions so that companies would not be able to take advantage of the inherent benefits of economies of scale,¹⁴ thus, resulting in less market competition, less employment, and higher prices for consumers.¹⁵ American law endeavors to protect these free market values while simultaneously mitigating the harm to dislocated workers by offering financial assistance such as unemployment compensation and welfare support.

Compared to the US, European national governments as a whole are significantly more protective of their workers, in large part due to historical influences and the development of law and social policies. The Treaty Establishing the European Community¹⁶ (hereinafter “EC”) provided for four basic freedoms as the fundamental principles of EU Law: the free movement of goods, persons, services, and capital. The EU Treaty¹⁷ in effect today includes provisions for social policy and labor law, set forth initially in the 1957 Treaty of Rome¹⁸ and emphasized in the 1998 Treaty of Amsterdam.¹⁹ The member states of the EC²⁰ further demonstrated their support of social and employment policy by establishing the 1989 “Community Charter of the

¹⁴ Economies of scale is an economic effect resulting from enlarged technological capabilities and combined large production operations which cheapen the process of production, making costs per unit fall as output increases.

“Economies of scale provides a powerful impetus toward a growth in firm size . . . which secures a competitive selling advantage.” ROBERT L. HEILBRONER, UNDERSTANDING MACROECONOMICS 40-1 (1986).

¹⁵ “Large firms compete more effectively in world markets. Increased firm size provides scope for superior management, more rapid innovation, higher wage rates, efficiencies of large scale operations, and expansion of output and trade . . .” YALE BROZEN, CONCENTRATION, MERGERS, AND PUBLIC POLICY (1982).

¹⁶ The 1957 Treaty of Rome , or the Treaty Establishing the European Community, was signed by Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, laying the foundation for the European Union (hereinafter “EU”). 298 U.N.T.S. 11.

¹⁷ The European Union Treaty in effect today is the 1998 Treaty of Amsterdam, which incorporates and supersedes the 1957 Treaty of Rome Establishing the EC and the 1992 Maastricht Treaty. 37 I.L.M. 56 (1998).

¹⁸ 298 U.N.T.S. 11.

¹⁹ The 1998 Treaty of Amsterdam amended the Treaty on European Union, the Treaties Establishing the European Community, and Certain Related Acts. One of the main features of the Treaty of Amsterdam is the entirely new EC Title VIII on employment providing that “Member States and the Community shall work towards developing a coordinated strategy for employment.” 37 I.L.M. 56 (1998).

²⁰ The 1992 Treaty on European Union was signed in Maastricht by the following countries: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. 31 I.L.M. 247 (1992).

Fundamental Social Rights of Workers.”²¹ Although the UK did not participate in the formation of this policy, the governments of the European Free Trade Association (hereinafter “EFTA”)²² States joined in with the EC to endorse the principles established for workers in the charter.²³

Because many EC countries’ national governments were previously influenced by socialist ideologies, developing policy in the EC has traditionally been more worker friendly than it has been in the US, where individuals do not have any property right or interest in their jobs and the prevailing attitude is that workers sell their labor as a commodity in the marketplace.²⁴ As the composition of the governments of several European countries changed over the second half of the 20th century and capitalism flourished, social policy in the EC reflected an increased awareness of the individual rights of workers.

Commencing with the monumental 1974 Social Action Program,²⁵ the EC implemented legislation with the intent of protecting workers “against the consequences of an increasingly deregulated labor market while endeavoring to reconcile working life with family life and social responsibility.”²⁶ This legislation was significant because it established the groundwork for

²¹ The Community Charter of the Fundamental Social Rights of Workers, adopted by the EC on December 9, 1989, provides, “The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community.” The EC’s “attachment to social rights as defined in the . . . 1989 EC Social Charter is added to the Preamble and the new EC Social Policy Title (Art. 136)” of the 1998 Treaty of Amsterdam, the European Union: Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community. 37 I.L.M. 56 (1998).

²² The EFTA is comprised of states that are not members of the EC, including Iceland, Norway and Liechtenstein. Together with the EC, the members of EFTA negotiated and enacted the European Economic Area Agreement (hereinafter “EEA”). The EEA provides EFTA states with free access to the single European market in return for the EFTA states’ enactment of specific areas of EC economic law. Carl Baudenbacher, *Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area*, 3 COLUM. J. EUR. L. 169 (1997).

²³ ALAN C. NEAL, *EUROPEAN UNION LABOUR LAW AND SOCIAL POLICY* 15 (1999).

²⁴ Summers, *supra* note 5, at 1063.

²⁵ 1974 O.J. (C 13). The European Council enacted a Resolution for the Social Action Programme on January 21, 1974. From a historical perspective, the impact of the 1974 Social Action Program was enormous. NEAL, *supra* note 23, at 89.

²⁶ NEAL, *supra* note 23, at 513.

future development of social and labor policy by serving as a basis for Directives on these important issues.

The 1974 Social Action Program was a catalyst for three famous EC Council Directives protecting workers rights: collective redundancies;²⁷ transfers of undertakings;²⁸ and insolvency.²⁹ Originally enacted between 1975 and 1980, these Directives were amended with the implementation of the 1998 Social Action Program,³⁰ which demonstrated the continued importance of social policy and labor law in the EC. This commitment to the protection of employees' rights is further evidenced by the EC's enactment of additional laws in more progressive areas in the employment law spectrum. In addition to these Directives, member states, which generally repudiate the common law doctrine of employment at-will, have implemented their own national legislation to further safeguard workers' rights, placing the responsibility of employment on the corporations and greatly reducing the burden of dislocation on dismissed workers.

III. The Acquired Rights Directive

In practical terms, the Acquired Rights Directive applies to transfers of undertakings occurring within the member nations of the European Union³¹ and the EEA³². It is intended to

²⁷ Council Directive 75/129/EEC was subsequently amended and consolidated by Council Directive 92/56/EEC and Council Directive 98/59/EC on the approximation of laws of the Member States relating to collective redundancies. 1998 O.J. (L 225) 16.

²⁸ Council Directive 2001/23/EC on the safeguarding of employees rights in the event of an undertaking, 2001 O.J. (L 82) 16.

²⁹ Council Directive 80/987/EEC was later amended by Council Directive 87/164/EC, 1987 O.J. (L 66).

³⁰ 1999 O.J. (C 93) 56.

³¹ As of September 2001, the EU Member States were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

³² The EEA includes all Member States of both the European Union (*supra* note 31) and the European Free Trade Association (as of September 2001, EFTA Member States were Norway, Iceland, and Liechtenstein). THE SECRETARIAT OF THE EUROPEAN FREE TRADE ASSOCIATION, EFTA, EUROPEAN ECONOMIC AREA, *available at* <http://secretariat.efta.int/euroeco/> (last visited Dec. 18, 2001).

apply to all situations in which there is a legal transfer or merger of a business and the business continues its original activity, whether or not an actual transfer of ownership takes place.³³ The intent of the Acquired Rights Directive is to safeguard the rights of workers “on a transfer of the employing undertaking by ensuring that the workers [are] entitled to continue working for the transferee employer on the same terms and conditions as those agreed with the transferor employer.”³⁴ Under this Directive, when the transferee acquires an undertaking, business, or part of an undertaking or business from a transferor as a result of a legal transfer or merger, the transferee also takes the current employment contracts subject to their existing rights and obligations. Additionally, a transfer alone may not result in terminating an employee unless there is “an economic, technical, or organizational reason entailing changes in the workforce.”³⁵

Two of the most debated issues of the Acquired Rights Directive are the concepts of “transfer” and “undertakings” as well as the question of the Directive’s application to modern employment arrangements. In its passage of Council Directive 98/50/EC, which took effect in July 1998,³⁶ the European Parliament attempted to clarify these terms, expand the scope of the original Directive, and increase the Directive’s flexibility for transfers in the event of bankruptcy. In meeting the Parliamentary objectives, the amended 1998 Directive covered part-time and temporary employees and also applied to employers in the public sector.³⁷

Three years after the enactment of the amended Acquired Rights Directive, the European Parliament repealed both the 1977 and 1988 directives and implemented a new Directive³⁸ in

³³ *Memorandum on Acquired Rights of Workers in Cases of Transfers of Undertakings*, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/seura/eutrans.htm> (last visited Dec. 18, 2001) [hereinafter *Memorandum*].

³⁴ Vivien Shruballs, *Employment Rights and Business Transfers: Changes to the Acquired Rights Directive*, 5 WEB J. CURRENT LEGAL ISSUES (1998), available at <http://webjcli.ncl.ac.uk/1998/issue5/shruballs5.html>.

³⁵ *Id.*

³⁶ Council Directive 98/50/EC, 1998 O.J. (L 201) 88.

³⁷ Broughton, et al., *supra* note 2.

³⁸ Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding

order to further clarify the scope of the Directive and standardize the preceding laws and amendments. In that regard, a primary objective of the new 2001 Directive is to minimize the differences in national laws of member states with respect to protecting employees' rights in the event of a transfer.³⁹ However, it should be noted that the 2001 Directive's "clarification has not altered the scope of Directive 77/187/EEC (the Acquired Rights Directive) as interpreted by the (European) Court of Justice."⁴⁰ Therefore, the precedent case law continues to apply and will provide a foundation for how the new Directive will affect transfers of undertakings in the future.

Although the transfer of undertakings provision has proven to be somewhat controversial⁴¹ the Directive is valued for its overall effectiveness regarding the protection of employees' rights in Europe. The Directive has consistently been praised for being "an invaluable instrument for the protection of workers in the event of the reorganization of an undertaking."⁴²

With the legislative amendments now incorporated in the Acquired Rights Directive, protection of employee rights extends to part-time and temporary employees without regard to "the number of working hours performed" and to "public and private undertakings engaged in economic activities whether or not they are operating for gain."⁴³ While the intent to safeguard the rights of any person considered an employee "under national employment law"⁴⁴ is admirable, this expansive protection could be counterproductive and may lead to greater overall

of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses was effective on April 11, 2001. 2001 O.J. (L 82) 16.

³⁹ "Whereas . . . (4) Differences still remain in the Member States as regard to the extent of the protection of employees (in the event of a change of employer) and these differences should be reduced." Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

⁴⁰ *Id.*

⁴¹ "The (European) Commission published proposals aimed at restricting the scope of the Directive . . . the Commission was forced to admit defeat after the intervention of the European Parliament. Labour has 'no wish to narrow the coverage of the Directive . . .'" DEP'T OF TRADE AND INDUS. PUB. CONS., U.R.N. 98/513 (December 1997).

⁴² *Memorandum, supra* note 33.

⁴³ Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

⁴⁴ *Id.*

unemployment in the long term. This legal guarantee of continued employment for workers whose jobs may otherwise be expendable by a business that needs to reduce costs has a disparate impact on corporations that could benefit from a merger, but for the legislated cost of employing these workers.

IV. Implementation of the Acquired Rights Directive in Member States and Interpretation of the Acquired Rights Directive by the Courts

As a precursor to evaluating the interpretation of the transfer of undertakings rules in the original and amended Acquired Rights Directives, it is necessary to take a step back and discuss the role of Directives in EU law and their implementation in member states.

EC member states are involved in both the formation of new EC regulations and directives and in the implementation of their own national regulations corresponding to these directives.⁴⁵ While EC member countries do not formally enact EC regulations locally, “they must create an environment in which the [regulations] can operate.”⁴⁶ EC directives, on the other hand, often serve as legislative models for the member nations to enact within specific periods of time if their national legislation does not already reflect the directives’ applications.⁴⁷ The objectives of the EC directives are binding on each member state, but each can choose its own method of implementation⁴⁸ and then “inform the Commission immediately of the measures [it

⁴⁵ Art. 94 (ex Art. 100) of the Consolidated Version of the Treaty Establishing the European Union and the Treaty Establishing the European Economic Community provides that the “Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.” 37 I.L.M. 56 (1998).

⁴⁶ Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT’L L.J. 1, 11 (2000).

⁴⁷ Member States are sometimes able to rely on existing legislation so long as that legislation guarantees the full application of the directive. *See, e.g.*, Case 29/84, *Commission v. Germany*, 1985 E.C.R. I-1661, 23, [1986] 3 C.M.L.R. 579 (1985).

⁴⁸ Art. 249 (ex Art. 169) of the Consolidated Version of the Treaty Establishing the European Union and the Treaty Establishing the European Economic Community, 37 I.L.M. 56 (1998).

has taken] to implement the Directive.”⁴⁹ Because member states have significant flexibility in implementing directives, there is a strong likelihood that the resulting national laws supporting the objectives of the EC Directives will differ in response to each member states’ prevailing goals and concerns.⁵⁰ Because member states have rights to independent governance, this divergence from EC law is acceptable at the local level as long as states implement the directives and do not breach EC law. Generally “Member States charged with enforcing Community law may determine their own rules so long as they do not defeat or discriminate against Community rights.”⁵¹ Following its landmark decision in *Francovich v. Italy*,⁵² the European Court of Justice has held member states liable for breaching EC law when they have failed to enact directives, enabling “one private party to commit wrongs against another.”⁵³ While standardization of employment protection laws was a parliamentary objective in enacting the 2001 Directive (on the approximation of the laws of the member states relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses), the impact of the new amendments will only be fully realized as the European courts resolve cases subject to the new Directive.

A European Court of Justice ruling has binding effect with regard to the issue that is decided as well as the interpretation and application of that issue in future cases.⁵⁴ EC law has direct effect because it “grants individual rights that can be asserted before the national courts of the member states” and supremacy because it is binding on those courts.⁵⁵

⁴⁹ Art. 2 of Council Directive 98/50/EC, 1998 O.J. (L 201) 88.

⁵⁰ Broughton, et. al., *supra* note 2.

⁵¹ Case 33/76, *Rewe-Zentral-finanz eG v. Landwirtschaftskammer fur das Saarland*, 1976 E.C.R. 1989, [1977] 1 C.M.L.R. 533 (1976).

⁵² Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1991).

⁵³ Swaine, *supra* note 46.

⁵⁴ Case 69/85, *Wunsche Handelsgesellschaft GmbH & Co. v. Fed. Rep. of Germany*, 1986 E.C.R. 947, at ¶ 13.

⁵⁵ See quotations in P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES AFTER THE COMING INTO FORCE OF THE SINGLE EUROPEAN ACT 333, 349 (1989).

While the EFTA court generally follows European Court of Justice case law, this is not a requirement under the EEA Agreement, which provides that the EFTA Court may diverge from European Court of Justice law without necessarily violating the EEA Agreement.⁵⁶ One area in which the EFTA Court and the European Court of Justice have arrived at different conclusions is the interpretation of transfer of undertakings in the Acquired Rights Directive.⁵⁷ One contributing factor to these differing interpretations of “transfer of undertakings” is that the distinct member states have enacted different local laws in implementing the Acquired Rights Directive.⁵⁸ Another factor is the member states’ reluctance to implement the Directive in an effort to avoid the state liability imposed by the Court in *Francovich*.⁵⁹

The European Court of Justice’s interpretation of the Acquired Rights Directive has been broad, based on the Directive’s intent to prohibit businesses from letting employees go when there is a business transfer of undertakings.⁶⁰ The main issue in understanding the application of the Directive is determining exactly what type of a transaction qualifies as a legal transfer. In *Spijkers v. Abattoir*,⁶¹ the European Court of Justice set forth specific criteria to establish whether the business transaction is a “transfer of undertakings, businesses or parts of businesses.”⁶² The main inquiry is whether the business or economic entity retains its identity as a result of its

⁵⁶ Baudenbacher, *supra* note 22.

⁵⁷ See Case C-382/92, *Commission v. United Kingdom*, 1994 E.C.R. 2435, 1 C.M.L.R. 345 (1995) (invalidating the United Kingdom’s implementation of the Acquired Rights Directive into British law).

⁵⁸ Council Directive 77/187/EEC was amended by Council Directive 98/50/EC in 1998; both were repealed by Council Directive 2001/23/EC, codifying the content and amendments to this Acquired Rights Directive. 2001 O.J. (L 82) 16.

⁵⁹ “*Francovich* is widely celebrated for having made strides toward a European federalism founded on the vindication of individual rights. Increasingly it can be said that for every Community right there is a remedy, but only against Member States.” Swaine, *supra* note 46.

⁶⁰ See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594 [1964] C.M.L.R. 425 (1964).

⁶¹ Council Directive 77/187/EEC was adopted on the basis of ex Art. 100. It is intended to provide for the protection of employees in the event of a change of employer and to ensure their rights are safeguarded. Case 24/85, *Spijkers v. Gebroeders Benedik Abattoir CV*, 1986 E.C.R. 1119, 2 C.M.L.R. 296 (1986).

⁶² *Id.*

operations being continued or resumed by the new employer.⁶³ The Acquired Rights Directive defines identity as an “organized grouping of resources” which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”⁶⁴ If the transferor business’ operations were transferred to the transferee, the business transaction is considered a transfer of undertakings.⁶⁵

In establishing whether a business keeps its identity, it is important to consider all of the facts and circumstances surrounding the transaction. Although no one factor is solely outcome determinative, specific factors to evaluate include: whether the nature of activities engaged in continued or stopped with the transfer; whether the employees were transferred to a new employer; whether customers were transferred; the similarity of the old and new activities; and the length of relevant time periods.⁶⁶

In *Danmark v. Daddy’s Dance Hall*,⁶⁷ the scope of the Directive was expanded with the European Court of Justice’s decision that a transfer of undertakings does not necessitate a change in ownership. In that case, a restaurant’s non-transferable lease expired, reverting to the owner who subsequently leased the facilities to a new tenant who operated Daddy’s Dance Hall. Upon commencing the new lease, Daddy’s Dance Hall re-employed all of the restaurant’s employees, including the plaintiff restaurant manager, to perform their previous jobs. When the manager brought an employment contract claim against Daddy’s Dance Hall, the Court evaluated the plaintiff’s level of protection in light of the transfer of undertakings provisions. The Court found that even though the business transfer involved two successive transactions rather than a direct legal transfer or merger, under the Acquired Rights Directive, the restaurant manager was entitled

⁶³ *Id.*

⁶⁴ Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Case 324/86, *Foreningen af Arbejdsledere i Danmark v. Daddy’s Dance Hall*, 1988 E.C.R. 739, 2 C.M.L.R. 517 (1989).

to employment under the terms and conditions negotiated with the transferor business.⁶⁸

Therefore, if the transferred business retains its identity, the Directive applies even when ownership of the entity does not change and the transfer of the business occurs in two stages, from the original lessee to the owner and from the owner to the new lessee.

In subsequent cases, the European Court of Justice further increased workers' protection under the terms of the Directive, paving the way for provisions that would be included in the amended Directives of 1998 and 2001. One such case was *Stichting v. Bartol*,⁶⁹ which established that a non-profit enterprise can be included under the Directive's umbrella of legal protection for workers, as long as the transfer of either a commercial or non-commercial business is a transfer of a stable economic entity as evaluated in *Rygaard v. Dansk*.⁷⁰ In *Rask v. Iss Kantineservice*,⁷¹ the European Court of Justice further emphasized the importance of safeguarding employees by extending the Directive's provisions to encompass employees who are not part of a company's core business operations but perform supporting activities like operating and managing the company's canteen facility.⁷² In *Raask*, when the responsibility of running the canteen at a company was contracted from the transferor to the transferee and the staff was retained throughout the transfer, the employees successfully argued their entitlement to

⁶⁸ *Id.*

⁶⁹ Case 29/91, *Stichting v. Bartol*, 1992 E.C.R. I-3189, [1992] 3 C.M.L.R. 265 (1992) (providing that a non-commercial enterprise qualifies when employees of a foundation that provided public assistance to drug addicts were transferred to another organization but not hired when the organization lost its public funding.)

⁷⁰ Case C-48/94, *Rygaard v. Dansk Arbejdsgiverforening*, 1995 E.C.R. I-2745 [1995]. In *Rygaard*, the Court applied the *Spijkers* factors and decided the Directive did not apply because in *Rygaard*, the subject of the transfer was a contract for a construction project, and not a stable economic entity. The Court held that even though the transferred contract included the continued employment of several workers, use of the same building materials, and project deadline, "[s]uch a transfer could come within the terms of the directive only if it included the transfer of a body of assets enabling the activities." *Id.* at ¶ 21.

⁷¹ Case C-209/91, *Rask v. Iss Kantineservice*, 1992 E.C.R. I-5755 [1992].

⁷² In *Rask*, the Court refused to distinguish core parts from ancillary parts." Joshua M. Henderson, *The Institutional and Normative Significance of the European Union's Acquired Rights Directive*, 29 GEO. WASH. J. INT'L L. & ECON. 803, 812 (1996).

the wage schedule set under the transferor's employment provisions.⁷³ This addition of protection of employees who perform auxiliary functions is reflected in the new 2001 Directive, which applies to the "transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger" and includes both central or ancillary economic activities as part of the entity's identity.⁷⁴

The European Court of Justice has made it clear that the transfer of undertakings clause in the Acquired Rights Directive applies to transfers of non-profit enterprises, economic entities and ancillary services, yet it is debated whether a transfer can be found for employees working under existing service contracts when the ownership of the business changes. In *Schmidt v. Spar- und Leihkasse*,⁷⁵ the Court held that a sole cleaning woman working at a German bank during a change in the bank's ownership qualified for protection by the Acquired Rights Directive because, even though she performed the same amount of cleaning services at the same location for both her old and new employer, the new employer decreased her pay. On the contrary, in *Suzen v. Zehnacker*, which involved the termination of a cleaning woman's job when her employer lost its school-cleaning contract to a competitor cleaning company, the European Court of Justice decided that the Directive did not apply because there was not an actual transfer.⁷⁶ If there is a change in the service provider only, there is not a transfer of undertaking unless there was a transfer of assets or the new contractor acquired a major part of the old contractor's workforce (in terms of numbers and skills) to perform that service. Therefore, the Directive only applies to employees of a service contract if there is additional support to the activity being transferred. This additional support can be comprised of the tangible or intangible assets or if there are no assets involved; it can include a group of workers performing an activity as the "undertaking." Consequentially, "in certain labour-intensive sectors a group of workers engaged

⁷³ Case C-209/91, *Rask v. Iss Kantineservice*, 1992 E.C.R. I-5755 [1992].

⁷⁴ Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

⁷⁵ Case 392/92, *Schmidt v. Spar-und Leihkasse*, 1994 E.C.R. I-1311 [1994].

in a joint activity on a permanent basis may constitute an economic entity,”⁷⁷ resulting in the application of the Directive if the transfer of the economic entity keeps its identity.

The European Court of Justice supported its ruling in *Suzen* by further expanding the application of the Acquired Rights Directive in several cases that followed. In the joined case of *Hidalgo v. Asociacion de Servicios Aser* and *Ziemann v. Ziemann Sicherheit GmbH*,⁷⁸ the Court held that the Acquired Rights Directive applies when there is secondary outsourcing of contracts, in which one contractor passes the contact on to another contractor, but only if there is a transfer of an economic entity. An economic entity is “an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised.”⁷⁹ The European Court of Justice reaffirmed this position in the joined case of *Hernandez Vidal v. Gomez Perez, Santner v. Hoechst AG*, and *Gomez Montana v. Claro Sol SA*,⁸⁰ where it held that a corporation’s reversion to providing an in-house service also qualifies as a transfer of undertaking if it meets the ‘economic entity’ test.

Under the 2001 Directive, the rights of employees subject to a legal transfer or merger will be protected if “there is a transfer of an economic entity that retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”⁸¹ The determination of whether or not the identity of an economic enterprise continues after the transfer is a matter for national courts to decide, in light of the following specific factors: the “type of undertaking or business; whether or not the tangible assets and intangible assets are transferred; the value of intangible assets at the

⁷⁶ Case C-13/95, *Suzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-1259 [1997].

⁷⁷ *Id.* at ¶ 21.

⁷⁸ Case C-173/96, *Hidalgo v. Asociacion de Servicios Aser* and Case C-247/96, *Ziemann v. Ziemann Sicherheit GmbH*, 1998 E.C.R. I-8237 [1998].

⁷⁹ *Id.* at ¶ 34.

⁸⁰ Case C-127/96, *Hernandez Vidal v. Gomez Perez*; Case C-229/96, *Santner v. Hoechst AG*; and Case C-74/97, *Gomez Montana v. Claro Sol SA*, 1998 E.C.R. I-8179 [1988].

⁸¹ Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

time of transfer; whether or not the majority of employees are taken over by the new employer; whether or not customers are transferred; the degree of similarity between the activities carried on before and after the transfer; and the period in which those activities were suspended.⁸²

The Directive applies to transfers resulting in a change in the responsibility for carrying the business; however, the mere transfer of ownership interests in the company's shares does not amount to a transfer of the undertaking. The Directive also does not apply when the transfer happens in the context of insolvency proceedings.⁸³

As demonstrated above, the European Court of Justice has interpreted the Acquired Rights Directive liberally, stretching it to safeguard employees' jobs as long as there is continued activity. By applying the transfer of undertakings provisions to industries in which contractors or service providers with intangible assets or skilled human resources are the principal capital, the Acquired Rights Directive was stretched to include new business models other than the traditional brick and mortar establishments.⁸⁴

This expanded application of the Acquired Rights Directive can frustrate businesses' objectives because newly owned businesses resulting from a transfer or merger must retain employees with the benefits and wages established by the transferor employer. The retention and potential increase in these compensation and benefits costs can be quite burdensome to employers such as start-up enterprises and developing companies without significant cash flow. These types of entities may ordinarily consider merging with existing, established businesses to combine experience, reputation, and customers, but may be discouraged by compensation costs resulting from the application of the Acquired Rights Directive. This is especially true in industries in

⁸² *Memorandum, supra* note 33.

⁸³ Council Directive 2001/23/EC, 2001 O.J. (L 82) 16, provides that unless the national laws of the Member States specify otherwise, the Directive does not apply to transfers occurring "where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings . . ."

⁸⁴ In *Suzen*, the European Court of Justice held that the transfer of a major part of a workforce in a service contract qualified as a transfer of undertaking. Case C-13/95, *Suzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-1259 [1997].

which highly skilled workers do not really need laws to safeguard their jobs due to the immense competition for their expertise. In these industries, the application of the Acquired Rights Directive decreases the attractiveness of what could be a sound corporate decision to merge with a competitor. Finally, applied in this capacity, the Acquired Rights Directive does not satisfy its social objectives or the drafters' intent, which was to ensure that employees rights and jobs would not be sacrificed at the whims of their employers' and their business decisions.⁸⁵

V. The Acquired Rights Directive in the United Kingdom

Like the US, the UK is a common law country, but its system of job security is vastly different than the American one. A primary distinction is that the UK does not follow the common law at-will employment principles that are the foundation of American employment law.⁸⁶ Other differences include that British employers are statutorily required to (1) give advanced notices of dismissal; (2) consult with employees' representatives in making decisions on collective dismissals; (3) make redundancy or severance payments to dismissed employees; and (4) follow the British law implementing the Acquired Rights Directive.⁸⁷ Although the UK and the US share many values, the UK, in response to its own domestic policy issues and its membership in the EC, has demonstrated a greater commitment to social policy in its employment law.

Since reluctantly becoming a member of the EC more than 15 years after the original treaty establishing the EC was signed in 1957, the UK has shown resistance to complete unification with the EC by not always participating in social policy initiatives. For instance, the

⁸⁵ Council Directive 2001/23/EC, 2001 O.J. (L 82) 16, states that economic trends are bringing "changes in the structures of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers. It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded."

⁸⁶ Summers, *supra* note 5, at 1041.

⁸⁷ *Id.* at 1042.

British government did not join the other European countries in forming the Social Policy Agreement, “leaving the other member states the power to coordinate social and labor policies that would have no legally binding effect on the United Kingdom”⁸⁸ with the exception of those policies directly provided for in the EU Treaty.⁸⁹ In comparison with the Social Policy Agreement, which covers diverse issues such as providing equal pay, social security, and a right to information for workers, the EU Treaty only specifically mandates protection for the health and safety of workers.⁹⁰ Based on the principle of *subsidiarity*,⁹¹ which requires the EU “to respect the multiplicity of economic and social traditions in different member states by according deference to all national legislation,”⁹² the UK successfully held its ground in not adopting the additional social and employment policies other EC countries’ embrace, thus keeping its original commitment to the EC an economic one and consequently causing a widening gulf of social isolationism between itself and its fellow EC member states.

The UK’s implementation of the Acquired Rights Directive, the Transfer of Undertakings Protection of Employment Regulations (hereinafter “TUPE”),⁹³ fosters these increasingly distinct social ideologies. The British government was resistant⁹⁴ to the Directive’s expansive application

⁸⁸ Brian Bercusson, *The Dynamic of European Labour Law After Maastricht*, 23 *INDUS. L.J.* 1, 1-9 (1994).

⁸⁹ Art. 2 of the Social Policy Agreement was appended to the Treaty Establishing the European Union, subjecting the UK to its provisions.

⁹⁰ Art. 137 (ex Art. 118) of the Consolidated Version of the Treaty Establishing the European Union and the Treaty Establishing the European Economic Community, 37 *I.L.M.* 56 (1998).

⁹¹ Essentially similar to federalism, subsidiarity allows EU institutions to act “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states.” Art. 5 (ex Art. 3b) of the Consolidated Version of the Treaty Establishing the European Union and the Treaty Establishing the European Economic Community, 37 *I.L.M.* 56 (1998).

⁹² Council Resolution of 6 December 1994 on Certain Aspects for a European Union Social Policy: A Contribution to Economic and Social Convergence in the Union, 1994 *O.J.* (C368) 6, 9.

⁹³ Transfer of Undertaking (Protection of Employment) Regulations, 1981 (Eng.) [hereinafter “TUPE Regulations”].

⁹⁴ “By 1990, indeed, the [UK] government had come overtly to maintain that the two ideologies were in conflict with each other, and that it was committed to resisting the encroachment of the Community’s policies upon the working of the labour market in the U.K.” PAUL DAVIES & MARK FREEDLAND, *LABOUR LEGISLATION AND PUBLIC POLICY* 576 (1993).

and its effect on business transfers like mergers and acquisitions and the contracting out of employees in the UK.⁹⁵ Despite the British government's reservations about implementing the social policies prevalent in the other member states, the TUPE Regulations arguably provide substantial protection for British workers.⁹⁶ Like the Acquired Rights Directive, the TUPE Regulations require that when an undertaking or business is transferred from one employer to another:

[T]he employment contracts of the employees, along with all the rights, powers, duties and liabilities of the transferor [i.e. the old employer] under or in connection with those contracts [other than certain benefits under occupational pension schemes] pass automatically to the transferee [i.e. the new employer]; employees of the transferor or of the transferee may not be dismissed in connection with the transfer unless the dismissals are for economic, technical or organizational reasons entailing a change in the workforce; and both the old and the new employer must inform employee representatives and consult them about any measures envisaged in relation to any of the employees affected by the transfer. The employees concerned therefore become employees of the transferee, but under the same terms and conditions [except for certain occupational pension rights] as applied to them as employees of the transferor, and are treated as if they had been the transferee's employees all along.⁹⁷

⁹⁵ The EU Directive rationales "seemed to challenge free transfer of capital and freedom of contract [and] in a narrow sense [they] impeded the sale of businesses in difficulty - [which] . . . was an important consideration in the conditions of severe recession prevailing by the early 1980s." *Id.* at 578.

⁹⁶ Although the UK government's policy of deregulation is at odds with the interventionist stance of the EU, TUPE forces the UK to recognize that once a person has worked at a particular job for a period of time, that person has acquired a property right in the job. Leslie Braginsky, *How Changes in Employer Identity Affect Employment Continuity: A Comparison of the United States and the United Kingdom*, 16 COMP. LAB. L. 231, 259 (1995).

⁹⁷ *New Clear Rules Assure Employees' Transfer Rights*, THE UK BANKRUPTCY & INSOLVENCY WEBSITE NEWS, June 4, 1998, available at <http://www.insolvency.co.uk/news/0604dti.htm>.

Critics of the 1981 TUPE regulations characterized them as being restrictive, curbing the full range of protection to which British employees should be entitled, and shortchanging them from the rights guaranteed by the Acquired Rights Directive⁹⁸ to all workers in the EU.⁹⁹ By reading TUPE between the lines, one can see that the regulations (1) only offer protection to those dismissed workers who were “employed immediately before the transfer;”¹⁰⁰ (2) enact no TUPE counterpart for “constructive dismissal”¹⁰¹ of employees in a transfer; and (3) implement an employer-friendly provision for “reasonable dismissal”¹⁰² of employees before or after a transfer.¹⁰³

The criticism that the British government has received for the shortcomings of the TUPE regulations peaked in the 1980s during the UK’s movement toward privatization of industries, a public policy initiative championed by Prime Minister Margaret Thatcher.¹⁰⁴ When the TUPE Regulations were enacted in 1981, “undertaking” was defined as “any trade or business in the nature of a commercial venture.”¹⁰⁵ For a transfer of undertakings to qualify for protection of employees under the TUPE Regulations, it was necessary for it to be a “commercial” business,

⁹⁸ Council Directive 77/187/EEC. 1977 O.J. L 61.

⁹⁹ The European Commission even brought a cause of action against the UK for failure to fully implement the Directive. The European Court of Justice “ruled against the United Kingdom, finding that TUPE failed to adequately transpose the Directive. Consequently, the Court ruled that the U.K. government denied workers their full rights under E.U. law.” See Case 382/92, *Commission v. United Kingdom*, 1994 O.J. (C 233) 1.

¹⁰⁰ TUPE Regulations, *supra* note 93, reg. 5(3).

¹⁰¹ TUPE Regulations, *supra* note 93, reg. 5.

¹⁰² If the employer asserts the employee dismissal meets TUPE Regulation 8(2), the British courts must determine if the dismissal was reasonable given the facts. Employment Protection (Consolidation) Act, 1978, ch. 44, §57(1), (3) (Eng.).

¹⁰³ The employer must show the dismissal resulted from “an economic, technical or organizational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer,” TUPE Regulations, *supra* note 93, reg. 8(2).

¹⁰⁴ Henderson, *supra* note 72, at 816.

¹⁰⁵ *Id.*

controversially exempting transfers during the course of privatization, which was inherently noncommercial in nature.¹⁰⁶

This limited definition of “undertakings” was ultimately deleted from the TUPE regulations¹⁰⁷ just before the European Court of Justice’s decision in an action filed by the EC against the UK,¹⁰⁸ asserting that the “TUPE Regulations’ exclusion of employees in noncommercial undertakings violated the Directive.”¹⁰⁹ In *Commission v. United Kingdom*,¹¹⁰ the European Court of Justice disrupted “the United Kingdom’s privatization initiatives by largely invalidating that country’s implementation of the Directive.”¹¹¹ The European Court of Justice’s decision impacted the British government’s attempt to privatize by proscribing “private parties from cutting labor costs by reducing wages or terminating employees.”¹¹²

In its interpretation of the TUPE Regulations, the European Court of Justice stated that even though the UK does not strongly embrace the concept of a centralized European government in regard to its implementation of social policies, it must safeguard employee rights in both the private and public sectors.¹¹³

As a result of the European Court of Justice’s holdings expanding the provisions in the Acquired Rights Directive and contributing to conflict among member states over social policy,¹¹⁴ it became apparent that the EC needed to enact an amended directive. The British government held the Presidency of the EU in the first half of 1998, during which time Prime Minister Tony Blair generated public support and championed the UK’s selected amendments to the Acquired

¹⁰⁶ *Id.* at 814 (1996).

¹⁰⁷ Trade Union Reform and Employment Rights Act, 1993, ch. 19 § 33 (Eng.).

¹⁰⁸ Case 29/91, *Stichting v. Bartol*, 1992 E.C.R. I-3189, [1992] 3 C.M.L.R. 265 (1992).

¹⁰⁹ Henderson, *supra* note 72, at 820.

¹¹⁰ Case 382/92, *Commission v. United Kingdom*, 1994 O.J. (C 233) 1.

¹¹¹ *Id.*

¹¹² Henderson, *supra* note 72, at 828.

¹¹³ *Id.* at 827.

¹¹⁴ *Id.*

Rights Directive, which the EC revised in following years.¹¹⁵ Because EU legislative proposals require unanimous member consent to become law, the UK made the passage of the amended Acquired Rights Directive a priority, negotiating for its enactment with all of the other EU member states.

The amended Acquired Rights Directive, as implemented in 1998, reflects the series of judgments by the courts interpreting the original 1977 Directive. The amendments are practical and specify which transfers qualify under the Directive. The amendments do not narrow the Directive's scope or lessen the level of protection that employees received under the original Directive. The intent of the amended Directive is to safeguard workers' rights in a transfer while not restricting or impeding economic progress of the business.¹¹⁶ Specific amendments to the 1998 Directive include: the Directive's clear application to subcontracting operations and transfers from the public sector to the private sector; the member states' application of the Directive to pension rights; and the Directive's requirements for consultation and the grant of a negotiation period for employee representatives to salvage jobs upon the transfer of an insolvent business.¹¹⁷

Three years after the amended 1998 Acquired Rights Directive went into effect in the EC, the EU enacted the 2001 Council Directive, which supersedes, but does not alter the content of, both the 1998 and 1977 Acquired Rights Directives.¹¹⁸ While the EU member states were in the process of enacting national transfer of undertakings provisions under the 1998 Directive into local law, the 2001 Directive expedited the process, as the objective of the Directive is to codify

¹¹⁵ Shrubsall, *supra* note 34.

¹¹⁶ "Promoting this co-operative partnership approach to business restructuring will help competitiveness and employment flexibility, by helping the labor market to adapt to structural change in the economy without walking over the rights of employees." Quote from Mr. McCartney, DTI Minister of State, following the Council of Ministers meeting in Luxembourg on June 4, 1998.

¹¹⁷ Council Directive 98/50/EC, 1998 O.J. (L 201) 88.

¹¹⁸ "The codification concerns a number of formal aspects of the texts only, with no implications for their content, which remains unchanged." Section 2.5, 2000 O.J. (C 367) 21.

and incorporate all previously existing legislation.¹¹⁹ Since the 2001 Acquired Rights Directive came into force on April 11, 2001, the UK has not passed new TUPE Regulations. While the primary objective of the 2001 Directive is to reduce differences among member states, in references to the extent of protection each country offers employees, the UK will adopt revised transfer of undertaking provisions to comply with the rights guaranteed to workers under the 2001 Directive.¹²⁰ The Directive also provides that the member states can introduce laws that are more favorable to employees.¹²¹

It is anticipated that when the UK enacts new provisions to implement the 2001 Acquired Rights Directive, the revised TUPE Regulations will incorporate some of the European Court of Justice's decisions while striving to "make as clear as possible whether TUPE applies in all contracting out situations, including primary and secondary outsourcings, or bringing a service back in-house."¹²² It is generally thought that new TUPE regulations will set forth "for the first time an explicit statement that [the TUPE provisions] appl[y] to contracting out."¹²³ It is also believed that the new TUPE regulations will contain a new article that imposes an obligation on the transferor employer to notify the incoming transferee employer of "all the rights and

¹¹⁹ "The purpose of [the Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses] is to undertake official codification. The new directive will superseded the various directives incorporated in it . . . their content is fully preserved, and they are brought together with only such formal amendments as are required by the codification exercise itself." Sections 1.3-1.4, 2000 O.J. (C 367) 21.

¹²⁰ "Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive." Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

¹²¹ "The Commission shall submit to the Council an analysis of the effect of the provisions of this Directive before 17 July 2006." Council Directive 2001/23/EC, 2001 O.J. (L 82) 16.

¹²² Gill Andrews and Gaela Bailey, *TUPE and Outsourcing: A Legal Perspective*, NETWORK OUTSOURCING ASSOCIATION NEWS, available at <http://www.noa.co.uk/> (last visited Dec. 19, 2001).

¹²³ Quote from Mr. McCartney, DTI Minister of State, following the Council of Ministers meeting in Luxembourg on June 4, 1998.

obligations that will be transferred. . . . so far as those rights and obligations are known or ought to have been known to the transferor at the time of the transfer.”¹²⁴

Thus, after following the guidance of the EC, incorporating principles found in the courts, and seeking significant consultation from the public, it is anticipated that the UK will enact revised TUPE Regulations demonstrating a commitment to employees, while maintaining corporations’ abilities to operate their businesses as freely as possible without government intervention. This is a nice compromise between the social policies of the EU and the free market principles of the UK because it protects corporations’ interests in having the market influence employment decisions during the course of a transfer of undertakings while not leaving employees without any protections during this process.

VI. The Acquired Rights Directive in Germany

A fundamental distinction between employment law in the UK, the US, and Germany is that, unlike the UK and the US, Germany is a civil law country. Another difference between employment law in the US and Germany is that at-will employment is not as prevalent in Germany as it is in the US. Instead, Germany shares the social issues, political history, and growing role of the EC’s central government, which have contributed to increased protection for workers in the EC.

Like the UK’s TUPE Regulations, Germany’s codification of the Acquired Rights Directive provides that in a transfer of undertakings, the new business owner assumes all rights and duties of the employment contract as they existed before the transfer occurred.¹²⁵ The content of the German transfer of undertakings law is more similar to the Acquired Rights

¹²⁴ *Id.*

¹²⁵ German Civil Code [hereinafter BGB] § 613a provides that “the transfer of a business or part of a business to another owner has the consequence of making all employment relationships belonging to that business or part of the business automatically transfer as well.”

Directive than the TUPE Regulations, and the German courts have interpreted the law in a similar manner as the Acquired Rights Directive has been interpreted.

The definition of “business or part of a business” has been significantly debated in the German Federal Labor Court, which prior to the *Suzen* case, only qualified a transfer as a business transfer if tangible or intangible assets belonging to that business were transferred to another owner. The German Federal Labor Court did not consider the significance of hired or transferred employees as a contributing factor to the transaction and instead, viewed employees as incidental.¹²⁶ However, the German courts ultimately adopted the European Court of Justice’s interpretation of a business unit as an “organization of persons and assets in order to conduct a business activity with its own purpose.”¹²⁷ The European Court of Justice further articulated that the identity of a business includes not only its operations but also its personnel, employees, customers, business methods and assets, giving particular emphasis to the “importance of work force for the definition of business unit in the Acquired Rights Directive.”¹²⁸ The German Federal Labour Court followed the European Court of Justice’s decisive ruling by providing that if the employee’s human factor is pertinent to consumers, “a transfer of undertaking can be assumed if the purchaser hires a greater part of skilled employees than have carried out the business in the past.”¹²⁹

Of all the member nations in the EU, Germany is arguably the most protective of employees’ rights to keep their jobs in the event of a transfer of undertakings, while the UK is the least protective of these rights. The US, on the other hand, is the most employer friendly of the three countries. Despite these outward differences, each system has a framework of general

¹²⁶ Markus Kopenhagen, *Transfer of Undertaking Rules*, GLOBAL LABOUR, EMPLOYMENT AND EMPLOYEE BENEFITS BULLETIN, available at <http://www.bakerinfo.com>.

¹²⁷ Case C-13/95, *Suzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-1259 [1997].

¹²⁸ Kopenhagen, *supra* note 126.

¹²⁹ *Id.*

employment law principles that enables employers to unilaterally dismiss their employees without compensation.¹³⁰

An employer in the US can dismiss an employee for practically any reason. While a British company must follow TUPE and other national employment laws, there are exceptions for personal¹³¹ and economic¹³² reasons, which provide for a standard of reasonableness in justifying the termination. Germany places the greatest emphasis on the legal protection of job security but retains an at-will aspect to its laws that provides that workers have a right to continued employment.

This at-will provision is represented in German employment law through a provision that requires social justification for the individual and collective dismissals of employees.¹³³ The burden is on the employer to demonstrate social justification with any disputes being resolved by the German Federal Labor Court,¹³⁴ which generally does not “second-guess the employer’s economic decision as long as it appears to be made in good faith.”¹³⁵ However, in dismissing an employee for economic reasons, German corporation must consider social aspects, including the employee’s “age, length of employment, marital status, family responsibilities, and ability to find other work,” to determine which employee will be least affected by termination.¹³⁶ In Germany,

¹³⁰ Hepple, *supra* note 4.

¹³¹ The Employment Protection (Consolidation) Act of 1978 provides that a dismissed individual can appeal to an industrial tribunal on the grounds of procedural or substantive unfairness. The tribunal decides whether the employer reasonably believed that the dismissed employee engaged in misconduct and whether the termination action was reasonable. Summers, *supra* note 5, at 1041.

¹³² The Act also provides for dismissal in the case of commercial necessity. *Id.*

¹³³ Hepple, *supra* note 4.

¹³⁴ Germany has several Federal Supreme Courts organized by subject matter jurisdiction including a separate court in each of the following areas: administrative, financial, labor, social legislation, constitutional, and patent law. Class notes from Professor Basil Markesinis’ International Tort Law course.

¹³⁵ Hepple, *supra* note 4.

¹³⁶ GERHARD BOSCH, MANAGING WORKFORCE REDUCTION: AN INTERNATIONAL SURVEY, 164, 171 (1985).

if a dismissal is socially unjustified, it is legally invalid.¹³⁷ Thus, the employee can only be terminated if his employer demonstrates social justification, a condition analogous to the American collective agreements system in which employers have the burden to show “just cause.”¹³⁸ Besides the necessity for social justification, an additional limitation on employers is that they cannot terminate an employee if it would be possible for the employee to work in another part of the business, even if this means that the employer would have to train or school the employee for the new position.¹³⁹

It is evident that although Germany has stringent laws protecting its employees, there are several backdoors for corporations to justify the termination of employees in a transfer. These policies would not exist but for the fact that they are necessary in practice. While German law provides that collective dismissals for economic reasons must be socially justified, practically speaking, all the employer must do is prove the weak condition of his financial situation and the reason he must reduce the workforce.¹⁴⁰ These aspects of Germany’s employment law are also applicable when there is a transfer of undertakings.

VII. Conclusion

In consideration of the 2001 Acquired Rights Directive, the UK, Germany and other members of the EC must enact or amend their own legislation implementing the Directive in the upcoming years. Each nation’s laws will undoubtedly reflect their own social policies on employment law while including the expansion of rights provided by the European Court of

¹³⁷ Protection Against Dismissal Act (Kündigungsschutzgesetz) § 1 (F.R.G.). See generally EUGEN STAHLHACKE, KUNDIGUNG UND KUNDIGUNGSSCHUTZ IM ARBEITS VERHALTNIS (1982).

¹³⁸ Rolf Birk, *Protection Against Unfair Dismissal in West Germany: Historical Evolution and Legal Regulation*, LABOUR MARKET BEHAVIOR 247, 250 (1993).

¹³⁹ Summers, *supra* note 5, at 1045.

¹⁴⁰ “In practice, however, this does not significantly limit the employer’s freedom to restructure the enterprise, relocate or close plants, or reduce the number of employees for the labor courts will not second-guess the employer’s economic decision as long as it appears to be made in good faith.” *Id.*

Justice and the Parliament in recent years. These laws will have far-reaching implications not just for European corporations but also for foreign companies with business operations or employees in Europe.

As there is increased market competition for products and services on a global level, there is more pressure and incentive to reduce costs and increase profits. Traditionally, on a macro-economic level, labor costs have been considered variable, directly correlating to production levels and the amount of output. As businesses move further away from manufacturing and production industries to service industries, the cost of labor has a progressively larger impact on corporations. This is true for any company specializing in a service-related sector such as building, engineering, consulting, banking, information technology, or law.¹⁴¹

In a free market economy, corporations in the process of conducting a merger or acquisition may control the cost of employment in accordance with the demand for their products or services. In Europe, with the enactment of the Acquired Rights Directive, businesses could initially have maintained this freedom by circumventing the application of the Acquired Rights Directive by not transferring any assets with the transfer of employees. Now, even if no assets are transferred,¹⁴² transferring a large group of consultants,¹⁴³ for instance, triggers the application of the Directive. While the Acquired Rights Directive serves its purpose of safeguarding the rights of workers in the event of such a transfer, it can be a burden on the employer who acquires the employees' contracts, obligations, and seniority with his business

¹⁴¹ Andrews & Bailey, *supra* note 122.

¹⁴² In *Schmidt*, the European Court of Justice held that the transfer of a contract for services was capable of qualifying as a transfer of an undertaking under the Acquired Rights Directive, even if there were no assets transferred. Case 392/92, *Schmidt v. Spar-und Leihkasse*, 1994 E.C.R. I-1311 [1994].

¹⁴³ In *Suzen*, the European Court of Justice's decision provided that there has to be a transfer of significant tangible or intangible assets or the transfer of a major part of the workforce in terms of numbers and skills for the Acquired Rights Directive to apply. Case C-13/95, *Suzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-1259 [1997].

acquisition. While this policy effectively guarantees that people with jobs will not be discharged in a business transfer or reorganization, it greatly reduces the freedom of the transferor and transferee employers to make economic business decisions. It also potentially opens the floodgates for claims from truly incidental employees who were reasonably discharged during the transfer.

The problem with the expansion and interpretation of the Acquired Rights Directive lies not with its altruistic goal of protecting employees who have jobs, but with its application, which often hinders its intent. Because the Directive is now applied so broadly in so many diverse circumstances, all types of companies and business arrangements have an increased potential of being adversely affected by its policies. Instead of expanding the notion of transfers of undertakings and broadly applying the Acquired Rights Directive to all private and public sector industries, the courts and Parliament should consider limiting the application of the Directive to industries that receive government subsidies, federal funding, or other government protection. Less government regulation of employment law could grant more freedom to private industries to make business decisions with regard to the transfer of undertakings.

Corporate mergers can be beneficial to society because companies that merge generally expect their businesses to grow and generate profits. Although it is arguable that mergers may initially reduce the number of employees (in the absence of transfer of undertakings laws), merged entities do have potential to create new jobs. Because of the Acquired Rights Directive, unemployed Europeans, who may be highly skilled workers, could be overlooked for any new positions created as a result of a merger. Therefore, although the Acquired Rights Directive protects jobs of workers in the event of a transfer, it does little to foster employment opportunities for the unemployed.

From a business perspective, the application of the Acquired Rights Directive to mergers and acquisitions means that corporations contemplating a transfer of undertakings must realize that labor is a fixed factor. "All measures restricting the supply of labor burden the capitalists as

far as they increase the marginal productivity of labor and reduce the marginal productivity of the material factors of production.”¹⁴⁴ By providing for continued employment after a merger or acquisition, companies who would have achieved greater efficiencies and cost savings are now passing these costs along to the consumers of their products and services.

While the governments of European member states are dedicated to protecting their workers, it is evident that the Acquired Rights Directive imposes limitations on corporations in these countries. England’s initial hesitancy to support the development of social employment policy in Europe, coupled with its 1980s privatization efforts contribute to its laissez-faire attitude towards implementing the TUPE Regulations and show its concern with the Acquired Rights Directive. Similarly, Germany’s rarely questioned exceptions to its laws on dismissing employees provide additional support for the proposition that strictly adhering to employee protection policies is not beneficial to member states’ corporations and economies.

Going forward, to foster employment opportunities for the currently unemployed and to support competition and growth in Europe, the courts and Parliament should consider the long-term results of future implementation and interpretation of the Acquired Rights Directive. While it may provide short-term guarantees to current workers, and the European governments undoubtedly want to protect and champion their rights, it is a shaky foundation for employment and economic growth in the long run.

¹⁴⁴ VON MISES, *supra* note 13, at