THE PRINCIPLE ON EMPLOYEE PROTECTION IN A MERGER AND A TRANSFER OF AN UNDERTAKING

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RESEARCH MATERIAL

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Act on the Accession of Sweden into the European Union 1994:1500; Publication of legal instruments on the Accession of Sweden into the European Union

Act on the coming into force of the European Social Charter (Revised) provisions 14.6.2002/78


European Social Charter (Revised) 3.5.1996

OJ C241 29.8.1994 and OJ L1 1.1.1995 on the Accession of Finland and Sweden


Publication of legal instruments on the Accession of Sweden into the European Union 1994:1501

Social Modernisation Act 17.1.2002

2 PREPARATORY WORKS

COM (72) 887 final 18th July 1972 OJ C131/49 The Commission’s first Proposal for a Fifth Council directive to coordinate the safeguards which, for the protection of the interests of members and others, are required By Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty

COM (90) 629 final – SYN 3 OJ 11.1.1991 Second Amendment to the proposal for a Fifth Council Directive based on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs

COM (94) 300 final Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employee rights in the event of transfers of undertaking, businesses or part of businesses


Proposal for a Fifth Directive founded on Article 54 (3)(g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs

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Opinion of Advocate General Tizzano in Case C-55/02 Commission v. Portugal pp. 195-196

3.1.2. Judgments

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Case 14/83 Sabine von Colson and Elisabeth Kamann v. Land Nordrhein – Westfalen page 275


Case 41/83 Italian Republic v. Commission of the European Communities page 163

Case 135/83 H.B.M. Abels v. The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie pp. 14, 164, 167, 171, 172 and 176

Case 186/83 Arie Botzen and Others v. Rotterdamsche Droogdok Maatschappij BV pp. 152 and 164

Case 215/83 Commission of the European Communities v. Kingdom of Belgium pp. 14, 113 and 194


Case 105/84 Foreningen af Arbejdsledere i Danmark v. A/S Danmols Inventar, in liquidation pp. 14, 145, 146, 164, 177 and 180

Case 237/84 Commission of the European Communities v. Kingdom of Belgium page 186

Case 24/85 Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV pp. 151, 157, 158 and 345

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6 ABBREVIATIONS

ABT Act on Business Tax 29.12.1995/1733 with later amendments

AC Act on Commerce 1736:0123 with later amendments

ACC Amalgamated Construction Co. Ltd

ACS Act on Cooperative Societies 28.12.2001/1488 with later amendments

Act on CA 2005´s Enforcement

Act 2005:552 on the Companies Act´s enforcement


Act on Co-operation in Finnish and Community – scale groups of Undertakings

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Act on Co-operation on Occupational Health and Safety at Workplaces

Act on Co-operation on Occupational Health and Safety at Workplaces 20.1.2006/44

Act on Financial Inspection

Act on Financial Inspection 27.6.2003/587 with later amendments

AU  Act on Unemployment Protection 30.12.2002/1290 with later amendments

AYA  Act on Yearly Accounting 1995:1554 with later amendments

board  board of directors

CA  Companies Act 1975:1385 with later amendments


CA 2005  Companies Act 2005:551 with later amendments


CA 2006 BR  Companies Act (c. 46) which received Royal Assnet 8.11.2006


Commission  Commission of the European Communities

Commission´s first phase consultation

Anticipating and managing change: a dynamic approach to the social aspects of corporate restructuring. First phase of consultation of the Community cross-industry and sectoral social partners

Committee  Committee of Permanent Representatives

Committee Proposal 2003

Committee Proposal 2003 12.6.2006 on the Revision of the Act on Co-operation within Undertakings

Community  European Community

Companies Regulations 2007

Companies (Cross-Border Mergers) Regulations 2007
Communication from the Commission to the Council and The European Parliament Modernising Company law and Enhancing Corporate Governance in the European Union – a Plan to move Forward

Council


European Committee of Social Rights
Comité Européen des Droits Sociaux December 2006


Directive on employee protection in employer insolvency


Directive on fixed-duration and temporary employment relationships


Directive 94/45/EC or Directive on Works Councils

Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

Directive on takeover bids


Directive on Transfers of Undertakings or Directive 2001/23/EC


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Directive 68/151/EEC or the First directive

First Council Directive (EEC) 68/151 of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community

Directive supplementing the Statute for SCE with regards to employee involvement


Directive supplementing the Statute for SE with regards to employee involvement


Directive 2005/56/EC on cross-border mergers


Directive 2007/63/EC


Directive 2008/104/EC


Ds 2006:22

Ds 2006:22 19.2.2007 Gränsöverskridande fusioner

EC

European Community

ECA 1970

ECA 2001  

ECJ  
European Court of Justice

EC Merger Regulation  
Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

Council Regulation No 4064/89 on the control of concentrations between undertakings (OJ 1989 L395/1); corrigendum (OJ 1990 L257/1); amended (OJ 1994 C241/57), Dec 95/1 (OJ 1995 L1/1)

Council Regulation 1310/97 on the control of concentrations (OJ 1997 L180/1)

Economic and Social Committee  
Economic and Social Committee of the European Communities

EEA  
European Economic Area

EEC  
European Economic Community

EFA  

EFTA  
European Free Trade Association

EMU  
European Monetary Union

ERA  

ERA 1996  
Employment Rights Act 1996

“Eri tapoja kohdata”  

EU  
European Union

EU Charter  
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>I&amp;C Regulations</td>
<td>The Information and Consultation of Employees Regulations 2004 Statutory Instrument 2004 No. 3426</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>Industrial Relations 2004</td>
<td>European Commission: Industrial Relations in Europe 2004 European Communities European Commission Employment &amp; Social Affairs Belgium 2004</td>
</tr>
<tr>
<td>KKO</td>
<td>Finnish Supreme Court</td>
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<td>Lagrådsremiss</td>
<td>Lagrådsremiss Gränssöverskridande fusioner 27.9.2007</td>
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<tr>
<td>M&amp;A</td>
<td>Mergers &amp; Acquisitions</td>
</tr>
<tr>
<td>Occupational Safety and Health in Finland</td>
<td>Ministry of Social Affairs and Health Brochures of the Ministry of Social Affairs and Health 2006:16eng Occupational Safety and Health in Finland Ministry of Social Affairs and Health Helsinki, Finland 2007</td>
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<tr>
<td>OECD</td>
<td>The Organization of Economic Cooperation and Development</td>
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<td>OJ</td>
<td>Official Journal of the European Communities</td>
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<td>OJ C 321 E/11</td>
<td>Treaty of Rome</td>
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<td>OMC</td>
<td>Open Method of Coordination</td>
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<td>Parliament</td>
<td>European Parliament</td>
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<td>Programme</td>
<td>The Company Law Harmonisation Programme</td>
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Proposal for the 5th directive  Amended Proposal for a Fifth Directive founded on Article 54 (3) (g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations or their organs Official Journal of the European Communities No C 240/2

PTK  Swedish central organisation for 28 employee organisations representing managerial employees with 700 000 members in the private sector

Member organisations are Sif, Tjänstemannaförbundet HTF, (CF) Sveriges Civilingenjörersförbund, Ledarna, Jusek, Civilekonomerna, Journalistförbundet, Lärärförbundet, Teaterförbundet, Vårdförbundet, Naturvetareförbundet, Akademikerförbundet SSR, Farmaciförbundet, Sveriges Farmaceutförbund, DIK-Förbundet, Sveriges Arkitekter, Agrifack, Lärarnas Riksförbund, (SFBF) Sveriges Fartygsbefälfsförening, (SFHL)

Redundancy consultation and notification – Guidance

BERR Department for Business Enterprises & Regulatory Reform
Redundancy consultation and notification – Guidance URN No: 06/1965

Redundancy entitlement guide for employees

BERR Department for Business Enterprises & Regulatory Reform
Redundancy entitlement statutory rights: a guide for employees URN No: 08/640

Regulation on SCE or Regulation 1435/2003


Regulation on SE or Regulation 2157/2001


Report of the High Level Group


SAK  Finnish Confederation of Salaried Employees Suomen Ammattiliittojen Keskusjärjestö SAK ry

The 11th directive on publicity requirements on branch companies

concerning disclosure requirements in respect of branches opened in a
Member State by certain types of company governed by the law of
another State

The 3rd directive or
Directive 78/855/EEC
Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty,
concerning mergers of public limited liability companies

The 12th directive on one member companies

1989 on single-member private limited-liability companies

The Second Directive or the Second Directive on regulation of the formation of public limited
liability companies and the protection of their share capital

coordinating of safeguards which, for the protection of the interests of
members and others are required by Member States of companies within
the meaning of the second paragraph of Article 58 of the Treaty, in
respect of the formation of public limited liability companies and the
maintenance and alteration of their capital, with a view to making such
23 November 1992

The sixth directive
of public limited liability companies

Treaty
Treaty of Rome 25.3.1957 A:25.3.1957
Treaty of Maastricht 7.2.1992
Treaty of Amsterdam 2.10.1997
Treaty of Nice 26.2.2001

TT
Finnish Labour Court

(TULR(C)A 1992)

TUPE 1981 Transfer of Undertakings (Protection of Employment) Regulations
1981 (SI 1981 No. 1794)
TUPE 2006  Transfer of Undertakings (Protection of Employment) Regulations 2006


Työmarkkinailmastotutkimus 2007  SAK, STTK, AKAVA: Työmarkkkinapolitiitten mielipideilmasto Kevät 2007


Työvoiman vuokraus Suomessa 2005  Työvoiman vuokraus ja yksityinen työnvälitys Suomessa vuonna 2005 Työministeriö 2006

Union  European Union

URN 05/926  DTI, TUPE: Draft Revised Regulations: Public Consultation Document, URN 05/926, March 2005


World Commission  The World Commission on the Social Dimension of Globalization: A fair globalization: Creating Opportunities for all, 2004

WTO  World Trade Organisation
I GENERAL PART – RESEARCH FRAMEWORK

I RESEARCH´S SCOPE AND BASIS AND THE MAIN RESEARCH TASKS

Company restructuring is targeted to a change of a structure\(^1\) or a change in the business activities\(^2\) of a corporation or corporations in question. The main target of this research is to evaluate the principle on employee protection and employee status in company restructuring at the national level, especially in a national level merger and a transfer of an undertaking. The directives governing them are the oldest EU-level provisions on restructuring.\(^3\) These transactions are forms of economies of scale and scope,\(^4\) important in the EU´s context in furthering its economic goals. The consequences of a restructuring have impacts on the company, individual employee and social level. The effects have to do with the share of responsibilities, which also impacts the costs between the parties.

In the context of this research, the principle governing employee protection has to do with protection of employee economic rights, especially protection against dismissals and changes in employment terms and conditions. Company restructuring generally leads to workforce reductions.\(^5\) Employee protection in company restructuring covers also proactive measures targeted to increase employees´ employability, reducing the threat of workforce reductions, and measures alleviating workforce reduction consequences, which are reactive in character. The measures are managed by employers, public power or by the both of them.

Proactive measures are targeted towards increasing employee employability by training or education – without there necessarily being an actual threat of workforce reductions at hand. An example is the Finnish model on personnel plans and training and education objectives.\(^6\)

The reactive measures used to alleviate the consequences of workforce reductions may be divided into different categories, depending on their character. One category covers measures in activating

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\(^1\) Palm page 41.
\(^2\) Mähönen – Säiläkivi – Villa page 479.
\(^4\) Lehto page 15.
\(^5\) Lehto pp. 6, 31 and 46-47.
and furthering re-employment. As a model of this group can be mentioned the Finnish action plans and principles on promoting employment,\(^7\) emphasising the co-operation of public authorities and employers. As another model can be mentioned the Swedish employers-financed model on action plans.\(^8\) To this category belong also the social plans common in the Central and Southern European countries, requiring generally employers´ active role.\(^9\) Still one category of measures used in alleviating workforce reductions’ consequences covers monetary benefits paid by an employer in the case of a loss of a job or employment affected by an employer.\(^10\)

The measures in alleviating the consequences of workforce reductions generally cover also unemployment benefits systems.\(^11\) This research does not, however, cover unemployment benefits due to their character as social policy measures.

The different models used in furthering employee employability and alleviating the consequences of workforce reductions are presented and evaluated. Further evaluation is done with regards to the models used in Finland, Sweden and the United Kingdom, completed in proposals on the EU-level framework.

Employees´ status in restructuring has to do with employees´ role in company restructuring procedures. Employees´ status in restructuring is based on the use of employer´s management right.\(^12\) As regards employees´ status in restructuring the research focuses on the relationship between the use of employer´s management right and the principle on employees´ protection in company restructuring, the use of employer´s management right affecting the practical implementation of the employees´ protection principle.

Employees´ roles in restructuring may vary, even considerably. Employees can be active participators in the procedures, decision-making included. Matters affecting their status may be taken into account in all the different stages of the procedures, employees themselves being active participators in transactions´ practical carrying out. According to another model employees may be consulted during the procedure on matters affecting them. According to still another model

\(^7\) ACU 2007 § 8:49 and ECA 2001 § 7:12.  
\(^8\) Bruun 2005 pp. 196-197.  
\(^10\) Redundancy entitlement guide for employees pp. 1-2.  
\(^11\) Bruun 2005 page 194.  
\(^12\) As regards Finland see Valkonen 2006 page 804, Tiitinen – Kröger 2003 page 412, Rautiainen – Äimälä page 260, Sweden see Iseskog page 138 and AD 1997 number 121 and the United Kingdom see Collins – Ewing – McColgan pp. 1069-1070.
employees may be unilaterally informed on matters affecting them. In this research’s context employee influence is a part of employee protection in restructuring.

Corporate governance has to do with managing and directing corporations. The concept refers to the use of authority in company matters. Corporate governance has to do with the corporations’ ownership and control, referring to companies’ management structures. Corporate governance covers also company objectives, rights, responsibilities and value distribution arising out of company activities. Corporate governance is linked with company growth, also in the form of economics of scale. It has to do with company’s strategic choices, financing and culture linked with values and behavioural norms. It covers social dialogue within the company, including employee involvement and the employees’ role in decision-making.

Due to corporate governance perspective the research is also a part of discussion on company stakeholders. In law and business economics there is not unanimity on company stakeholders’ circle. Traditionally shareholders are claimed to be the primary stakeholders, due to a risk-bearing affected by investments. There are also wider stakeholder definitions. Into addition to shareholders stakeholders cover management, employees, customers, creditors, suppliers and media. The widest definition covers also environment and social community, among the others governments, communities, educational institutions and different organisations, political and non-governmental organisations included.

In this research the concept of company stakeholders covers into addition to shareholders also employees due to their investments of time, work and skills. It covers also the society at large, due to educational, infrastructure and social inputs, forming often invisible but essential basics of business. Central in the present research are the relationships between company and employees and employees and shareholders. There are differences in different stakeholders’ negotiating power,

13 Timonen page 74.
14 Liukkunen page 115 on narrow and wide stakeholder-concepts, the narrow one referring to the relationship between the management and shareholders.
15 On the different definitions of corporate governance see Timonen pp. 3-5, 17 and 132; On the definition of economics on corporate governance, referring solely to investors’ return on the investment, see Tirole page 16; The first draft for the 5th directive on the structure of public limited companies and the powers and obligations of their organs OM (72) 887 final, 18th July 1972; Amended drafts OJ 9.9.1983 and OJ 11.1.1991; Gugler - Mueller - Yurtoglu page 26; Clarke – dela Rama pp. xviii-xix.
16 Fliaster – Marr pp. 243 and 251.
17 Barnard – Deakin pp. 122-123.
18 Dine pp. 223-225 and 227-228; Timonen pp. 36-40; Hopt page 452; Weston – Siu – Johnson page 108; Tirole pp. 56-62; Liukkunen page 115; Immonen - Nuolimaa page 124.
leading to tensions between them, to be internally at the corporate level reconciled by corporate governance structure.  

The research is based on the European Union’s law, the EU-law. In company and labour law the used concepts differ. According to the EU-law a transfer of an undertaking is not a company law concept. Also in the labour law there are national level differences in the used concepts. In the Finnish labour law a merger is a general succession, not a transfer of an undertaking. In Sweden and the United Kingdom a merger is a transfer of an undertaking.

The research is two-fold what comes to its material. Traditionally company law has primarily had to do with company matters in economic and structural sense, the term “company” in this context referring to legal entities with limited liability and juristic personality. In the research the terms company and corporation are used as parallels. Due to company law’s economic character its focus is on shareholder – management – relationship. Employees are not traditionally covered by company law, even less by the company restructuring law, although company and labour law are in company restructuring at least intertwined, if not even overlapping. Labour law has traditionally had a social dimension in the form of principle on protecting employees. Labour law is closely connected with national labour market systems, economic conditions and political trends.

In the EU-company law the research is based on the 3rd directive on mergers. Also the draft 5th directive on company structure is evaluated. In the area of EU-labour law the research is based on the directives on Transfers of Undertakings, Collective Redundancies and Informing and consulting employees. Into addition to substantive provisions in the directives on Transfers of Undertakings and Collective Redundancies, they and the directive on Informing and consulting employees.

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19 Visentini page 228; See Timonen pp. 41-43 on different interests between shareholders and management and majority and minority shareholders and creditors.
20 Directive on Transfers of Undertakings 2001/23/EC Title and Chapter I Article 1 1. (a).
23 Villiers 1998 page 188.
24 Villiers 1998 page 207.
25 Villiers 1998 pp. 188 and 207.
26 Sutcliffe page 243; Kauppinen page 154; Fahlbeck page 12; On the British individualist point of view see Lord Wedderburn page 38 and Industrial Relations 2006 page 42.
employees all cover information and consultation procedures,\(^{30}\) which are a part of the employees’ protection and status in company restructuring and, consequently, a part of the research.

The character of the directives under research forms a basis of one research issue. The directives are in character binding; however, they are labelled by a strong need for interpretation. Of special interest are the directives’ scope and limitations and the protection granted by them.

The research does not cover the directive on the European Works Councils.\(^{31}\) This is first due to the directive’s cross-border character. Secondly this is due to the directive’s scope, covering information and consultation procedures.\(^{32}\) Due to the scope of the directives on Transfers of Undertakings, Collective Redundancies and Informing and consulting employees, all three covering information and consultation procedures,\(^{33}\) the handling of the directive on the European Works Councils would lead to a four-fold handling of information and consultation procedures, not thought to be relevant in creating any added-value in the research’s context.

Employee social rights denote to rights concerning employees’ economic and social well-being in the form of basic rights. As basic rights employees’ social rights are regulated in the Council of Europe’s European Social Charter and the EU Charter of Fundamental Rights.\(^{34}\) Both of these instruments have provisions on employees’ right to information and consultation.\(^{35}\) The present

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\(^{34}\) de Búrka pp. 3-4.


European Social Charter (Revised) article 21 on the right to information and consultation, article 24 on the right to protection in cases of termination of employment and article 29 on the right to information and consultation in collective redundancy procedures. See on the right to information and consultation Mikkola pp. 158-159 and 161-162 and on the right to protection in cases of termination of employment and information and consultation in collective redundancy procedures ibid. pp. 162-163 and 164-165. See on the right to information and consultation Świątkowski pp. 243-249 and on the right to information and consultation in collective redundancy procedures ibid. 252-256. See further Digest of the Case Law 2006 on articles 21, 24 and 29, the pages being unnumbered. Act on the coming into force of the European Social Charter (Revised)’s provisions 14.6.2002/78.

See on the ratifications of the European Social Charter, its Protocols and the Revised European Social Charter Samuel Appendix III.

On the relationship between the European Social Charter and the EU Charter of Fundamental Rights see Explanations relating to the Charter of of Fundamental Rights page 27.
research does not cover evaluation of employees’ social rights as basic rights. Consequently, the research does not cover the evaluation of the provisions on information and consultation in the European Social Charter and the EU Charter of Fundamental Rights.

The EU represents a regional supra-national form of cooperation among its Member States.\(^{36}\) Finland, Sweden and the United Kingdom are all the Member States of the EU.\(^{37}\) As a part of the Membership obligations these countries have to implement EU-law as a part of their national law.\(^{38}\)

The research is based on the national implementation and application of the EU-law applicable in a merger and transfer of undertaking. The research covers the effects of membership obligations in Finnish, Swedish and British law due to the implementation. Has the EU-law under research affected the national systems and areas under research, or has the EU-law only mere a surface value, the national systems mostly having prevailed their special characteristics?

The above-mentioned research tasks and legal basis have determined the research’s structure. From the employee perspective, company and labour law in company restructuring are completely intertwined and inseparable; as a result, in the research, in handling both of these areas of law as a wholeness. With regards to EU-law, only the unified handling of these areas makes possible to evaluate the principle on employee protection and employee status in company restructuring as a wholeness on the basis of the relevant EU-law. National law’s evaluation preconditions a similar unified handling and evaluation, taking also into account the implementations’ effects. With regards to Finland, Sweden and the United Kingdom, both the company and labour law are thus handled in whole. The chosen structure makes it possible to evaluate both EU-law and national laws independently; however, as these structures interact with each other, both levels of law, in part, form a wholeness.


\(^{36}\) On the character and competence of the EU see Joutsamo – Aalto - Kaila – Maunu pp. 1-16; Raitio pp. 43-93 and Raitio 2007 pp. 251-254; Jääskinen page 280.


\(^{38}\) See Prechal pp. 73-91 on the implementation.
A majority of mergers and acquisitions (hereinafter M&A) within the EU are national level transactions. In 2000–2006 even 80 per cent of the M&A activities were national level transactions. Business economics shows that over a half of restructuring operations fail. The failure percentage is evaluated to be even over 70 per cent. From a company perspective this is – without exaggeration – a waste of resources, both human and economic. This can be held as a genuine market failure. Restructuring transactions generally also lead to workforce reductions, affecting unemployment and costs both for individuals and – from the Finnish perspective – to public power. Due to these facts there is a need to revise company restructuring procedures themselves, to create room for successful company restructuring transactions.

Restructuring operations’ success depends on operating firms’ ability to achieve synergies through restructuring process, based on carrying out of integration process. The ability to achieve synergies is dependent on participating firms’ ability to join in the restructuring process resources, structures, culture and politics, including accountability with control and trust. From the legislative perspective restructuring transactions’ success has to do with regulating transactions’ actual enforcement. Company restructuring is a part of corporate governance. Corporate governance is also connected with the basics of the company law, public law or contract law theory.

Due to high failure percentage of company restructuring operations, a crucial issue to be answered on the basis of the research findings has to do with increasing the success of restructuring operations. What can be done by legislative means to increase the success of restructuring operations, corporate governance included?

Corporate governance and stakeholder – discussion is connected with the company law’s basics, theories on public or contract law. The company law’s general underlining principle is to facilitate the carrying out of economic activities in a structured form. According to the public law or concession theories, companies’ foundation and functioning are based on a state’s concession. A company has to take into account in its operation common good of society and stakeholders at large. Law limits the company’s operational area. In the contract law theory companies’ foundation

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39 Eurofound News page 1.
40 Vuorenmaa page 9.
41 Peng page 381.
42 See Stiglitz page 190 on a definition of a market failure, the term denoting to externalities in a company’s actions’ consequences, it not paying the cost or receiving the benefit. See also Elkington page 331.
43 Lehto pp. 6, 31 and 46-47.
and functioning are targeted primarily to fulfil shareholders’ private interests by increasing shareholder value. The contract law theory does not primarily acknowledge other interests or stakeholders outside shareholders. Shareholders’ mutual relations are limited by the principle on formal equality, no other limits are acknowledged. If there are extensions on the principle, they are based on voluntary contracts between parties instead of legislation.\textsuperscript{45}

Research on relationship between industrial relations systems and competitiveness has not indicated any single model of social dialogue to be the best one, when evaluated from the perspective of promoting competitiveness. Instead decisive seems to be complementarity between industrial relations systems and other labour, employment and social protection systems.\textsuperscript{46} The most crucial feature is the quality of complementarity.\textsuperscript{47} This applies also on the importance of law in long-term cooperative relationships, being a factor facilitating fostering of trust. Ultimately the impact of law depends on the relationship between a legal system and other forms of institutional regulations.\textsuperscript{48} In the research context relevant is also the relationship between the company and labour law systems. The concept of complementarity is one of the basics of the research, denoting ultimately to legislation¿ coherence in the form of predictability.

According to Article 2 of the Treaty, the EU has the following objectives: the promotion of economic and social progress and a high level of employment and the achievement of balanced and sustainable development, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union. According to Article 136 of the Treaty, the Community and the Member States have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end, the Community and the Member States shall take measures which take into account of the diverse forms of national practises, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.\textsuperscript{49}

\textsuperscript{45} Werlauff 2003 pp. 44-46; Dine pp. 67-68 and 264-272; Armour pp. 500-501; See Birds page 13.
\textsuperscript{46} Industrial Relations 2006 pp. 16-17 and 154.
\textsuperscript{47} Industrial Relations 2006 page 156.
\textsuperscript{48} Arrighetti – Bachmann – Deakin pp. 171 and 192.
\textsuperscript{49} OJ C 321 E/11.
Is the EU’s company restructuring law able to respond to challenges posed by the EU’s own enlargement and the globalisation? How well does the EU company restructuring law of the Union of the 27 Member States respond to the goals stated in the Treaty, especially Articles 2 and 136?

Law can be described as an isolated system and a phenomenon as such, separated from the historical, social and economic environment having given birth to it. In legal research evaluation of legislation, based on interpretation, is of crucial importance. Evaluation has to do with the legislation’s aims, contents, limits and actual effects. Legal research in an evaluative meaning cannot be done without taking into account history and wider social and economic changes in any society. National economies, social structures, cultural factors, politics and ideologies on society’s development are closely connected together. All these factors act in close interrelation with each other, forming the basis of law. Legal issues under research are evaluated in the light of history, sociology and business economics. In certain aspects also findings of psychology are used.

The work is rooted in the common history of Finland and Sweden, being an inseparable part of the European history. The research is comparative in character, comparative law having as its goal to compare different legal systems. From a comparative law perspective, Finland, Sweden and the United Kingdom represent two different legal systems, being now bound together by the EU’s legal system. The comparison is done between the Nordic legal system, called also the Scandinavian Law, being a part of the European Civil Law system, labelled with a written law orientation, and the English Common law, being a part of the Anglo-American Legal Family. In Scandinavia the development of law is based on the German origin. In different Scandinavian countries, the interrelationship between national legal systems is due to historic and cultural reasons. Mutual trade, close connections and a tradition of co-operation in the legislative field have led to this legal system’s development. The English Common Law has formerly been labelled by judge-made law by precedents. This is now fading, the legislative power having been transferred to the Parliament.

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50 Alvesalo - Ervasti pp. 6-8.
51 Raitio pp. 9 and 40.
52 Zweigert – Kötz pp. 2 and 4.
53 Fahlbeck page 7.
54 Zweigert – Kötz pp. 276-285 and 180-204, especially page 201.
1.1. DISPOSITION OF THE RESEARCH

The research is divided into four parts.

I General Part – Research Framework

The research’s target and goals are presented with central research tasks. Methodological starting points are presented, covering interpretation, comparison and legal sociology.

The first part covers the historic background of the research, including in brief the common history of Finland and Sweden. The Nordic Legal System and the English Common Law system are presented, including differences in legal development and differences in the systems. Labour market and corporate finance systems in Finland, Sweden and the United Kingdom are presented.

The general part covers the processes on EU’s integration and enlargement and globalisation, the emphasis being on sociological perspective. As a part of the research background different theories and research on developing competitive advantage are presented.

Different restructuring transactions are presented. Business economics’ company restructuring theories on restructuring reasons and their practical carrying out are presented and evaluated. Restructuring operations’ scale and effects are presented. Different measures and models in increasing employee employability and alleviating the consequences of workforce reductions are presented and evaluated.

II The EU company and labour law on company restructuring in the research context is presented and evaluated with conclusions.

III National company and labour law on company restructuring in the research context

The third part covers national laws’ presentation and evaluation in the research framework. General company law principles in Finland, Sweden and the United Kingdom are presented and evaluated as a part of corporate governance. The Finnish, Swedish and British law on company restructuring in the research context is presented and evaluated with conclusions.
IV The fourth part covers the final remarks on conclusions and the summary.

1.2. METHODOLOGICAL STARTING POINTS – INTERPRETATION, LEGAL COMPARISON AND LEGAL SOCIOLOGY

Methodologically, the research is based on legal dogmatics in the form of interpretation, comparison and sociological analysis.55

Legal dogmatics has to do with interpretation and systematisation of norms.56 It is targeted to create coherence in areas under evaluation.57 Interpretation of legislation has to do with legislation’s aims, contents and limits, purported to give an integrated meaning to legal concepts and texts.58 Interpretation is not done in a legal vacuum. It takes place in a contextual environment. At its best it leads to a systematisation of legal norms. This presupposes as its basis grounds derived from a fixed system of sources of law. Interpretation as a contextual process is limited by legislation’s goals and wording, borderline being a flexible one. Interpretation is also affected by societal changes. Changes in economics, politics and technology alter the results already achieved.59

In the interpretation legislator and courts have main role, being affected by legal research. In the context of individual rights interpretation process is nowadays affected by basic rights point of view.60

Interpretation can be divided into two parts. They are a prevailing doctrine and an alternative doctrine, called also a critical or a political doctrine. The prevailing doctrine’s starting point is a neutral one with regards to values behind made descriptions, evaluations and interpretations of the legal system in question and its individual norms.61 The prevailing doctrine reflects an idea of a state ruled by law.62 Legal dogmatics creates predictability and uniformity in legal norms’

56 Aarnio pp. 48, 51 and 57.
57 Alvesalo – Ervasti pp. 7-8 and 15.
58 On legal interpretation see Aarnio pp. 160 and 165-167.
59 See Alvesalo – Ervasti pp. 57 and 60-61.
61 Siltala 2003 pp. 61, 64, 142-144 and 150.
62 Aarnio page 81.
application. Legislation’s steering and integrative role in neutralising societal conflicts is emphasised, granting at its best protection at an individual level.63

The alternative doctrine’s aim is to achieve the best possible or even ideal description and interpretation of the legal system and its individual norms. It also aims to influence legislative process in the future.64 In the research both of these views are present, the prevailing and alternative doctrine, the latter one especially due to legal sociology.

Comparison has to do with different legal systems’ systematisation, comparison and interpretation.65 Comparison may be used as a basis for a legislative process. It is a source of knowledge on solutions in other legal systems. However, it may be used only to increase understanding of other legal systems.66

Comparative law has primarily to do with law’s functions. The starting point of comparative method is not sticking to formalities of law, but looking beyond formal structural barriers. One has to look for purposes of norms under evaluation.67

Comparison has to do with legal systems’ different aspects, spirit and style, method of thought and legal processes. The way of creating law, being based on precedents or legislative acts, is of importance. Under comparison may be taken legislative techniques and ways of codification and interpretation. The role of legal science is also to be taken into account. All these aspects are affected by politics, economy and wider by the history of a nation in question.68

In the research comparison is used in relation to two legal systems, the Scandinavian or the Nordic legal system,69 and the English system of law, called the common law. The comparison taking place between different legal systems, the research is thus featured by trans-nationalism or at least inter-nationalism. Further comparison is still made inside the first one, the Nordic legal system. Historical reasons have led to differentiation of judicial development in Finland and Sweden, having affected special national features in legal development.

63 Aarnio pp. 19 and 64-65; Laitinen page 109; Alvesalo – Ervasti pp. 59-62.
64 Siltala 2003 pp. 61-64, 142-144 and 150.
65 Aarnio pp. 50-51.
66 David – Jauffret – Spinosi I pp. 4 and 17; Siltala pp. 11-12 and 19; Siltala 2003 pp. 131 and 131.
67 Zweigert – Kötz pp. 34-36 and 43-44.
68 Zweigert – Kötz pp. 4-5 and 68-72.
69 Zweigert – Kötz page 276 and as a whole pp. 276-285.
The use of comparative method is also necessary because of the basis of the research, the EU-law. The EU-law forms a unique and autonomous legal system of its own, having its own legislation, methods of interpretation and a court to settle interpretation disputes. The EU-law develops in a continuous interaction with the Member States’ legal systems. EU-law has its origins in Member States’ national legal systems. Legislative processes at the European level, which are end-results of political processes, usually use as their sources national solutions of the different Member States, based on comparison between different national systems.

In the EU-law there is at the moment, however, a discerned opposite movement away from interaction with the Member States’ legal systems. The increased freedom granted to Member States in implementing law based on objectives or principles is apt to lead, in addition to decrease in interaction, also to fragmentation.

The character of the EU’s legal system as an independent legal system has been challenged, due to a claimed underdevelopment of its legal culture. The development of a legal system is a time-related sedimentation process. An example of this kind of a process is the English common law. Its development took hundreds of years. Even the development of the system’s core took 150 years. From this perspective the present state of the EU’s legal system cannot be evaluated as a ready-made but as a dynamic system seeking its form under continuous change, being affected by the Member States’ different legal cultures and languages and by economics, politics and social ideologies, furthered by the integration process.

Comparative method can be used in paving new ways of handling and tackling challenges posed by social and economic change. In the EU context this challenge is – on a continuous basis – the implementation of the integration process in various fields. The European Court of Justice has a remarkable role in the development of the EU and its legal system. On the basis of the Treaty

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70 Joutsamo – Aalto – Kaila – Maunu pp. 64, 103, 298-309 and 342; Eilavaara pp. 219-236; On the interaction of the EU’s legal system and national legal systems in relation to the company harmonisation programme see Villiers 1998 page 22.
71 Laulom 2003 pp. 291-292; Liukkunan page 49.
72 Compare Villiers 1998 pp. 48-49.
73 Tuori pp. 224-229.
74 Zweigert – Kötz pp. 182-184; Glenn page 255.
75 Joutsamo – Aalto – Kaila - Maunu page 1; Raitio pp. 13, 18, 40-41 and 57. See Case 283/81 CILFIT paragraph 20. On the new-liberal ideology behind the Internal Market Programme of the European Communities affecting also the European Union’s legal system see Raitio pp. 40 and 55-62.
Article 234, it has a right to give precedents on the interpretation of the EU-law, at the initiative of the Commission or the Member States.76 In giving precedents the ECJ has used its powers especially by using teleological interpretation method.77

The ECJ has had a remarkable role in developing company restructuring law. As an example can be mentioned the directive on Transfers of Undertakings, the ECJ having interpreted and developed the directive’s main concepts.78

The EU-law needs to be supplemented by the Member States’ national law. Only after this supplementation in the form of implementation EU-law forms a wholeness to be compared and evaluated. As an example of this process can again be mentioned the directive on Transfers of Undertakings. The directive is based on an idea of national law supplementing the European one, into addition to partial harmonisation.79 In the context of the EU-law critics has been expressed. EU law has to be compared and evaluated in context, referring to application and interpretation at the national level, too. The use of a method taking into account national provisions and practises is apt to reveal the otherwise often hidden national level differences affecting significantly the practical end-results of EU-provisions. This method makes visible the practical results of the EU’s individual legal instruments.80

Legal sociology81 evaluates from sociological perspective legislation’s effects in different social relations. It uses as its methods among the others social sciences, history and statistics. In the

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76 Treaty of Rome article 226 on the powers of the Commission and article 227 on the powers of the Member States to initiate the proceeding before the ECJ; Malmberg page 64.
77 Siltala 2003 pp. 342-443; As an example can be referred to Case C-215/83 Commission v. Belgium, stating in Summary on the failure to implement the Directive 98/59/EC on Collective Redundancies that the Member States must fulfil their obligations under community directives in every respect and may not plead provisions, practises or circumstances existing in their internal legal system in order to justify a failure to comply with those obligations. This is repeated in paragraph 25 stating also, that a Member State cannot plead in its defence that the circumstances are of little practical significance or that the national legislation provides the workers in question with other forms of social security.
79 Case 105/84 A/S Danmols paragraph 26. The directive on Transfers of Undertakings is not intended to establish a uniform level of protection within the Member States, based on common criteria. The core of the protection afforded is to extend the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. The directive is to ensure that the employment contract or relationship continues unchanged with the transferee so that the employees affected by the transfer are not placed in a less favourable position solely as its result. See Cases 324/86 Daddy’s Dance Hall paragraph 16 and 135/83 Abels paragraph 38, Nielsen page 314. Some of the directive’s key concepts are to be defined on the basis of national laws and practises, for example the employee, see Directive 2001/23/EC Chapter I Article 2 (d); Case 105/84 A/S Danmols paragraphs 23 and 28.
80 Laulom 2003 page 293. See also Raitio page 9 on the significance of comparative law in evaluating the EU-law.
81 The definition of sociology and its tasks see Laitinen pp. 7 and 9.
present research also business economics is used. Business economics forms company restructuring transactions’ practical basis at the company level, affecting the employees’ status and protection. Legal sociology’s target is to evaluate legal system and individual norms as social phenomena, norms’ effects reaching outside the legal system itself, although the evaluation’s starting point is the legal system as such. Legal sociology is featured by a multi-scientific perspective. It is targeted to define and evaluate structural and historic connexions between legal and social phenomena, basing its evaluations on societal changes.

Legal dogmatics sees law as an autonomous system. Its working methods are interpretation and systematisation. In legal sociology law’s evaluation is based on an empirical analysis in a social context. Central is to evaluate enacted legislation’s real effects in society. The mere enactment does not guarantee legislation’s consequences, neither its application. Legal sociology researches and evaluates among the others central legal institutions or organs, like court system, legislation itself or administration. It evaluates and researches also the legal provisions’ factual social significance.

Legal dogmatics targets to create coherence in a legal order in the form of predictability. Legal sociology does not take for granted achieving of coherence, the enacted law’s objectives in practise realising themselves in a legal system.

In this research the central legal institution to be researched is company, especially company/employee relationships and employee/shareholder relationships. Under research is especially factual social and legal significance of the provisions regulating company, employee and employee/shareholder relationships in the company restructuring context. At its core, the research has to do with company legal sociology. The choice of sociological method is determined especially by the globalisation and the EU’s integration and enlargement processes, all being driving forces in company restructuring.

82 Siltala pp. 74-75; Siltala 2003 pp. 69, 104, 107, 115-116, 128 and 150; Alvesalo – Ervasti pp. 1, 4-7, 9 and 15.
83 Alvesalo – Ervasti pp. 1-3 and 5.
84 Laitinen pp. 8-9 and 12.
85 On legal sociology’s character as an empirical science see Laitinen pp. 11-12.
86 Alvesalo – Ervasti pp. 7-8.
87 Laitinen pp. 8 and 14; Alvesalo – Ervasti pp. 41-42.
88 Laitinen page 10.
89 Alvesalo – Ervasti page 5; Laitinen page 8.
90 Alvesalo – Ervasti page 7.
In the present research legal science is understood as a social phenomenon. Law under research can be evaluated only empirically in its social context, taking into account social, political and economic environment. The chosen point of view leads to critical attitude with regards to the legal system and phenomena under research.

Instrumentalism is also of significance. Instrumentalism is characterised by an urge to steer society’s development to a certain chosen direction. Law is a means to realise societal goals. It also is a means to political legitimacy. In the EU-context instrumentalism is strong, due to the EU’s economic emphasis, affecting also at the Member State level. Political power is realised in legal mechanisms and relations. Norms protect values inherent in the adopted law.

2 FINLAND’S AND SWEDEN’S COMMON HISTORY, THE ERA OF AUTONOMY AND SOME 20TH CENTURY ECONOMIC AND SOCIAL LANDMARKS

2.1. FINLAND’S AND SWEDEN’S COMMON HISTORY AND THE ERA OF AUTONOMY

Finland and Sweden have a common history socially, politically and consequently also judicially. The concept of a modern centralised state was born between the 1400s–1600s. Its development can be influenced and guided by law and civil servants. State ideology was born, increasing the importance of law and jurisprudence, and leading in the 1500s to the formation of international community in its present form. In Europe, the leading forces in the development were England, Spain and France. In Sweden the modern state in its centralised form was born during the era of Gustavus I Vasa (1532-1560).

With the rise of the centralised modern state developed also commercial law. The first limited companies were established in the 1600s on royal assent, largely influenced by state power.

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91 Laitinen on legal sociology’s critical task as social critics page 11.
92 Alvesalo – Ervasti pp. 6-8.
93 Alvesalo – Ervasti page 62; Laitinen pp. 102 and 104.
94 Laitinen page 108.
95 Laitinen page 8.
96 Laitinen page 125.
97 Ylikangas pp. 15-32; Cassese pp. 4 and 22-24; Hentilä – Krötzl – Pulma page 105; Klinge page 28; Meinander page 27. The unification process between Sweden and Finland leading to formation of state and the Kingdom of Sweden began in the 1100s, achieving its peak in the 1200s. Finland and more widely the Nordic countries were annexed to the influence of the Western culture. This development reached its peak in the beginning of the 14th century. See Meinander pp. 14, 17-21 and 69.
98 Werlauff 2003 page 44; Talbot page 6.
East-Indian Company established itself in Sweden in 1731. In Sweden, limited companies’ foundation was enacted in the first Companies Act in 1848,\(^9\) justified by society’s interest.\(^{100}\)

After the Finnish war in 1808-1809 Finland was annexed to Russia in 1809 as an autonomous Grand Duchy. It was allowed to keep its own law of the Swedish origin, central administration, the Parliament and a considerable independence in internal affairs.\(^{101}\)

In Finland the era of Alexander II (1855-1881) was a period of progress. A large scale liberalisation programme was carried out. Universal freedom of trade was enacted. Foundation of banks and limited companies was enacted. Act on limited companies was adopted in 1864. The renewed Act of 1895 included merger provisions.\(^{102}\) Industrialisation accelerated. Communication and different forms of transport developed, creating room for international trade and cultural exchange. In economy and culture ties with Sweden were important.\(^{103}\) Civil society began to form itself. Parties and since the end of the 1800s trade unions were established, leading to central unions’ formation in Finland and Sweden.\(^{104}\)

2.2. SOME ECONOMIC AND SOCIAL LANDMARKS OF THE 20\(^{TH}\) CENTURY

The general transfer to a market economy began to get force in Europe in the end of the 1700s due to industrialisation. An idea, even an ideal of national independence began to get force in Europe during the 1800s. An important factor in the nationalism was the formation of market economy, leading to rise of peasantry, bourgeoisie and workers, whose economic and political significance increased. National independence was needed to guarantee freedoms to economic activity and at personal level and to influence societal changes and welfare development. In the 19\(^{th}\) century German and Italy were unified. Turkey, Austria and Russia broke down. All these changes paved a way to Finland’s independence 6.12.1917.\(^{105}\)

After the Winter War in 1939–1940, the Continuation War in 1941–1944 and the war in Lapland of 1944–1945, the Finnish society’s development in the 20\(^{th}\) century was labelled by strengthening...
relations with the Soviet Union to stabilise internal and foreign policies. The Treaty between Finland and Soviet Union on Friendship, Co-operation and Mutual assistance was in force in 1948-1991. Finland’s aim was to keep itself outside the great powers’ conflicts and strengthen its neutrality. Due to the Treaty on Friendship, Co-operation and Mutual assistance Finland had military obligations towards the Soviet Union, unlike the other Nordic and Western countries. Another goal in the society was the creation of welfare state, targeted to level social differences.106

Finland joined the EFTA, the European Free Trade Association in 1961 as an associate member, to secure wood processing industry’s products’ export to the Western countries. Finland got full membership in 1985, paving a way to a deeper European integration.107 In 1973, Finland made a customs agreement with the European Economic Community, the EEC. Finland became a member of the OECD, the Organisation of European Cooperation and Development in 1969. Other Nordic countries had been members from the organisation’s establishment since 1961.108

Finland developed its long ties with the other Nordic countries, especially with Sweden, through its membership in the Nordic Council.109 It had been established by Sweden, Denmark, Norway and Island in 1952 as a co-operation forum between the Nordic countries’ Parliaments. Finland joined the Nordic Council in 1955.110 The common Nordic labour market was opened up in 1954.111 Migration from Finland to Sweden strengthened economic ties between Finland and Sweden. Over 230,000 people migrated permanently to Sweden during 1945–1990.112

The welfare state development began in Finland in the 1940s, being at its strongest from 1950s to the 1980s, in the Golden Years. The welfare state is based on progressive taxation and full employment, forming its economic basis. Social reforms were extensive in scope, based on citizens’ equal treatment and an ideal on social citizenship. Welfare services were primarily produced by the public sector. The model’s inseparable part is a labour market system with negotiations between the parties, employers’ and employees’ organisations, and the state.113

107 Jääskinen page 83.
109 Klinge page 138.
111 Hentilä – Krötzl – Pulma page 301.
112 Meinander page 201; Kirby page 294.
The welfare state’s disintegration can be traced in Finland to the 1990s. Capital markets were liberalised in Finland in the 1980s, leading to an overheating at the stock market and finance market in general. Credit losses realised in the beginning of the 1990s, leading to heavy state compensations, equating to 7.1 per cent of the Finnish gross national product. Of public expenditure, 15 per cent was covered by loans. Welfare state structures began to change. More weight was put on flexibility. Market forces were emphasised, especially in employment policy. Due to the economic recession’s seriousness with an unemployment rate of 16 per cent in 1990–1994, it has also been claimed that the welfare state was able to preserve its basic structures, in spite of great cuts and changes.114

After the cold war’s end and the Soviet Union’s disintegration in 1989–1991, Finland evaluated anew its status in Europe. Finland, Sweden and Austria became members of the EU in the beginning of 1995.115 The membership had been preceded by an agreement on the European Economic Area since the beginning of 1994.116 Sweden had an agreement on free trade with the European Communities since 1973. Sweden had long hesitated with full Membership due to its neutrality policy.117

Finland’s membership in the EU can be evaluated from political, social and export industry’s perspective. Finland’s policies since 1950s had been targeted to co-operation with Western countries to guarantee export. Form this perspective the membership can be evaluated as a natural continuation to former politics.

3 THE NORDIC LEGAL SYSTEM’S DEVELOPMENT AND THE COMMON LAW’S CHARACTERISTIC FEATURES

The Nordic legal system’s development through codification can be traced to the 12th century, when the codification of the former rules of German origin began. In the 1350s and again in the 1440s a common Land Law was given. In 1350 a generally applicable Town Law was given. This indicates

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117 Nyström page 20.
the establishment of Swedish law and wider the Scandinavian social system in Finland. A comprehensive code, *Sveriges rikes lag*, was enacted in 1734.\(^{118}\)

A close co-operation in the legislative field between the Nordic countries began in the end of the 1800s, leading to very similar commercial law in all the Nordic countries, due to that era’s economic activity.\(^{119}\) The co-operation continued in company law revisions in the 1960–1970s.\(^{120}\)

Finnish labour law’s roots are in especially in German and Swedish law and the International Labour Organisation’s, ILO’s, law drafting since 1920s.\(^{121}\)

The Nordic or the Scandinavian legal system is labelled by legislators’ and legislative acts’ importance. The law is not made by individual judges.

The common law system began to develop in England after 1066, when Normans won Anglo-Saxons. The system’s core developed in 150 years.\(^{122}\) The Normans created a tight feudal system headed by the King, based on a heritable land-owning. Power was centralised in the King’s hands. Due to fiscal reasons jurisdiction was transferred to the King in civil and criminal matters. During the next centuries law was unified and jurisdiction was centralised by the kingly court. During this process the former Anglo-Saxons’ law lost its place. The unified law was called the common law, opposite to local laws based on custom. The common law was labelled by procedural and public policy aspects. Procedural aspects’ importance made the reception of Roman law concepts in England impossible. Already from the early stages of the common law’s development lawyers had an important role in developing law on the basis of precedents. This has led as side-effects to inconsistent features in the system.\(^{123}\)

The common law does not divide law into public and private law known in civil law countries. Also the division of law into independent branches of law like commercial law is unknown in the common law. Enactments’ significance has greatly increased in the common law. The status of enactments and precedents are equal. Incoherence in enactments needing interpretation demand final interpretation at the courts, making law wholly binding. The system is based on an open

\(^{118}\) Fahlbeck page 7; Klinge page 25; Zweigert – Kötz page 278; Hentilä – Krötzl – Pulma pp. 44-45 and 117.

\(^{119}\) Zweigert – Kötz page 280.

\(^{120}\) CA Committee 1992:32 page 44.

\(^{121}\) Bruun – Malmberg page 84.

\(^{122}\) Glenn page 225. On the birth, development and character of the common law see Glenn pp. 225-240.

\(^{123}\) Zweigert – Kötz pp. 191-193 and 197.
method, forming a basis for settling all judicial problems. In courts there is still a tendency to give decisions on individual matters, instead of generally applicable rules. This is due to written statutes being interpreted in a narrow way according to their wording. Secondly this is due to the status of precedents in the common law system. The courts still have a role in making law, instead of only applying it.\(^\text{124}\)

Nowadays the term “common law” refers to three in meaning different concepts. In the widest sense the term refers to a legal system in force among the others in England, the United States and Canada. Secondly, the term refers to case law developed by the English lawyers, labelling as a whole the Common law system. In the English law the precedents have a binding force, \textit{stare decisis}, in relation to later cases. Also in the United States, the legal system is characterised by precedents.\(^\text{125}\) The former precedents’ binding force is comparable to written law’s binding force in civil law countries. In England, the binding force of precedents covers Supreme Court and lower courts’ cases. Thirdly, the term common law refers to “equity”. This is an area of the English case law having been under appeal and later amended by the Chancellor on the basis of equity. The division of law between the common law and equity has survived, irrespective of changes in the legal system.\(^\text{126}\)

There are similarities in common law between England and the United States. There are, however, major differences. In England, there is no written constitution.\(^\text{127}\) Another difference has to do with the division between federal and individual state law. In the United States, principally individual states have legislative powers.\(^\text{128}\) The third difference has to do with the procedure to inspect laws fulfilling constitutional demands. This procedure is not in use in England.\(^\text{129}\) With its constitutionalism, the common law used in the United States has common characteristics with the legal systems in continental European countries.

\(^{125}\) See David - Jauffret – Spinosi II page 113.
\(^{127}\) David – Jauffret – Spinosi II page 86.
\(^{129}\) David – Jauffret – Spinosi II page 129.
4 INDUSTRIAL RELATIONS AND LABOUR MARKETS IN FINLAND, SWEDEN AND THE UNITED KINGDOM

Originally the term industrial relations denotes to management’s and labour’s relations within different industries. The coverage of the term has extended. Nowadays it covers also relations in service and public sectors. The term can be used to refer to a labour market system as a whole, including into addition to labour market also politics and economics.\(^{130}\) Central in a labour market system are state’s and employers’ and employees’ organisations’ mutual relations, referring as a whole to a concept of corporatism.\(^{131}\)

In Finland, the birth of union is linked with the civil society’s birth from 1850 onwards and with the industrialisation, having led to new social problems from 1880s onwards. These same factors affected labour market development also in Sweden since the late 1800s.\(^{132}\)

In Finland and Sweden labour markets are labelled by a high unionism. In Finland about 81 per cent of employees are unionised. Employer membership in employer organisations is common in Finland.\(^{133}\) The approximate employee membership rate in is Sweden 80 per cent. In the United Kingdom, the approximate membership rate is under 30 per cent\(^{134,135}\). In Sweden, collective agreement coverage in 2001 was over 90 per cent; in Finland over 80 per cent.\(^{136}\)

In Finland and Sweden labour law has been labelled by the principle of protecting workforce. Employees have been considered to be in a weaker and, consequently, an unequal position compared to the employers, needing legislative protection.\(^{137}\)

\(^{130}\) Kauppinen page 11; Kairinen 2006 page 41.
\(^{131}\) Kauppinen pp. 16-17. See Kauppinen pp. 18-23 more in detail on the concept of corporatism. See also Kauppinen pp. 34-54 on the historic development of the Finnish labour market.
\(^{132}\) Kauppinen pp. 72-73 and 273; Edström page 177.
\(^{133}\) Bruun – Malmberg page 84.
\(^{134}\) Neal page 499.
\(^{135}\) Kauppinen pp. 77-80 and 312; Nyström page 23; See also Industrial Relations 2006 pp. 24-26. Estimates on the membership level vary, depending on the source. See Bruun – Malmberg page 84 on the membership level in Finland, which is estimated to be about 90 per cent; pensioners and other special groups excluded, 72 per cent. See Kairinen 2006 pp. 55-56 and Bruun – Malmberg pp. 84-85 on the Finnish labour market organisations.
\(^{136}\) Industrial Relations 2004 page 30.
\(^{137}\) Kairinen 2006 pp. 42-44.
form the labour market’s basis. However, since the 1970s, extensive labour law renewals have been carried out.138

In Finland, crucial for the collective agreements system’s development was the “January Engagement” in January 1940, denoting to a declaration acknowledging trade unions’ equal status with the employers in negotiating and agreeing collective agreements, forming also basis for developing employee involvement at the corporate level.139 In Finland, labour law and collective agreements in their present forms began to develop extensively after the Second World War, guaranteeing in individual branches labour market peace against salary development.140

The Finnish labour market model has been labelled with centralised organisations and negotiations and consensus, solidarity and close relations between state actors and labour market parties.141 Trade union interests’ scope is wide, ranging from negotiating collective agreements to general social and international interest representation. Employers’ organisations in their turn further trade and also international interests.142 In Finland, collective agreements are on certain preconditions generally binding. Also unorganised employers have to apply them.143 A system of generally applicable collective agreements is unknown in Sweden.144

Since 1968, the Finnish labour market has been labelled with the cooperation of the government and central labour market organisations in the form of incomes policy agreements, targeted to develop economic and incomes policies, labour market and society at large. Incomes policy agreements, which are in character framework agreements, require separately negotiated collective agreements to be implemented at the branch level.145

Salary rises in centralised incomes policy agreements have been moderate in 1991–2006. They are based on approximate inflation rate and increase of productivity rate. Moderate salary rises restrain rise of prices. They increase export and thus supply of work at the domestic level, creating surplus

139 Kairinen 2006 page 42; Hietala – Kaivanto page 1.
140 Kairinen 2006 pp. 41-43.
141 Kauppinen pp. 111 and 286.
142 Kairinen 2006 page 54.
143 ECA 2001 § 2:7; Kauppinen page 303.
144 Nyström page 67.
145 Kauppinen pp. 54-60 and 153-154; Bruun – Malmberg page 85.
to be used for improvements in social sector. This has created social predictability. A negative aspect is a weaker adaptability in recessions and high unemployment due to increases in productivity rate.¹⁴⁶

In Finland the EU-membership affected the labour market system. Since 1995 it has been called “EMU-corporatism”,¹⁴⁷ due to a transfer of central decision-making powers to the European actors. Centralised labour market agreements’ character changed. Government emphasised restraints in inflation rate and cuts on social security system. Employers’ organisations emphasised increase of growth by flexibility. Employee organisations emphasised increase of employment rate. Different strategic goals have led to more flexible agreements at the branch and local level.¹⁴⁸ At the moment, the Finnish labour market negotiations system is under a change. There is a trend to a more dispersed system. Negotiations will be carried out at the branch and local levels.¹⁴⁹ Changes in the negotiations system are apt to decrease predictability between branches with regards to employment terms and condition levels, including salaries.

In Sweden, the so-called “December compromise” of 1906 played a crucial role in developing the labour market system. It is a basic agreement between the employers’ and employees’ confederations on employee rights to organise themselves and employer’s direction right, referring to an employer’s right to lead and distribute work, hire employees and terminate their employment contracts.¹⁵⁰ The system based on an employer’s direction right has been prevalent in Sweden ever since, now over 100 years. This is the case in Finland and the United Kingdom, too.¹⁵¹ Since the mid-1930s, the Swedish model has been labelled by labour market parties’ independence from state intervention.¹⁵² The so called “Saltsjöbad-agreement” from the 1930s forms another basis of the present Swedish labour market system. In labour market issues there is a target of always trying to settle them by an agreement-based end result.¹⁵³

¹⁴⁶ Kauppinen pp. 113-114.
¹⁴⁷ Kauppinen page 71.
¹⁴⁸ Kauppinen pp. 68-71, 116-118 and 166; Bruun – Malmberg page 85; See Lauri Ihalainen 11.1.2008 in Helsingin Sanomat on negotiations round 2007-2008 at the branch level and possible further development in the labour market system, Janne Virkkunen 30.3.2008 on incomes policy and Helsingin Sanomat 22.5.2008 on dispersed branch level negotiations.
¹⁴⁹ Helsingin Sanomat 17.9.2008.
¹⁵⁰ Edström page 177; Malmberg page 60; Glavá page 26; Iseskog pp. 319 and 631.
¹⁵¹ ECA 2001 § 1:1.1; Collins – Ewing – McColgan pp. 71-72.
¹⁵² Nyström page 23; Bruun-Malmberg page 101; Bruun – Malmberg 2006 page 65.
¹⁵³ Iseskog page 632; Glavá page 29.
Since the 1990s centralised agreements have been abandoned in Sweden. National framework agreements leave more room for local level regulation.\textsuperscript{154} The Swedish labour market system is highly decentralised. Local trade unions monitor legislation and collective agreement enforcement and are responsible for negotiations and organising employee representation at the workplace level.\textsuperscript{155}

Sweden is not a member of the European monetary union (EMU) and the common currency, euro. It prefers furthering own policies in welfare issues, employment strategies included.\textsuperscript{156} There has been considerable concern in Sweden on safeguarding the Swedish model of industrial relations during the EU membership. In core the matter has concretised in implementing directives, either in the form of law or by using collective agreements.\textsuperscript{157}

In the United Kingdom, the labour market system is highly individualised. Consensus and solutions based on collaboration have not generally been favoured.\textsuperscript{158} Due to historical reasons prospects on furthering social dialogue in the United Kingdom are evaluated to be low.\textsuperscript{159} The system is sometimes called “collective laissez faire”.\textsuperscript{160} The British system has been labelled by a narrow legal framework. In regulating labour markets the significance of law has, however, increased.\textsuperscript{161} Enacted law is labelled by individual employee rights.\textsuperscript{162} Since the 1980s, collective bargaining system has been labelled by a decline in made agreements’ coverage. Only about one-third of employees are covered by collective agreements, equalling with the average union membership rate in the United Kingdom.\textsuperscript{163} Trade unions have lost space in traditional collective bargaining on salaries.\textsuperscript{164}

In the United Kingdom employment conditions are to a large extent settled individually in employment contracts. The system of collective agreements\textsuperscript{165} is decentralised, taking place at the

\textsuperscript{154} Bruun – Malmberg 2006 page 76.
\textsuperscript{155} Kauppinen page 278; Bruun – Malmberg page 101. See Industrial Relations 2006 page 75 on the role of shop stewards in Sweden.
\textsuperscript{156} Nyström page 23.
\textsuperscript{157} Bruun – Malmberg 2006 pp. 61-64.
\textsuperscript{158} Treu page 106.
\textsuperscript{159} On prospects on social dialogue in the United Kingdom see Neal pp. 493 and 501 and on central labour market organisations in the United Kingdom see \textit{ibid.} pp. 497-498.
\textsuperscript{160} Industrial Relations 2006 page 42.
\textsuperscript{161} Nyström page 62; Neal pp. 491, 494-495, 500-501 and 507.
\textsuperscript{162} Neal page 500.
\textsuperscript{163} Kauppinen page 303; Neal page 499.
\textsuperscript{164} Deakin pp. 200-201.
\textsuperscript{165} See Industrial Relations 2006 page 45.
company and workplace level. Trade unions need employer’s recognition as a basis for action.\textsuperscript{166} Employers are free to choose the recognition’s extent and nature. Recognition may concern individual representation in disagreements or negotiation in traditional sense, targeted to an agreement on pay and other employment conditions. Recognition may cover joint consultation, including involvement in business and investment planning. Collective agreements are procedural in nature, instead of substance, negotiating process being continuous in character. In the United Kingdom, collective agreements are not generally binding.\textsuperscript{167} Even national collective agreements lack legal enforcement.\textsuperscript{168}

The British decentralised system makes possible quick adaptation to economic changes by increases or decreases in needed labour force. It is also labelled by an uneven incomes distribution. Only the most successful companies have economic space to salary increases.\textsuperscript{169}

Finnish incomes policy agreements are a general framework for incomes increases. Incomes policy agreements guarantee an equal and predictable level of incomes increases. At the same time the system may work as a brake in strives to correct differences in general salary levels. Centralised agreements do not take into account branch-related aspects. Centralised agreements having long characterised especially Finnish labour markets are apt to create predictability on employment condition level and company costs in individual branches. This is applicable also with regards to the effects of labour laws. Companies may, however, use the predictability of labour costs as an incentive in making decisions on production-sites. Decentralised system makes possible quick adaptation in economic changes, increasing however unpredictability at the individual employee level.

Both in Finland and Sweden collective agreements system is characterised by the role of shop stewards as negotiators at the company level.\textsuperscript{170} The system is apt to lead to a continuous interaction between the management and labour. In a climate of trust labelled by a respect for mutual interests the system is advantageous for both of the parties. In a climate of distrust labelled by a power imbalance the end-results are apt to be the opposite ones.

\textsuperscript{166} Neal page 501.
\textsuperscript{167} Nyström page 67.
\textsuperscript{168} Sisson – Storey pp. 9-10, 189-191, 195, 197 and 203-204.
\textsuperscript{169} Kauppinen pp. 114-115, 138-139 and 300-301.
\textsuperscript{170} See ECA 2001 § 13:3 on elected representatives.
The British labour market system is labelled by low unionism, low level social dialogue and high individualism in setting employment terms and conditions. Low level social dialogue is not necessarily apt to lead to initiatives in developing employee skills, which is important in knowledge-based production.\(^{171}\) Low level unionism and high individualism in setting employment conditions may be an advantage for employers in adjusting to economic changes. The system is apt to create uneven competitive environment with regards to labour costs. From the employee perspective, these systemic features are not apt to create predictability and stability at the individual level.

5 CORPORATE FINANCE IN FINLAND, SWEDEN AND THE UNITED KINGDOM

Issues on company restructuring and management are closely connected with the structure of capital markets and corporations’ financing. The structure of capital markets is of primary importance in corporate management, referred to also as corporate governance. Corporate governance has to do with directing and managing companies in the form of authority in company matters.\(^{172}\)

There are to be found two different ways of financing corporations, forming a basis for two different ways of corporate governance. These financing models are a market-oriented dispersed one and a bank-oriented concentrated one. The dispersed model of financing and corporate governance is based on liquid securities markets, labelled by a high market transparency and disclosure standards. This model is represented by the United States and the United Kingdom. Capital is collected directly from public, claimed to lead to lower costs.\(^{173}\) Shareholders exercise their control in an indirect way, by electing representatives to boards of directors, having a monitoring role. In corporations ownership and control are separated. The managing director’s role is a crucial one. A negative feature in the system is shareholder passivity, leaving room for management’s independent action, even out of the shareholders’ will. Market-oriented model is labelled by an emphasis on shareholder value over other stakeholders’ interests, due to short-term investment policies.\(^{174} \)\(^{175}\)

In concentrated financing and corporate governance model financial institutions act as sources of financing. They are often also major shareholders. They are represented in corporations’ governing

\(^{171}\) See Grimshaw – Marchington pp. 529-531.
\(^{172}\) Timonen page 74.
\(^{173}\) Compare Ellsworth pp. 166-167 and 257-259.
\(^{175}\) Bratton – McCahery pp. 311-312.
bodies. Investment policies are long-term ones. Concentrated corporate governance system is labelled by weak securities markets with narrow transparency and disclosure standards. This model is common in the continental Europe, linked with an emphasis on stakeholder value.176

The Finnish system of corporate finance has been a bank-oriented, concentrated one. Also the Swedish model has been a bank-oriented, concentrated one. In a concentrated system takeovers are rarely carried out.177 The British system of corporate financing is labelled by a dispersed ownership. Institutional owners are primarily investment trusts and pension funds, with short-term investment policies. Due to dispersed ownership with short-term investment policies there is an emphasis on shareholder value. Also takeovers are common, especially hostile ones.178

The former fairly stiff borderlines between countries with different corporate financing systems are blurring. Changes have taken place in financial markets due to globalisation. Also changes in the EU-policies have had similar affects. For example, in Sweden ownership structure in listed companies has changed largely since the end of the 1990s. Foreign investors, largely pension funds or other institutional investors, own now over a half of the largest companies in Sweden. They have short-span investment policies. They also have a low level interest in a long-time company development. Also the character of Swedish shareowners has changed. Institutional investors have to a great extent replaced individual investors.179 These kinds of changes are taking place also in Finland.

6 EU’S ENLARGEMENT AND GLOBALISATION

6.1. EU’S INTEGRATION AND ENLARGEMENT

The EU has a unique character as a supranational actor, due to its wide supranational decision-making powers and action fields.180 In developing the EU there has been an emphasis on governmental co-operation between Member States instead of creating a federal state.181

176 Timonen pp. 63-64; Clarke – dela Rama page xxx; Pinto pp. 4 and 10; Gugler - Mueller – Yurtoglu page 26; Hinterhuber – Matzler – Pechlaner – Renzl page 130; Visentini page 229; Bratton – McCahery page 313.
177 Timonen page 64; Palm pp. 283-284.
178 Sisson – Storey page 9; Timonen page 64; Palm pp. 283-284.
179 See SOU 2001:1 pp. 22-23.
180 Jääskinen page 328.
181 Raitio page 66.
Since 1960s there has been in Europe a worry over American corporations´ increasing influence in the European markets, affecting EU-policies.\textsuperscript{182} The EU is one of the largest economic actors in global trade, together with the United States and Japan. The EU has a primacy in the world export. It is ranked the second in imports after the United States.\textsuperscript{183}

The EU´s status in global trade is based on its common trade policy with common customs tariff, including the integration of Member State trade policies and the Union´s autonomy in these fields.\textsuperscript{184} The EU has also competence in budget and monetary policies in relation to its Member States. On the basis of the Economic and Monetary Union, the EMU, the Member States are to further budget policies targeted to avoid budget deficits. They are also to stabilise price levels. The European Central Bank determines the level of interest rates, and the Commission gives general guidelines on economic policy.\textsuperscript{185} \textsuperscript{186}

The EMU does not have as such direct effects on social and labour law policies at the Member State level. The EMU with its Stability and Growth Pact sets however limits to national level economic space by constraining national expenditure and budget deficits. This naturally affects welfare inputs. Economic policies are a matter of common concern within the EU.\textsuperscript{187}

In addition to the EU´s affects at the national level economies in the EU of now 27 Member States,\textsuperscript{188} differences in labour costs and taxation levels between the former and new Member States are matters worth of attention. Differences act as incentives in corporate investment decisions. Living standards and speed of economic progress differentiate remarkably in individual Member States. There are also remarkable differences between the old and new Member States with regards to labour market systems. As a high level generalisation the former Member States are said to be characterised by a negotiating system taking place at the union level, the new ones are said to be characterised by a negotiating system taking place at the corporate or workplace level.\textsuperscript{189} In spite of the dangers involved in generalisations, differences in negotiating and labour market systems

\textsuperscript{182} SOU 1992:83 page 313.
\textsuperscript{183} Jääskinen page 211.
\textsuperscript{184} Joutsamo – Aalto – Kaila – Maunu pp. 768-810.
\textsuperscript{185} Kauppinen page 68.
\textsuperscript{186} Jääskinen pp. 102-103; Joutsamo – Aalto – Kaila – Maunu pp. 758-764; See Jääskinen pp. 188-194 on the EMU. See Raitio 2007 pp. 252-254 a summary of the European Communities’ development to the EU.
\textsuperscript{187} Jääskinen pp. 192-194.
\textsuperscript{188} On the EU’s enlargement see Jääskinen pp. 57-60 and on preconditions for ascencion \textit{ibid.} pp. 60-61.
\textsuperscript{189} Raitio pp. 1 and 9; Raitio 2007 page 251; See Raitio pp. 74-76 on the EMU; Barnard pp. 20 and 128-132; Kauppinen pp. 317-323 and 327; Eilavaara pp. 334-335.
between the Member States are a fact. All these factors are apt to cause tensions between the Member States, affecting directly cohesion in the EU and its development.

6.2. CHARACTERISTIC FEATURES OF GLOBALISATION

Globalisation is a term not having a legal definition. Globalisation’s definition, grounds, dimensions and consequences have been widely discussed in social sciences. Globalisation is a central factor in defining the present research’s sphere, due to its consequences at the nation state level.

With globalisation one can refer only to an economic process. Globalisation can be defined to cover a wider scope of issues, economy being only a part of those. The widest definition of globalisation covers into addition to economy also environmental issues, labour market, production outputs, information, culture and civil society including dissemination of values, referring to human rights and trade values.190

A central feature in globalisation is its facilitating cross-border free movement of capital, production, knowledge and people. It forms a basis for integration of countries, peoples and national economies, leading to a mutual interdependence. This is facilitated by a reduction in communication and transportation costs. Mutual economic interdependency191 has as its side-effect a threat of vulnerability due to sudden economic shocks.192 Also short investment-spans increase vulnerability. In the 1960s, American pension funds193 made investments for approximately 46 months. In 2000, this span was only 3.8 months. Measures to estimate profitability have changed. Paid dividends have been replaced by changes in share exchange rates. All these capital market changes have affected changes in business organisations, which are dynamic and flexible webs.194 Corporations are not organised on production. They are primarily organised on the basis of economic decision-making at monetary market, to increase shareholder value. A corporation’s financial performance is not based on its fundamental value or by production markets. Crucial is remuneration expected by shareholders.195

190 Beck page 19; Mozaffari pp. 24-25; Fliaster – Marr page 247.
191 Beck page 47.
193 See Drucker pp. 5-16 on the development of the American pension funds.
194 Sennett 2007 pp. 42-43; See Monks on the institutional investors pp. 80-84.
Information technology’s development has given rise to a new model of society, information society. It is characterised by knowledge generation and information processing.\(^{196}\) This has facilitated a change in company strategies. They have become international and transnational in character. The change in company strategies, having facilitated an organisational change to elastic nets,\(^{197}\) has resulted in the creation of a network society. Network society is another concept used in describing information society, featured by a possibility to a simultaneous communication all over the world.\(^{198}\)

There is a wide acceptance on key characteristics of globalisation. It is characterised by liberalisation and expansion of international trade covering industry and services, expansion of foreign direct investments having led to a cross-border finance and heavy global market competition. These development trends have been facilitated by deregulation on economic transactions\(^{199}\) and technological change.\(^{200}\)

Globalisation is facilitated by institutional changes. Since 1995 the World Trade Organisation (WTO), as the successor of GATT (founded in 1947), has as its target to increase and supervise world trade liberalisation. Since its founding, the WTO has been evaluated as a strong catalyst in accelerating the globalisation process.\(^{201}\)

World trade has increased since the 1980s. Qualitative changes have also taken place. Production process has been broken up into parts and located into different countries, having led to disintegration in production.\(^{202}\) A new global division of industrialised work has arisen. Jobs and capital are transferred to areas with lower production costs instead of the West-European countries and the United States. In this context one can also speak of internationalisation. There are about 60,000 international corporations having 500,000 subsidiaries. According to another estimate, the number of multinational corporations is 65,000, with 850,000 affiliates.\(^{203}\) Most of the worldwide business takes place between these corporations. Globalisation is also labelled by intra-company

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196 Castells – Himanen page 1. In the EU-context Jääskinen page 186, Liukkunen page 27.
197 See also Treu page 109.
199 See Alvesalo - Ervasti page 63 on deregulation, referring to flexibilisation in regulation. It may be defined to cover increase in the quality of law.
200 The World Commission pp. 24 – 35; Weston – Siu – Johnson page 3; Porter page 690.
201 Raitio page 96; Ståhle – Grönroos page 31.
203 Milberg page 59.
Irrespective of the high increase in corporations’ trans-national activities, intra-firm trade has remained fairly stable during the last 25 years.\textsuperscript{205}

Production transfers to other countries or continents on the basis of foreign direct investment and company restructuring have been reviewed to be good for national economy, but only on one condition: transfers have to concern unproductive branches. This not being the case, the trend is undesirable and in the long run even devastating for national economies in losing competitive production.\textsuperscript{206}

The concept of state in its various forms has evolved within time. The state in its modern form is a creation of the 15\textsuperscript{th}–17\textsuperscript{th} centuries. A nation state is the creation of primarily of the 19\textsuperscript{th} century. The welfare state is the creation of the 20\textsuperscript{th} century. Traditionally states are characterised as sovereign and equal in relation to each other. States have an exclusive jurisdiction and authority over individuals and juristic persons in their respective territories. They have a power to enforce governmental power. Their mutual relations are organised on international law principles and rules and characterised by non-intervention. States can limit their sovereignty by mutual arrangements. The EU as a supra-national form of co-operation is a form of limiting sovereignty, but only in areas and to an extent specially agreed upon by Member State consent. Into addition to the EU, globalisation process has increased other regional forms of co-operation in other parts of the world.\textsuperscript{207, 208}

A nation state is fixed and tied to its own territory. In the era of globalisation capital is however genuinely global. It is not exaggeration to claim that the new global economy has power to challenge the basics of the above-mentioned traditional forms of state.\textsuperscript{209} New global economy has a power to challenge state equality.\textsuperscript{210} This takes place by actions of individual economic actors, through firm-specific choices on investment, production and tax sites. This is due to trans-national corporations’ economic power.\textsuperscript{211} When under examination are taken the 100 largest economic

\textsuperscript{204} Beck 2005 pp. 21 and 155; Mozaffari page 36.
\textsuperscript{205} Milberg page 65, the estimate being based on statistical data in the United States, Japan and Sweden. In the United States, the share of intra-firm trade has been about 35 per cent for exports and 42 per cent for imports since the late 1970s. The statistics confirm also qualitative changes in the world trade system. Instead of expanding own production, multinational corporations prefer disintegration of production chains, for example, by outsourcing.
\textsuperscript{206} Porter page 689.
\textsuperscript{207} Mousseau page 107; Raitio page 96.
\textsuperscript{208} Hakapää pp. 3-4, 8, 67 and 188; Cassese pp. 48-53 and 83; Beck 2005 page 87.
\textsuperscript{209} See Beck 2000 pp. 18-20 and 26-27.
\textsuperscript{210} See Dine pp. 72-76.
\textsuperscript{211} Compare Berle – Means page 357 and see Hakapää pp. 6-7.
entities in the world, of those about 50 are nation states and the rest half consists of corporations, the total amount of states being about 200.\footnote{Dhanarajan page 27; Cassese page 4.} Corporate investment decisions are closely linked with national politics and economy, having far-reaching effects on individual nation state economies and social integration within states, due to increasing unemployment at the local level.\footnote{Meinander pp. 240-241; The World Commission page 46; Beck pp. 2-4; 7, 50 and 96-97; Beck 2005 page 150; Mozaffari page 37; Mousseau pp. 107-108.} There is to be perceived to be an asymmetry in the power balance between nation-states and corporations.\footnote{Beck 2005 page 127.}

The seemingly unified action of individual multinational corporations on investments is not necessarily intentional. Total effects result from numerous individual decisions at the corporate level, making decisions in fact in character political due to their consequences at the nation state level. In the core of corporation decision-making are investment decisions. A decision not to invest in an individual country is referred to as an option to exit. The use of this option increases corporations’ independence from individual states and increases competition between states on investments.\footnote{Beck 2005 pp. 15, 52-53, 117, 125, 128 and 138.}

The change in corporations’ organising principles is related with treatment of human labour. In neoclassical economics human labour is treated as a production factor, merely a commodity. Output is described as a function of inputs, be these machines, financial resources or labour. In this evaluation labours human aspect is neglected, if not even forgotten. Without attention is left two central aspects related only to human beings. These aspects have to do with well-being, both mental and physical, and motivational factors, completely unknown with other production factors. Motivational factors are linked with information imperfections, affecting economic and productive outcomes. Important in this sense are information asymmetries, leading to imperfect competition, affecting corporations’ general economic and financial status. Information asymmetries affect also bargaining power, having to do with employees’ status.\footnote{Stiglitz 2007 pp. 410-411.} In this model of thinking economic development is equated with progress. Needs for security at the personal level are largely forgotten.\footnote{Supiot page 515.}
Globalisation has challenged one of the leading principles of social development since the beginning of industrialisation. This has to do with works transforming nature. Since the beginning of industrialisation work has been considered as a means of social progress and change, with a capability to transform society. Due to globalisation the relation between paid work and development is now under reconsideration.218

Capital market liberalisation has increased corporations’ bargaining power. In the present era capital market liberalisation and demands on labour market flexibilisation have largely gone hand in hand. These two politics may seem to be symmetrical. In practise this is not the case, due to consequences. These politics’ consequences are asymmetric. As an end result, corporate welfare and significance seems to be increasing, at the cost of employees.219 Corporate welfare and significance seems to be increasing at the cost of the society as a whole, too. 220

6.3. NEW WAYS OF ORGANISING WORK

Traditionally an employment contract has been considered as a governance mechanism. It has been targeted managing of economic and social risks in a long-time perspective. It has linked an organisation with a supply of work. Labour law has set rules governing individual employment contracts, limiting employers’ decision-making. Labour law has to do with organising of an enterprise and actual work done in it, in fact with different power relations. Traditionally state has acted as a party in this context with its central nation state powers of legislation and taxation.221

Employment contract has been based on a model of a linear and homogenous career development, continuing from the end of schooling up to the beginning of retirement.222 Up to the mid-1970s employment relationships in different European countries were mostly regulated on the basis of employment contracts agreed upon for an indefinite period on a full-time basis. An employment agreement agreed upon for life common in the public sector was a kind of an ideal also in the private sector.223 This traditional view established in the era of industrialisation is now challenged, due to changes in investment and production markets.

218 Foucauld page 599.
219 Stiglitz 2007 pp. 413 and 418.
220 See Beck 2000 page 19.
221 Deakin pp. 191 and 193; Morin page 359.
222 Bollé 2002 page 500.
223 Treu page 107.
Investment decisions affect directly the demand of labour, its quantity, quality, employment conditions and investments in research and development and training and education. Largely these effects are due to changed premises underlining ways of organising work. The key concept is flexibility.\textsuperscript{224}

Since the 1990s, precarious forms of work have increased, such as fixed-time and part-time contracts, hired workers, self-employment and subcontracting,\textsuperscript{225} increasing insecurity at the individual level. All these employment forms emphasise works temporary character. Their increase is affected by ways of organising work. Increase in precarious forms of work has led to a division in the labour market to a core and periphery. The core is labelled by employment contracts in force for an indefinite period. The periphery is labelled with different forms of precarious work.\textsuperscript{226}

The division in the labour market has also been defined by using a concept of groups. There are insiders with permanent employment and stable employment conditions and another group of outsiders. This includes temporary and casual workforce and unemployed with insecure living prospects.\textsuperscript{227} Increase in precarious forms of work emphasise the secondary role attached to a company and, generally, organisational long-time development.\textsuperscript{228}

\textsuperscript{224} Flexibility is closely connected with company restructuring. Flexibility has to do with costs borne by companies, protection afforded to employees and society as a whole. Ultimately, flexibility gets its forms and shape in legislation and collective agreements. Compare Berle – Means page 356.

The concept of flexibility has a wide scope of application. It can refer to numerical or external flexibility. It has to do with employers’ decision-making on the size of workforce and character of employment contracts for an indefinite period or for a fixed-time or on a part-time basis, see Treu pp. 104, 111 and 116. Numerical flexibility is connected with employment protection, especially with dismissals protection, which can be found in all the European labour law systems, see Treu page 105.

See Treu pp. 109-114 on functional flexibility, having to do with a company’s internal organisation of labour. It covers a division of labour and internal ways of organising production. The primary goal is the best possible and most functional use of resources. Internal flexibility covers team work, job enlargement, reduction of job demarcation and use of new human resource management practises of selection, training and performance appraisal. Also disintegration in production chains can be included, for example, by using subcontracting. Flexibility is used in arranging working-time and pay-systems.

On flexibility see also Industrial Relations 2006 page 15, emphasising the role of governments and employers in facilitating entry and exit to labour markets, and more in detail on different forms of flexibility \textit{ibid.} pp. 96 and 135-144.

\textsuperscript{225} Sennett 2007 pp. 50-52; See ECA 2001 §§ 1:3.2 on fixed-term contracts, 2:5.1 on increasing working-time in a part-time contract and 2:9 on determing employment conditions with regards to hired employees.

\textsuperscript{226} Treu pp. 107-108; Ichino pp. 431-432. See Työvoiman vuokraus Suomessa 2005 pp. 3-4 on increase of hired employees in Finland; in 2000, there being about 40,000 hired employees, amounting in 1999-2000 to about 1-2 per cent of the workforce; in 2005, 103,000, amounting to 4 per cent of the workforce.

\textsuperscript{227} Ichino page 432.

\textsuperscript{228} Sennett 2007 page 51.
Investment decisions are linked with labour market, being local in character. Investment decisions have a crucial role in work and income distribution. In addition to affecting labour markets in general, they affect labour market bargaining system in its present national level form. Globalisation has led to labour market transnationalisation. Transnational corporations have a remarkable role as employers. There is thus interdependence between transnational and national levels in relation to labour markets, setting of employment conditions and ways of supplying work.

New technology facilitates organisational change. Following-up of production, sells and employees is a constant process. Constant following-up is emphasised by targets on production and sells. Targets are ever increasing and often measured overestimating available personnel capacity. Time span between managerial decision-making and its actual carrying out in production procedures is shortened dramatically. In the 1960s, in the American car industry the time-span was about five months. At the moment, it is about five weeks.

Specialisation in production is emphasised. Companies seek to supply consumer demands with a greater amount of more specialised products in an ever speeding pace. Requirements on quality, training qualifications and delivery deadlines all affect employment conditions.

Efficiency in production is emphasised. There is a constant threat of cuts in the workforce. In Finland in 2004–2008, the number of employees under negotiations on workforce reductions has varied from 20,000–58,000. The number of dismissed has varied from about 2,000–7,800 at that time. Employee reductions or even a threat of them decreases trust, severing employee motivational ties with an employer. As a general rule mistrust reduces productivity. The end-result is the very opposite to the goal of efficiency.

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229 Compare Ichino page 431.
231 Sennett 2007 page 45.
232 Castells – Himanen page 22.
233 Morin page 364.
235 Robbins – Judge page 445. See also Elkington page 85 on trust.
The demand on increased efficiency has decreased the status of experience. This leads to a tendency of shortening active time at work, evaluated from life-long perspective.\textsuperscript{236}

Efficiency highlights adaptability, communicative skills and continuous willingness to renew work-motivation.\textsuperscript{237} In teams work is actually process-like, being labelled by constant organisational changes, making impossible to create emotional ties with an organisation and its members.\textsuperscript{238} Also, a career development as a specialist in a work labelled by temporarity is difficult, in practise even impossible. In team work immediate measurable results are of primary significance. The long-term efficiency has only a secondary role to play.\textsuperscript{239}

Team work distorts power-relations. By highlighting team’s responsibility and importance in getting results and team members’ equality with the management, the gap in the factual power-relations is hidden. Basically the issue has to do with corporate governance. In this context the concept of efficiency is highly political. Basically the concept of efficiency refers to ways of organising social life, either under the Anglo-American model or under the model based on civil society, common in many European countries.\textsuperscript{240}

In new organisations different forms of social capital are apt to become decreased. During recession and business changes a high level of loyalty is, however, of special importance. Its creation is based on trust, taking time. Creation of loyalty has to do with ways of using working time, emphasis nowadays not being in organisation’s lifecycle. The Japanese system is, however, based on seniority and long-time relationships.\textsuperscript{241} Changes in corporate structures have narrowed management’s decision-making powers. Often the management is not allowed to carry responsibility in company matters in a long-standing manner, investors looking for short-span results. Modern companies are labelled by a lack of trust and institutionalised loyalty.\textsuperscript{242}

In the present era of globalisation a lot of work is still locally tied due to its character. Characteristic to locally tied work often in the form of services is its focus on people and to a large extent on

\textsuperscript{236} See Sennett 2007 pp. 90-94; Sennett 96-103.
\textsuperscript{237} Boissonnat page 556.
\textsuperscript{238} Sennett 2007 page 115.
\textsuperscript{239} Sennett 2007 pp. 51 and 53; Sennett page 118.
\textsuperscript{240} Sennett pp. 113-124; On the situation in Finland see Siltala and on employees’ opinions on the state of the Finnish labour market see Työmarkkinailmastotutkimus 2007 pp. 30-33.
\textsuperscript{242} Sennett 2007 pp. 69-70 and 78; Compare with Ellsworth page 1.
know-how. Changes in trade structure affect the demand of locally tied work. In Finland, agriculture and industry are decreasing sectors being supplemented by an increase in the demand of services. Locally tied services cover care and treatment, security, training and education, culture, social sector and repairs. Among the factors increasing the demand on locally tied services are, among the others, a general increase in the living standard, population ageing and demands on training and education. But the locally tied services are not immune to factors characterising ways of organising work in the era of globalisation. Efficiency with regards to number of employees allocated to work and resulting in costs, flexible division of labour and capital profits are emphasised. Locally tied work has often to do with any society’s fundamental values and tasks, being in that sense indispensable.

6.4. SOCIOLOGICAL PERSPECTIVES

The first modernity of industrialisation was labelled by the Fordist regime of mass production and consumption, based on full employment. Basic underlining ideas were homogenisation and standardisation. In sociology the present era is described as postmodernism. The concept refers to a shift from permanence of institutions and different forms of social life to a continuous change. Postmodernism is labelled by unbalance and insecurity in social development. It is labelled by a lost faith in social development’s continuance.

The present phase of social development is also called the risk-society. The concept refers to a form of a society collectively unable to respond to challenges posed by a society’s transformation in social, political and economic fields. People are left drifting at their own. Risks are ultimately carried out at the individual level. The risk-society’s characteristic features are increased by periods of sudden economic growths and falls labelling information society. The dynamics of risk-society produce collective problems especially in working-life. Tools of industrialised society only poorly respond to these.

243 Lehto page 48.
244 Työvoima 2025 pp. 84, 87, 91-92, 120, 123-125 and 131-135; Julkunen page 57. See Helsingin Sanomat 30.6.2007.
245 Glavå 1999 page 676.
246 Foucauld page 600.
The basic challenge of the risk society has to do with resources to bear the risks. There is a huge difference between the resources available to corporations compared to individuals, even between corporations compared to nation states with regards to risk-bearing in social crises. As examples can be mentioned organising re-training, re-education and re-employment.

Changes and trends connected with globalisation and increased competition can also be defined by using a concept of transition. Transition is global or systemic in character when a country’s labour market or employment policy is affected as a whole. Also unemployment, inequality, poverty and population ageing are factors causing systemic transitions. The present era is generally called “the Era of Transformation”. This is due to the welfare state’s disintegration in the Western European countries since the 1990s. The disintegration process has largely been accelerated by systemic transitions taking place due to globalisation. From an individual point of view worrying in the ongoing process is its length. The ongoing change may take a generation or even more.

There seems to be a general confusion on the direction of needed solutions. This is increased by decrease in capacity to innovate socially. Solutions have to do with political decision-making. Traditionally democracy is conceived to take place by parties and representatives. They have a transmitting role in political processes, being in character negotiation, not production in a corporation-like sense. The new phenomena of the second modernity challenge the traditional concept of democracy, too. This is linked with state’s new role, emphasising individual responsibility, thus denying state’s traditional responsibility of its own citizens. This is apt to still further the effects of the risk-society, due to differences in available resources.

6.5. PORTER’S COMPETITION MODEL – EMPHASIS ON INNOVATION AND COMMITMENT

Companies have an important role in wealth-creation. In any Western society they are main creators of wealth. To achieve economic efficiency, companies have to take into account in their activities the impact of their actions on employees and communities, into addition to environment.
It is important to evaluate companies’ actions due to their social and economic role, resulting from creating competitive advantage.

Michael E. Porter’s research is focused on corporations’ and different nations’ competitiveness.²⁵⁷ According to Porter, any nation’s primary economic goal is to produce to its citizens a high and rising living standard. This goal’s achievement depends on capital’s and labour’s productivity, affecting national income per person. Productivity at the national level facilitates employee high-salary levels, investor high-profits levels and a high level of national income, needed for financing public services and benefits. High productivity is an essential precondition in enforcing law on safety and health, environment and equal opportunities, creating space for financing these areas. Productivity development presupposes continuous development in economic sector at corporate level. In creating competitive advantage corporations need to understand the importance of commitment on continuous human resources development and long-standing employment relationships.²⁵⁸ Productivity determines the price level of products and services, depending ultimately on their quality and production chain’s efficiency. At the national level, productivity presupposes continuous development at the economic sector. At the nation state level, there is a need to specialise in areas in which a nation’s relative productivity is higher compared to other countries. Productivity level is ultimately set by international competition. To be able to compete at the national level successfully, corporations need abilities to compete also internationally.²⁵⁹

In traditional thinking, companies’ competitive advantage in different branches is created by lower costs compared to competitors. Another means to achieve competitive advantage is by product differentiation. This refers to products’ unique value, depending on products’ quality and characters. Production differentiation presupposes dynamism in competition and an anticipatory approach based on continuous innovation²⁶⁰ and change.²⁶¹ New products and processes are used to increase profit levels. According to Porter, competitive advantage is found in branches, where shareholders and employees have developed a long-standing commitment on company and branch in question²⁶²,²⁶³.

²⁵⁷ Porter pp. 31-33.
²⁵⁸ Porter page 657; See also Hyvinvointi versoo tuottavuudesta page 12.
²⁶⁰ On innovations as productivity source see also Castells – Himanen pp. 46-47, referring to innovations in products, processes and organisations based on educated people, functioning financing system and creativity, this in its turn being based on innovative culture.
²⁶¹ See also Hyvinvointi versoo tuottavuudesta page 14.
²⁶² Porter page 164.
²⁶³ Porter pp. 41 and 83-87.
Into addition to continuous human resources development another crucial factor in developing competitive advantage is permanent employment. Instead of atypical workforce and dismissals, corporations should avoid dismissals and have policies on permanent employment relationships and skills development by training, education and transfers to new jobs.\textsuperscript{264} In carrying out opposite policies corporations in fact act against their very best in the long run.

A corporation’s competitive advantage is dependent on its value chain. This is interlinked with its different parts and value system, including clients, suppliers and distributors. The system is wholly interlinked. There is a total mutual interdependency. It creates added value for a client. Costs levels are of importance, but from another perspective compared with the traditional model. Competitive advantage is created by innovation. It is based on a global strategy of continuous betterments. This presupposes investments in human resources in the form of specialised skills and know-how. Cost level is not a matter \textit{per se}, but lower costs are due to an ideal functioning of the whole production chain and value system in relation to every player.\textsuperscript{265}

In addition to especially the international strategies of multinational corporations, the third important factor in creating competitive advantage is the home base. This refers to a nation state in which a corporation creates its strategy, core products and production processes. Corporation’s home base and profit level are essential in creating national income, profiting national economy as a whole. Corporation’s home base supplies skilled workforce, infrastructure, higher education and scientific knowledge, suppliers and at least a part of actual demand. Competitive advantage is created by joining a nation’s environmental and a corporation’s strategic goals. There is a strong interaction between politics and economics, the relationship between government and business being a strong one.\textsuperscript{266} The time perspective in creating competitive advantage is long. It takes years, even decades, demanding continuous environmental analysis. In this process both state and corporate actions are needed, process being mutually reinforcing. State actions have to do with different fields of politics, also these being mutually reinforcing. State actions have especially to do with inputs in workforce quality based on education, science and infrastructure, targeted to high standards in each field. State actions based on static competitive model and targeted to short-term competitive advantages are a serious mistake from the long-time perspective. State actions should

\textsuperscript{264} Porter page 657.
\textsuperscript{265} Porter pp. 77-83 and 648-655.
\textsuperscript{266} Villiers 1998 page 197.
be targeted to create corporations room in developing innovative policies. Corporations should respond to this by committing themselves in a standing manner to workforce, the corporate itself and the branch. There is thus a real contradiction between state and corporate actions, if the latter transfer productive production fields outside the home base.

In addition to the United States and the United Kingdom, also in Sweden there is a trend to underestimate the significance of home base. In the United States and the United Kingdom, there is also a reluctance to invest in human resources. This is grounded by a free-rider problem, referring to skilled employee voluntary departure after know-how development. Underestimation of human resources and home base’s significance reflects static competitive model, in the long run weakening competitive advantage at the national and corporate level. Labour market parties have a common challenge in changing course of action, by fostering and facilitating improvement of skills.

Porter’s competitive advantage model equals with one of the models expressed as a response to problems posed by the present second modernism. This has to do with the craftsmen’s attitude, denoting to loyalty, commitment and a willingness to do matters well for their own sake, due to attached values.

6.6. ELLSWORTH ON SHAREHOLDER VALUE MAXIMISATION AND CUSTOMER-BASED PURPOSE

Due to globalisation company actions’ legitimacy has been taken under consideration. Legitimacy has to do with a company purpose and company’s responsibility in its actions. Companies are society’s creation. Company actions’ legitimacy is ultimately tested on the basis of their social benefits at large.

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267 Porter pp. 689-715 and 826.
268 See Elkington page 315.
269 See page 735.
270 Compare with Sennett 2007 pp. 42-43 on American pension funds’ short investment spans. From the employee perspective, this forms a free-rider problem, by braking long-term company development.
274 Ellsworth pp. 29 and 145; See Toiviainen page 166 on the interest of public power with regards to limited companies. Public power has economic interests due to a right of levying taxes. It co-ordinates society’s interest as a whole, among others things, by regulating competition, business activities generally and environmental issues in addition to by furthering employment and citizens’ general well-being.
Company purpose is crucial for any company’s development, in sustaining competitive advantage.\textsuperscript{275} Company purpose expresses the reason for a company’s existence.\textsuperscript{276} It should also be an end to which a company’s strategy is directed.\textsuperscript{277} Company purpose directly affects coherence of decisions with strategic character. It also affects direction of developing core competencies.\textsuperscript{278} Without doubt the most common – or at least one of the most common – company purpose is shareholder value maximisation.\textsuperscript{279}

Former sources of competitive advantage were capital and labour costs. These have been largely replaced by knowledge, its creation and management.\textsuperscript{280, 281} The development is largely furthered by globalisation.\textsuperscript{282} Essential in creating competitive advantage are quality of workforce and management. In order to achieve outstanding and sustainable competitive advantage, companies have to apply the full intellectual capability of employees.\textsuperscript{283} The focus on knowledge as the source of competitive advantage increases the importance of individual employees’ commitment, initiative, creativity and loyalty.\textsuperscript{284, 285} Knowledge-based competitive advantage has clearly made employees core assets in any company.\textsuperscript{286} These aspects in turn bring to the agenda the importance of trust, its creation and maintenance in company/employee relationship,\textsuperscript{287} and employee/shareholder relationship.

Knowledge in its most sustainable form is not easy to migrate from an organisation to another. Knowledge may be protected by legal devices, using patents. Another way of protecting knowledge takes place by infusing it in an organisation’s social structure. Knowledge is possessed by employees collectively. A group as a whole knows more than any one of its individual members.\textsuperscript{288}

\begin{flushright}
\textsuperscript{275} Ellsworth page 18.
\textsuperscript{276} Ellsworth page 29.
\textsuperscript{277} Ellsworth Preface page xii.
\textsuperscript{278} Ellsworth page 109.
\textsuperscript{279} Ellsworth Preface page x, using the term shareholder wealth maximisation.
\textsuperscript{280} Ellsworth pp. 51 and 183.
\textsuperscript{281} Ellsworth pp. 10-12 and 145.
\textsuperscript{282} Ellsworth page 1.
\textsuperscript{283} Ellsworth page 51.
\textsuperscript{284} Ellsworth page 13; See also ibid. page 125.
\textsuperscript{285} Ellsworth pp. 65-67 and 235.
\textsuperscript{286} Ellsworth page 221.
\textsuperscript{287} See Robbins – Judge pp. 444-445.
\textsuperscript{288} Ellsworth page 12.
\end{flushright}
Shareholder value maximisation as a company purpose holds capital as the primary source of competitive advantage, instead of knowledge.\textsuperscript{289} This is the main line of thinking especially in the United States and the United Kingdom.\textsuperscript{290} But economics has shown that social welfare is not maximised in profit-maximising. In order to achieve economic efficiency, companies have to take into account the impact of their actions on employees, communities and the environment.\textsuperscript{291}

By furthering the purpose of shareholder value maximisation, companies, in fact, subordinate customer and employee interests to shareholder interests. Shareholder value maximisation leads in company actions focusing on capital markets. Irrespective of the purpose of shareholder value maximisation strategies may, however, be focused on products markets. Focusing on shareholder value maximisation puts often employee values at the secondary place. Divisions between the company purpose of maximising shareholder value and a strategy targeted to provide customers added-value on the basis of long-term competitive advantage is apt to lead to an internal conflict in a company, due to emphasis on financial results instead of product-market.\textsuperscript{292, 293} Internal conflict is shown in choices on functional policies and sub-unit strategies on product development, operations, marketing and human resources. It is also shown in decisions on specific goals.\textsuperscript{294} This causes also a conflict of interests between different constituents.\textsuperscript{295}

Shareholder value maximisation is commonly grounded with ownership rights.\textsuperscript{296} Ownership grounds have been valid reasons in the early 19\textsuperscript{th} century and may still be in the case of family- and related share-ownership.\textsuperscript{297} Present share ownership is generally dispersed in nature.\textsuperscript{298} Primarily it takes place by pension funds and other institutional investors with short investment-spans. Taking also into account lack of shareholders’ personal responsibility, ownership rights as grounds for a company purpose of shareholder value maximisation may well be questioned.\textsuperscript{299} In a business environment of dispersed share ownership shareholder value maximisation as a company purpose is

\textsuperscript{289} Ellsworth page 55.
\textsuperscript{290} Ellsworth pp. 145 and 243. See CA 2006 BR Part 10 Chapter 2 172 on directors’ duties, who in promoting success of the company for the benefits of its members must have regard to the interests of the company’s employees. See also Explanatory notes page 50 on enlightened shareholder value.
\textsuperscript{291} Stiglitz pp. 190 and 203. See also Elkington pp. 73-94.
\textsuperscript{292} Ellsworth page 94.
\textsuperscript{293} Ellsworth Preface page x.
\textsuperscript{294} Ellsworth page 105.
\textsuperscript{295} Ellsworth page 136.
\textsuperscript{296} Ellsworth page 113; See Dine pp. 257 and 263.
\textsuperscript{297} Compare with Toiviainen page 171 and Berle – Means pp. 346-347.
\textsuperscript{298} Clarke – dela Rama page xxix.
\textsuperscript{299} Ellsworth pp. 54, 154, 178-179, 183, 219 and 224.
apt to increase senior manager and managing director independence, if shareholders lack effective controlling mechanisms or willingness to use them.\textsuperscript{300}

Furthering of shareholder value maximisation as a company purpose is facilitated by used accounting methods. Profits and investment returns are partial and inadequate means to reflect a company’s ability to create value. Traditional accounting methods treat other sources of value creation, especially those linked with employee core competence development or environment, mainly either current period costs or reductions in revenues, neglecting investment perspective.\textsuperscript{301} This is applicable also with regards to customer loyalty inherent in brand loyalty.\textsuperscript{302} In this context also the term “economic” is worth of taking under consideration. In traditional shareholder-focused thinking, maximising returns to capital is generally considered to be economic. Employment maximising or returns to labour are not held economic.\textsuperscript{303}

The mere furthering of shareholder value maximisation is apt to shrink a company’s role. Any one company’s value-creation has consequences extending outside its shareholders’ sphere. The furthering of a shareholder-based company purpose is apt to neglect customer expectations and their role in a company’s long-term success. Employee expectations on incomes and security may also be neglected. The consequences of company activities largely affect also surrounding communities.\textsuperscript{304}

A company purpose has a moral dimension, being intertwined with competitive advantage. From the employee point of view, shareholder value maximisation lacks ability to energise employees by bringing meaning to work.\textsuperscript{305}

Irrespective of shareholder value maximisation, company leaders largely know that the fundamental purpose for any company’s existence is providing value to customers. This purpose is also a key to outstanding performance.\textsuperscript{306} Customer-based purpose, followed by attending employees’ needs\textsuperscript{307} links strategically important needs of focusing on product-markets\textsuperscript{308} and employees’ well-being in

\textsuperscript{300} Ellsworth page 55.
\textsuperscript{301} Ellsworth page 31; See Hyvinvointi versoo tuottavuudesta page 14.
\textsuperscript{302} Ellsworth pp. 123-124.
\textsuperscript{303} Dore page 69 compared with Ellsworth page 321.
\textsuperscript{304} Ellsworth page 4.
\textsuperscript{305} Ellsworth pp. 3-4.
\textsuperscript{306} Ellsworth page 1.
\textsuperscript{307} Ellsworth page 225.
\textsuperscript{308} Ellsworth pp. 15 and 19.
global markets. Customer-based purpose provides an organisational focus. It helps to focus on developing competitive advantage. It links together purpose, strategy, goals, shared values and processes to carry out all these. Customer-based purpose has also motivational meaning. It is apt to motivate managers to create company’s total value for a large sphere of constituents, outside only shareholders. It is apt to motivate employees to knowledge creation, creating meaning in work. From a community perspective, it is apt to enhance company action’s legitimacy.

Customer-based company purpose provides for shareholders long-term returns in a more secure and profitable way compared with a purpose of shareholder value maximisation. This is due to the purpose’s consequences on strategy, management and employee motivation. Customer-based company purpose links practical business needs, moral values and legitimacy.

Companies with remarkable value-creation usually focus on customers, secondly on employees. If employees are granted this kind of a priority, it usually leads to willingness to invest in their development. This, in turn, results in increased creativeness, inputs and commitment.

In a globalised business a customer-based purpose has ability to transfer national borders. Generally only purposes of serving the society, employees or customers have this kind of ability.

An employee-based purpose is not necessarily advantageous for a company in a long-run. At its worst it may degenerate to complacency, replacing innovativeness. It may also internalise the focus of company actions. Instead of product-markets, the focus may be set on internal processes, threatening in the long-run the very existence of a company. Employee perspective is however important and cannot be neglected evaluating a company-purpose. Ultimately, employees bear the greatest risks of company actions. The risks have to do with health, both personal and environmental. They have to do with incomes, social relationships and personal growth. A loss of a job cuts options on a secure income, social relationships and personal growth, at least temporarily.

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309 Ellsworth page 40.
310 Ellsworth page 95.
311 Ellsworth page 93.
312 Ellsworth page 19.
313 Ellsworth pp. 45 and 125.
314 Ellsworth page 6. See also ibid. pp. 279 and 302.
316 Ellsworth page 110.
317 Ellsworth page 47.
318 Ellsworth page 44.
319 Ellsworth page 51.
Unlike shareholders, employees cannot easily diversify their production-inputs. They are more closely tied to their communities and present employers. Employee risks are still furthered on a daily basis by demands on contribution and accountability for performance.

Capital markets are sources of finance, but the long-term competitive advantage is determined in product-markets. Company’s purpose, employee commitment and an ability to create knowledge and maintain it are inseparable for individual companies’ success. Success is ultimately measured by growth, this in its turn providing to employees options to advancement and work, into addition to customer satisfaction. Customer-based purpose is apt to change an organisation’s character. Anticipation of customer needs makes an organisation a proactive one. This puts focus on employee development and organisational learning to guarantee company’s further success.

In a company with a purpose of shareholder value maximisation profits are often treated as a measure of serving this end. With a customer-based purpose, profits’ character is apt to change. They are more easily seen as a means to finance company actions to increase its competitiveness in a long-time perspective. Competitiveness and shareholder value maximisation in a short-term are not synonyms. Increasing company competitiveness in a long-time manner serves customer, employee and long-term shareholder common interests in a sustainable manner. Profitability is measured by growth in revenues and market share. It is measured by improvements in performance. It is also measured by the quality and costs of products and services. Customer decisions ultimately determine a company’s competitive advantage.

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320 Ellsworth pp. 43 and 224.
321 Ellsworth page 44. Compare with ECA 2001 § 3:1 on employees duties, stating that employees shall perform their work carefully, observing the instructions concerning performance issued by the employer within its competence. In their activities, employees shall avoid everything that conflicts with the actions reasonably required of employees in their position. See Collins – Ewing – McColgan page 72 on employees’ implied obligations in common law, according to which an employee is, among the others, to obey employer’s lawful orders, take reasonable care in the performance of the contract, act loyally towards employer’s interests and serve employer faithfully within the contracts’ requirements.
322 Ellsworth page 163.
323 Ellsworth page 91.
324 Ellsworth page 136.
325 Ellsworth page 139.
326 Ellsworth pp. 34-35 and 38.
327 Ellsworth page 47.
328 Ellsworth page 125.
330 Ellsworth page 43.
6.7. CHALLENGES ON LAW

Law has a mirror-function. In different societies there are different expectations on arranging social relationships. Law can also be used to understand social changes, to manage the changes. The ultimate issue in managing social changes has to do with power.

Law can never be conceived as a metaphysical entity having got its character independently, without an active role of those participating in a legislative process. Law is parties’ special creation, based on an active participation in an enactment process. Because of this all kinds of markets, both commercial and labour ones, are special creations of an active human will.

Enacting and application of law in its traditional form is attached to a nation state. In international and other forms of supranational law a state consent is required. Due to the globalisation there is to be perceived a kind of polarisation with regards to traditional players in economics, politics and labour market. National governments, legislators and labour market actors are traditionally fixed to a territory of a nation state in question. This is not the case in relation to economic actors and activities and production, these not being fixed geographically. It has been claimed that globalisation could mean denationalisation in states’ traditional forms, due to erosion in nation states’ central characteristics and functions and different social and political operators within it.

It has also been claimed that globalisation would denote to erosion in law’s traditional dimensions. One theme in discussion has to do with state’s role, be it in character minimalist like in the United States or protective, denoting to the welfare state model. One challenge is national rules’ contradicting nature, being different in different countries. Due to legal phenomena’s different aspects, being often based on different value basis, there are needs to evaluate several branches of law simultaneously. A challenge can be a total lack of rules or their weakness, either at the national, transnational or international level. Companies may also take advantage of the

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331 See Villa page 5.
332 Supiot pp. 511-512.
333 See Supiot page 516, Tuori pp. 138-139, 147, 153-154, 163, 167, 171, 202-205 and 212-216; Alvesalo – Ervasti pp. 6-8; Siltala 2003 pp. 61-64, 142-144 and 150.
334 Cassese pp. 5 and 9.
335 Bauman page 298; Beck pp. 4-5, 14 and 21; Beck 2000 pp. 24-28.
336 Morin page 362; Stiglitz page 4.
337 Supiot 2007 page 627.
338 Liukkunen pp. 50 and 54.
present confusing situation in the legislative field with regards to differences and even lack of law.\textsuperscript{339} As regards nation states, globalisation process presupposes affected states’ permission and even tolerance, permitting global actors’ functioning. As a whole the above-mentioned aspects are referred to as a coherence of law, denoting to legislation’s predictability in the form of legal security. In the legal sphere, the globalisation process has led to a discussion on fragmentation of law, challenging aspirations towards coherence\textsuperscript{340, 341}.

In the present research’s context, legislation’s coherence denotes to the impacts of company activities on employees and communities.\textsuperscript{342} Basically, the issue has to do with sharing of economic and social risks.\textsuperscript{343} An underlining idea is a principle of sustainable social development, denoting to taking into account in social development different social interests.\textsuperscript{344} From the employee point of view, a concept of sustainable working life can be used.\textsuperscript{345} As a whole, sustainable development denotes to a balance between different social interests in a long-term manner.\textsuperscript{346}

The above-mentioned development trends set on the agenda issues on legal concepts and definitions, including present division of law into different branches.\textsuperscript{347} Into agenda are also set power-relations, affecting methods and ways of carrying out different kinds of legislative and social processes. The scope of law is a part of the issue. In all these areas re-evaluation is needed.

In the present era, economic and political objectives do not have the first priority in discussion. Consequently, the goals and targets behind legislative actions may be placed at the secondary level. As a part of improving living standards, employee well-being should be a matter of first importance. From this perspective, society’s development cannot be perceived solely as efficiency in the form of capital accumulation, increased efficiency in resource allocation or decrease of economic distortions. Society’s development should be seen as its transformation, by correcting

\textsuperscript{339} Compare Liukkunen page 125.

\textsuperscript{340} See also Liukkunen pp. 54-55 and 61-62.

\textsuperscript{341} International Law Commission on the fragmentation of international law pp. 244 – 245 and 248-249; Siltala page 869; Beck 2005 page 72.

\textsuperscript{342} Stiglitz pp. 190 and 203, generally environment is also included.

\textsuperscript{343} Morin pp. 358 and 364-365.

\textsuperscript{344} See Dine pp. 238-249.

\textsuperscript{345} See Lamponen August 2006 in a seminar on developing Finnish strategy on information society and Ahola – Lamponen in Yhteenveto 6/2006.

\textsuperscript{346} See Elkington pp. 73-94.

\textsuperscript{347} See Lyon-Caen page 593 on labour and business law’s merger, being affected by changes in wage-earners’status as subcontractors.
market failures,\textsuperscript{348} being centrally public power’s task. This inevitably has effects at the legislative agenda. Market forces are not able to produce and guarantee in a long run socially efficient and desirable outcomes. Traditionally, public power action has guaranteed politics’ socially acceptable results, referring to objectives. This should be its role in the future, too.\textsuperscript{349} Public power’s traditional role in guaranteeing social cohesion should thus further be emphasised.\textsuperscript{350, 351}

Companies are dependent on economic environment’s balance and predictability in making decisions to invest and produce and in dispute-settlement. These considerations are underlined by trust.\textsuperscript{352} Trust can be defined as a means to reduce uncertainty and risk and enhance co-operation in business transactions.\textsuperscript{353}

Trust functions at the micro and macro levels. At the micro level, trust has to do with personal characteristics, with a person’s trustworthiness. At the macro level, trustworthiness has to do with the trustworthiness of institutions and systems.\textsuperscript{354} Included are legal rules, doctrines and arrangements. In systems trust shared expectations and assumptions are formalised, constituting an accepted behaviour.\textsuperscript{355} Trust is a central underlying factor in evaluating a legal systems’ coherence. Institutions and systems are means to mass-produce trust. There is a great variation among peoples and nations with regards to felt trust towards different systems of trust at the macro level, for example, in relation to a legal system.\textsuperscript{356} The interplay of the above-mentioned factors is apt to lead to recognition of different actors’ mutual dependency.\textsuperscript{357}

Institutional norms are an integral part in developing and producing trust. Systems trust offsets power asymmetries between parties and promotes stability, decreasing uncertainty. Systems trust and institutions producing it should not be evaluated as constraints to freedom. They are a means to

\begin{itemize}
  \item \textsuperscript{348} See Stiglitz page 190 on a definition of a market failure, the concept referring to an externality in a company’s actions’ consequences, company not paying the costs or getting the benefit; See also Elkington page 331.
  \item \textsuperscript{349} Stiglitz 2007 pp. 413-415, 417-419 and 424-425. Stiglitz emphasises the role of governments especially in relation to labour markets in enforcing minimum labour standards and guaranteeing a right to collective action and full employment.
  \item \textsuperscript{350} Supiot 2007 page 627.
  \item \textsuperscript{351} Compare with Sennett pp. 94, 96, 152-153 and 183 and Sennett 2007 pp. 126-127.
  \item \textsuperscript{352} Beck 2005 pp. 4, 77, 81-82, 118, 173, 180, 240, 249-252 and 294.
  \item \textsuperscript{353} Arrighetti – Bachmann – Deakin page 173; See also Elkington page 242 on trust, being one of the most important investments in creating social capital.
  \item \textsuperscript{354} Arrighetti – Bachmann – Deakin page 175.
  \item \textsuperscript{355} Arrighetti – Bachmann – Deakin page 175.
  \item \textsuperscript{356} See Arrighetti – Bachmann – Deakin pp. 188-189; Tehokas hallinto ja yrittysten oikeussuoja pp. 25-27.
  \item \textsuperscript{357} Vuorenmaa pp. 25-26, 51 and 58; Sennett pp. 148-161.
\end{itemize}
channel contractual behaviour. They can be used to open up new ways for co-operative behaviour.358

Traditionally law’s tasks in economic exchange underline the significance of trust. Law creates parties space in their exchange. Law has an incentive function. It provides a set of sanctions, acting as an incentive to perform agreed obligations.359 Law has also a proactive role in furthering social development.360

7 BUSINESS ECONOMICS ON RESTRUCTURING

7.1. RESTRUCTURING THEORIES

Business economics restructuring theories cover primarily reasons why companies carry out restructuring transactions. These theories are important in covering company motives in restructuring. The theories cover, however, also issues having to do with the practical consummation of transactions or their end-results. Irrespective of these transactions’ reasons, their practical consummation and end-results affect directly employee protection and status, covered by the legal framework in its enacted form.

7.1.1. Efficiency

Efficiency theories emphasise social gains and gains for parties active in restructuring activities, achieved by unifying unequal managerial abilities.361 A firm’s efficiency is increased, when a less efficient firm is acquired by a more efficient one, the latter improving the less efficient one’s actions due to an acquisition. This is most likely to be valid in mergers taking place between companies in related industries. Restructuring is also affected by managerial capabilities, by claiming that any management could do better, implying to present management’s inefficiency. Restructuring is targeted to increase managerial efficiency362 363.

The Efficiency theories leave open the actual way of achieving the targeted efficiency.364 Quality of workforce and management are essential in developing competitive advantage in a long-term

358 Arrighetti – Bachmann – Deakin page 192.
359 Arrighetti – Bachmann – Deakin in the contract law context page 173.
360 See Elkington page 156.
361 Weston – Siu – Johnson page 139.
362 Timonen page 136; Lehto page 17.
364 Ali-Yrkkö page 11.
manner.\textsuperscript{365} Research on competitive advantage emphasises the importance of co-operation between the management and employees. In restructuring affected by efficiency there may be overvaluation in evaluating the effects of changing management and undervaluation in evaluating the effects of long-term co-operation between the management and employees in developing competitive advantage. As regards social gains in the form of continued and even increased employment and enhanced efficiency in the form of increased productivity, their achievement depends on the success of restructuring transactions.\textsuperscript{366} If the carrying out fails in practise, social gains are neither achieved.

7.1.2. Synergy and Diversification

Synergy theories emphasise M&A as a means to create economies of scale and scope, targeted to increase profitability or efficiency.\textsuperscript{367} They may be based on a need to enhance and consolidate market power. They create an option to overcome entry barriers and reduce risks.\textsuperscript{368}

Technological changes may act as motivators. Corporations exploit technological superiority or its enhancing to increase synergy.\textsuperscript{369} Corporations take advantage of product differentiation, based on know-how and mass production, especially in cross-border transactions. Critical mass refers to company size creating cost level maximising company’s operational capabilities and its ability to create profits at markets in relation to market prices.\textsuperscript{370} Growth generates company restructuring. A market’s prospective larger size or its growth rate may be targeted. An opposite goal may also direct restructuring. In consolidation or divestitures an excess capacity is reduced.\textsuperscript{371}

Economies of scale refer to a law of large numbers. Fixed investment costs on machinery or computer or transportation systems are spread over a large number of units, lowering costs. Economies of scope have to do with needs of cost reductions in related activity fields or by combining complementary activities. A firm strong in marketing is combined with another with strong manufacturing skills, companies complementing each other.\textsuperscript{372} Changes in industrial organisation may act motivators. An example is a change from vertical integration to horizontal

\textsuperscript{365} Ellsworth page 65.
\textsuperscript{366} See Vuorenmaa page 9.
\textsuperscript{367} Lehto page 15.
\textsuperscript{368} Peng pp. 378-379.
\textsuperscript{369} Weston – Siu – Johnson page 187.
\textsuperscript{370} Weston – Siu – Johnson page 121.
\textsuperscript{371} Weston – Siu – Johnson pp. 125 and 511.
\textsuperscript{372} Lehto page 15.
independent activities organised in a chain. Location of clients is of importance. A way of paying share purchases is meaningful, taking place by debt or measures based on share-for-share. Also options are used with regards to management.373

Restructuring can be used to set a firm’s investment opportunity to match with its internal cash flows. A unified company has capital with lower costs because of an access to complementary resources,374 due to internal funds. This is valid between firms in declining and growing industries. In a declining branch there may be large flows of cash without investments prospects, being a reality in growing fields. After a company unification there is a balance between available internal cash with moderate costs and investment opportunities.375

Diversification has to do with adding new distinct businesses to a corporation. It may take place by product diversification, denoting to an expansion to different industries and product markets, in the latter case, however, the expectations are not necessarily met.376 It may be carried out geographically, taking place by an entry into new geographic areas, covering new regions and countries, end-results on performance being positive ones in company internationalisation from a moderate to a high level. Product and geographical diversification can be combined.377

Diversification may be based on expectations on financial and tax advantages. It has also to do with manager and employee expectations. Shareholders can easily diversify their share-ownership in capital markets. Manager and especially employee position differs from that of the shareholders. Managers and especially employees have specialised firm-specific knowledge that are not transferable, as such. Companies diversify to accelerate human-capital investments by making management and workforce more productive. Management and employee value is increased by learning and developing new skills. Organisational and reputational capital is preserved and increased.378 A possible employees’ short-time commitment has been presented as a challenge, a free-rider problem.379

374 Peng page 379.
376 Ali-Yrkkö page 11.
Strategic fit has not been proved in scientific research. Achievement of synergies is a mere promise, being realised only after the integration process itself is carried out. If there is a failure in the process, also the benefits remain unachieved.\textsuperscript{380} The claimed efficiency may be due to a decrease in the number of competing companies, not necessarily due to an increased efficiency in practise.\textsuperscript{381} Research on the effects of company acquisitions shows that decreasing of activities and workforce is not to be reconciled with the idea of expansion.\textsuperscript{382}

From the employee perspective, the end result of a restructuring transaction in the form of success is to be emphasised. If trust is breached in relation to employees, there is a danger of productivity decreases in the long run.\textsuperscript{383}

7.1.3. Strategic Alignment to Environmental Changes

Public power activities affect restructuring. Changes in legal environment play a large role, covering trade treaties and deregulation, accelerated by globalisation. Tariff, quota and environmental policies affect company restructuring. Share values, inflation rates, interest rates levels and economic growth are of importance, being indicators of general economic situation. Differences in exchange rates affect cross-border mergers. A currency’s weakness or strength is linked with costs of financing and running a corporation into addition to profits’ repatriation. All these factors are affected by general political and economic situation of a country or countries in question. Firms also intentionally develop policies of diversification, targeted to an independence from a single national economy.\textsuperscript{384}

Company internal policies affect company restructuring. Time-consuming capabilities development by internal measures in a changed business environment is replaced by restructuring, thought to offer needed business capabilities and skills.\textsuperscript{385}

7.1.4. Valuation

Restructuring may take place when a target company’s market value does not reflect its real value. This has to do either with the true or potential value.\textsuperscript{386}

\textsuperscript{380} Vuorenmaa pp. 61-62 and 225-226.
\textsuperscript{381} Professor Heikki Toiviainen, June 2007.
\textsuperscript{382} Lehto page 48.
\textsuperscript{383} Robbins – Judge page 445.
\textsuperscript{384} Weston – Siu – Johnson pp. 3-4, 15, 194, 197, 511-515 and 526. See Ellsworth page 65.
Restructuring may be affected by a fundamental interest conflict between shareholders and management on payment of free cash flows. Ultimately the interest conflict concerns strategy. Free cash flow is the cash exceeding cash needed for investments, to be channelled as dividends to shareholders, thus maximising share price. This in turn decreases management’s power, setting them under capital markets’ examination.  

Restructuring may be motivated by a willingness to increase a company’s value and, consequently, shareholders’ share-value at the cost of other stakeholders by decreasing organisational reputation and capital by a breach of confidence. Stakeholders cover, for example, creditors, employees and the wider society at large, if restructuring has as one of its motives tax reductions, in turn, decreasing the public sector’s space of action. 

In restructuring motivated by valuation the increase of shareholder value is emphasised. If the transaction has failed in practise, the targeted goal’s achievement in the long run in a sustainable manner is questionable. If restructuring has led to an increase of mistrust among employees, for example, due to workforce reductions, this is to affect productivity negatively. From society’s point of view, the involved values are questionable, due to the minimising of tax revenues, shrinking the society’s economic scope of action. 

7.1.5. Managerial Motives, Agency and Hubris

M&A activities take place due to managers’ self-interested reasons. Managers build an empire to increase their personal power, prestige and wealth. In restructuring affected by managers’ personal reasons the target is over-paid intentionally. 

Managers in acquiring companies with over-confidence in their managerial capabilities may affect company restructuring. This is shown especially in, unknowingly, over-valuating a target company, referred to as an acquisition premium. It denotes to a difference between the target company’s acquisition price and its real market value. In cases several companies bidding for the

386 Weston – Siu – Johnson pp. 143-144 and 154 on the Undervaluation Theory.  
390 Compare with Stgltiz page 190.  
391 Peng pp. 378-379 and 381 on the Theory on Managerial Motives.  
same target, the one eventually winning the bid overpay, referred to as a winner’s curse of auctions.393

But managerial motives may also affect non-restructuring. Restructuring often leads to changes in management. Managers may oppose restructuring because of a fear of losing managerial positions.394

When evaluated from an employee and society viewpoint, there is deep unbalance of interests in restructuring taking place because of managerial motives. Restructuring based on managerial motives is apt to put employee and society interests on a secondary level, for example, in the form of continued employment.395

Restructuring may be motivated by managerial powers-exceeding.396 This is affected by an interest conflict between managers and shareholders. The interest conflict may also arise between shareholders and creditors. In the shareholder/manager relationship, the interest conflict is due to the management’s lack of ownership, company interests becoming secondary to it.397 The interest conflict may lead to unwise investments at the company’s cost. Restructuring is used as the strongest means to gain control back to shareholders.398 From the employee perspective, dangers lay in struggling company development policies.

7.1.6. Information

In takeovers a target company’s share-value is claimed to increase after a public takeover-bid, implying its present undervaluation. The valuation increase is claimed to take place irrespective of the takeover bid’s success. On the other hand, it is claimed that a takeover bid conveys to a target company’s present management information on a need to effectuate management and business activities, paving a way to implement a more efficient strategy, eliminating in practise the need to realise the made bid.399

393 Peng page 381.
395 Lehto pp. 6, 31 and 46-47.
396 Peng page 381 on the Agency Theory.
397 See Villiers – Boyle pp. 222-224.
It is not proved in practise that a takeover bid effectuates management. This is due to bids being targeted to corporations both with good and bad managements.  

7.1.7. Market Power

Concentration may be evaluated as an end-result of continuous competition, due to a company’s effectiveness and superiority. Company restructuring may however be based on a belief that increasing concentration decreases competition, leading to a collusion at least in its tacit form and monopolistic effects. Empirical evidence is not definitive.

7.1.8. Eliminating Transaction Costs

Restructuring is used to decrease or even eliminate business partners’ opportunism. Functions carried out formerly by partners in networks are carried out as in-house operations due to company restructuring.

7.1.9. Detachment of Trust-based Agreements

Organisational reputation operates within a company’s contractual area, being a part of a company’s organisational capital. It accumulates through firm-specific investments in human resources including training and organisational development, research and development generally and kept promises on advertising. Explicit contractual claims cover wage and salary contracts. Implicit contractual claims cover product quality, even a tacit one, in relation to customers. It includes also employee expectations of job security.

Restructuring may be used as a means to detach from trust-based agreements with employees. Management may evaluate these agreements as a barrier to increases in short-term profitability. Restructuring resulting in workforce reductions or closures is a tool to increase profitability.

400 Hopt page 479.
401 See, however, Ali-Yrkkö page 12.
403 Vuorenmaa pp. 21-22 on the Transaction Costs Theory.
404 Weston – Siu – Johnson pp. 141-142.
406 Lehto page 16.
Detachment of trust-based agreements does not serve company’s best own interest in the long run. It may lead to difficulties in getting qualified workforce. Detachment of trust-based agreements is apt to undervalue two of the most important stakeholders of any company, customers and employees, shrinking room for a company’s further success.

7.1.10. Trust and Control

Restructuring operations’ effects have been researched in business economics by using different kinds of methods. Accounting-based or share-return based measures are the most common. Restructuring is claimed to increase a company’s total value, especially in relation to a target’s shareholders. This is primarily due to a claimed market power increase, not to efficiency, often emphasised to be one of the primary reasons especially to mergers. Share-return measures measure primarily expectations from M&A in a period from five to 50 days after the transaction, not factual long-term effects. There is considerable insecurity on the trustworthiness of used methods, not measuring the long-term effects.

Qualitative research methods show that restructuring operations fail often at the individual company level. Even over half of the operations fail. According to another estimates, the failure percentage is even over 70 per cent.

Many factors explain failures. From the pre-acquisition level can be mentioned an inadequate screening and a failure to achieve strategic fit. Organisational fit is a remarkable factor. It has to do with cultural distances between participating corporations, lack of communication leading to a confusion in the process, conflicts and unclear roles and responsibilities at the personal level and in reporting relationships, changes in power, insecurity and workforce reductions, lack of resources generally and in the integration process itself into account to the integration process’s complexity and difficulties. Changes in policy and procedure may lead to failures. In a merger a disparity in

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407 Lehto pp. 16-17.
408 Ellsworth page 1.
409 Weston – Siu – Johnson pp. 218-219 and 221.
410 Vuorenmaa pp. 61-62 and 90.
411 Vuorenmaa page 9.
412 Peng page 381.
413 Peng page 382.
414 Peng page 383.
size between participating firms may lead to failures. In relation to employees also unrealistic
information, unkept promises and trust breaches are reasons to failures.\textsuperscript{415}

Erkki Vuorenmaa’s business economics dissertation is based on an empirical research on an
integration process between two companies. Restructuring operation was informed to be a merger,
being in practise a hostile takeover. The acquiring company was a Finnish firm. The company being
acquired was a Dutch one, in size twice the acquirer.\textsuperscript{416}

According to Vuorenmaa, a crucial factor in achieving the transaction’s goals is to create a climate
of trust in the actual integration process, linked with general organisational atmosphere. \textit{Trust and
control form restructuring transactions’ cultural starting points. They facilitate targeted synergy
realisation and business performance}. The concept of a climate of trust is characterised by
organisation’s reliability, trustworthiness and security. Any specific sources and objects of trust
cannot be mentioned.\textsuperscript{417} Trust emphasises management by interaction, focused on successful
management of a complex set of interrelated connections and an ability to solve problems arising in
these relations, being connected with a corporation’s management ideology.\textsuperscript{418}

The climate of trust is a product of politics and cultural factors, including centrally an organisation’s
management. Trust between partners and widely between stakeholders at large is a basis of co-
operation, leading to a common consciousness, forming the basis for trust creation. Control is a
precondition to achieve operations’ strategic goals and to its co-ordination and accountability.\textsuperscript{419}

\section*{7.2. Restructuring as a Means of Realising Strategy}

Term restructuring refers to changes in a firm’s policy or organisational structure, targeted to
achieve long-run strategic goals.\textsuperscript{420} Strategy covers a corporation’s most important goals and action
lines, being based on a mission. Strategy is a means to adapt to business environment and to change
it actively. Strategic planning preconditions organisation’s constant analysis. It covers a constant
analysis of an organisation’s economical environment. It covers an analysis of an organisation’s
capabilities, limitations and stakeholders’ status. It covers also an analysis of political, social and

\textsuperscript{415} Vuorenmaa pp. 9 and 73-74; See also Peng pp. 383-384.
\textsuperscript{416} Vuorenmaa pp. 98-102.
\textsuperscript{417} Vuorenmaa pp. 89, 92-93, 118 and 222. Compare Sennett 2007 page 54.
\textsuperscript{418} Kamensky pp. 36 and 316-319.
\textsuperscript{419} Weston – Siu – Johnson page 595; Vuorenmaa pp. 33-40, 61-62, 76-84, 88, 90-93 and 222; Compare Porter page 823.
\textsuperscript{420} Weston – Siu – Johnson page 6; Palm page 41.
technological factors. A company’s M&A strategy is based on its general strategy, there being a feedback relation between these two. Restructuring can be used as a means to achieve a company’s long-term strategic goals.\textsuperscript{421}

Traditionally restructuring has had to do with three spheres in a strategy. It has had to do with assets, capital and management. Financial restructuring covers governance structures and relationships with shareholders and capital markets. Portfolio restructuring includes, among other things, M&A, divesture and outsourcing. Organisational restructuring covers changes in company structures and processes, including personnel.\textsuperscript{422} The fourth dimension has to do with a restructuring transactions’ social and employee effects. In the present research’s context included are employee involvement, employment effects and developing of competitive advantage in the form of know-how.\textsuperscript{423} The fourth dimension overlaps, however, with the traditional three forms of restructuring with regards to strategy.

Restructuring is not the only means to achieve strategic goals. They can be achieved by internal growth. This path may not always be open, due to a lack of resources or an excess of capacity in a whole branch.\textsuperscript{424} Also a reluctance to invest resources in a long-term development may play a role, covering both the employees and business activities, forming a barrier to a corporation’s inner development. Restructuring is thought to be an easier way to get competitive advantage.\textsuperscript{425}

But there are dangers involved in targeting strategy to a large-scale company restructuring or to formerly unrelated branches, referring in addition to a branch itself also to unsimilarity of clients, distributors, suppliers and close technical relations. Transactions in an alien business-environment are often a mark of declining competitive advantage, in the long run weakening a corporation’s former core competence. Competitive advantage is a result of continuous development and innovations, being based on commitment to a branch and concentrated business activities.\textsuperscript{426} Restructuring activities in an alien environment may lead to successful end-results when done in a limited scale and combined with a corporation’s own internal growth.\textsuperscript{427} There should be a cautious attitude in creating competitive advantage by restructuring.

\textsuperscript{421} Weston – Siu – Johnson pp. 106-115, 120-125 and 646; Kamensky pp. 20-21, 24-29 and 44-46.
\textsuperscript{422} Young – Hood – Firn page 60.
\textsuperscript{423} See Elkington pp. 156, 216, 300, 311, 324 and 331.
\textsuperscript{424} Weston – Siu – Johnson page 142.
\textsuperscript{425} Porter page 823.
\textsuperscript{426} See also Ellsworth pp. 10-12, 51, 91, 145, 163 and 183.
\textsuperscript{427} Porter pp. 675-677; See Lehto page 48.
An integration process covers four different dimensions. The first one is governance. It has to with the formal integration process. It covers company direction and integration process management. It includes decisions on investments, divestments and locations, having an employee dimension. The second one is networking. It refers to a transfer of knowledge and best practices, covering also product-innovations. This area has to do with cultural atmosphere of participating companies. Company culture is a mix of values and everyday practices. Communication is an essential element in creating company culture. Realistic information plays an essential role in the actual integration process, facilitating its success. Official information is important in stabilising a company after restructuring, preventing dissemination of worst-case scenarios and rumours. The third part of the process has to do with procedure, referring, for example, to internal information systems and human resources management. The fourth part of the process is an operational one. It has to do with the actual restructuring operation itself. It is tied to participating companies’ governance, management and production, including ways of organising production. All these different parts of the integration process are closely linked with law, due to structural, economic, corporate governance and labour law aspects.

8 RESTRUCTURING TRANSACTIONS’ SCOPE, SCALE AND EFFECTS

Restructuring is targeted to adjust company size or its activities’ scope. It may take place by expansion or by reducing a corporation’s size. Actual ways of carrying restructuring transactions are wide, consequently also the used terminology. In summary restructuring covers among the others transfers of undertakings, joint ventures, mergers, divisions, divestitures, share repurchases, outsourcing and alliances. Operations may be carried out to achieve different business goals. Legal basis may vary. Restructuring may be based on labour, contract, company, securities markets, competition and tax law.

428 Vuorenmaa pp. 13-14, 82-83, 96 and 226.
429 Peng page 385.
430 Weston – Siu – Johnson page 169; Vuorenmaa page 40.
8.1. LABOUR LAW AND CONTRACT LAW TRANSACTIONS

8.1.1. Transfer of an Undertaking

A transfer of an undertaking is a labour law concept in the EU-law and according to national laws. It takes place due to a legal transfer or a merger. A transfer of an undertaking denotes to a transfer of a stable economic entity retaining its identity. This means an organised grouping of resources having an objective of pursuing economic activity, in character central or ancillary.

“A legal transfer” relates to a transfer’s method. The transfer has to do with contractual relations, leading to a change in an employer’s person. There does not have to be a direct contractual relationship between the transferor and transferee. The transfer can be realised in stages, a third party acting as an intermediary. Consensus of at least some level between the parties is, however, required. The transfer can also be carried out as a part of a web of different contractual relations, being indirect in character.

The concept covers different kinds of arrangements, for example, leasing arrangements. Contracting-out and outsourcing or subcontracting is also covered. Contracting-out and outsourcing or subcontracting has to do with using of outside suppliers and subcontractors. A company’s whole production or only a fraction of it can be channelled to an outsider. Contracting-out is targeted towards cost savings and is thus a form of economies of scale and scope. Its use may be grounded by an outside contractor’s better management skills or lower wage costs. Services previously provided in-house are offered out to tender, being later performed on a contractual basis by an outside contractor. Often services under tender are ancillary to a company’s main activity. However, this needs not be the case. From the employee viewpoint, outsourcing may be used to decrease former salary levels and affect changes in employment conditions. It is not apt to create stability in employment contract terms and conditions.

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431 Directive on Transfers of Undertakings Title and Chapter I Article 1 1.(a).
432 AEP § 6b; TUPE 2006 guide page 7.
433 A concept of a merger denotes to the one enacted in the 3rd directive.
434 Directive on Transfers of Undertakings Chapter I article 1 1. (a)-(b); Kairinen page 255.
435 Barnard pp. 628-630.
437 O’Leary page 249; Kairinen page 256.
438 Case 287/86 Ny Mølle Kro paragraph 15.
439 Barnard pp. 631 and 634.
441 Rautiainen – Äimälä page 146.
442 Barnard pp. 630-634; O’Leary page 252; Collins – Ewing – McColgan page 1053.
A transfer of an undertaking may take place in stages if the transferred undertaking retains its identity. This is shown by a fact of it being transferred as a going concern, denoting to its operation with same or similar activities, continuing or being resumed by the transferee.

An assessment of a legal transfer is a precondition to determine a transfer of an undertaking. The determination takes place by following factors: There is a change in contractual relations in a legal or a natural person responsible for carrying out a business, simultaneously incurring employer obligations towards personnel. An existence of an economic entity has to be assessed. This is defined as an organised grouping of persons and assets through which an economic activity is exercised, having a specific object. This entity has to be organised in a stable manner. A transfer may concern only a part of an entity. This entity’s tasks may not be limited to a performance of one specific contract. An economic entity has to retain its identity. This is shown especially by the continuation of the activities by a new employer. Into account are also taken the continuation of its workforce and management staff, a way of organising its work, operating methods and the operational resources used by it.

A transfer of an undertaking is marked by the employees’ right to continue their employment contracts with the new employer, the transferee. Rights and obligations arising from an employment contract existing on the date of a transfer are transferred to the transferee as such. In spite of the general succession inherent in the transfer, derogations, even essential in character, are allowed. A transfer of an undertaking does not either prevent dismissals based on economic, technical or organisational reasons entailing changes in the workforce. This being the case a transfer of an undertaking’s legal effects are comparable to those of a company’s dissolution.

8.1.2. Alliances and Joint Ventures

Alliances are long-term agreements, including joint-ventures, licenses and sells and supply agreements. Commonly they lead only to limited advantages. They cause costs on co-ordination,
difficulties in reconciling goals and often a lower level of profits compared to an independent action. They may hinder the long-term development of a corporation’s business actions.448

Joint venture449 is a form of strategic alliance. Joint ventures may be carried out in the form of contractual arrangements or they may be new firms established and owned by parties. Usually they have a special purpose. Joint venture’s duration may be unlimited or limited. They involve capabilities complementing each other. 450

8.2. COMPANY LAW

8.2.1. Merger

Mergers451 and takeover bids452 are forms of takeovers. Usually they are called M&A or M&A activities453.454

In a merger two or more independent companies merge or form a new economic unit.455 Company assets, debts, operations, management and employees are combined.456 Traditionally mergers have been preferred in the Scandinavian countries and Germany.457 In the United Kingdom, they are fairly rare.458

Usually mergers are grounded by business reasons. They may be targeted to a company size’s enlargement, leading to a stronger position in competition evaluated in turnover or market share in relation to competitors. Also efficiency increases may be targeted by reduction of overlapping functions.459

448 Porter pp. 683-684.
449 Merger Regulation 139/2004 OJ L 24, 29.1.2004 P. 1-22, art. 3 point 4; ARC Chapter 3a:12.
450 Weston – Siu – Johnson pp. 433 and 518.
451 CA 2006 § 16:1.
453 Immonen pp. 33-34; Peng page 377.
454 Weston – Siu – Johnson pp. 5-6.
456 Peng page 377; The 3rd directive on mergers Chapter I articles 3-4; Directive on Transfers of Undertakings Chapter II article 3; CA 2006 § 16:1; See also ECA 2001 § 1:10.1.
457 CA Committee 1992:32 page 310.
Most commonly merges take place in order to simplify a concern structure.\footnote{460} A subsidiary company is merged into a parent. This is grounded with a need to rationalise and make business activities more efficient.\footnote{461} Mergers may be used to cease business activities voluntarily.\footnote{462} This may concern a subsidiary company or a competitor. An acquiring company has no obligation to continue acquired company’s business. Mergers are used in company financing. A company may be established for financial purposes. A newly established company acquires a target company’s shares by borrowing only for this purpose. Merger is used to combine assets and debts.\footnote{463}

Mergers may be used for special purposes, too. A patent, trade mark or real estate may be acquired by using a merger as a means to realise an acquisition.\footnote{464} Mergers may be alternatives to tax-law based measures, denoting to a change of shares\footnote{465} or a transfer of business assets.\footnote{466}

In the EU a national level merger is regulated in the 3\textsuperscript{rd} directive.\footnote{467} The directive’s definitions derive originally from the law of France, Italy and Germany.\footnote{468} Mergers may also take place at the cross-border level between limited companies governed by laws of at least two different Member States.\footnote{469} Companies from different Member States may use a merger to form a public limited company with a European dimension, a European Company SE to carry out business at the European scale.\footnote{470} Merger may be used for cross-border transactions by forming a European Cooperative Society SCE.\footnote{471}

In a nutshell, a merger’s characteristic features include handing over of a complete company, ceasing to exist, in exchange of shares.\footnote{472} As a result there will be a new juristic personality in a company form.\footnote{473} Mergers have to meet enacted technical and legal requirements. They have a strong contract-law character, being negotiated and based on an agreement. Mergers are usually

\footnote{460} Immonen - Nuolimaa page 215.\footnote{461} Airaksinen – Pulkkinen – Rasinaho II page 138; Reinikainen – Pelkonen – Lydman pp. 249-251.\footnote{462} Heinenstam page 18.\footnote{463} Airaksinen – Pulkkinen – Rasinaho II pp. 138-139.\footnote{464} af Schultén page 471; Airaksinen – Pulkkinen – Rasinaho II pp. 139-140.\footnote{465} ABT § 52 f.1; Immonen page 315.\footnote{466} ABT § 52 d.1; Immonen 2006 pp. 25, 33 and 38.\footnote{467} CA Committee 1992:32 pp. 9, 105 and 311.\footnote{468} Edwards 2003 page 91.\footnote{469} Directive 2005/56/EC on cross-border mergers OJ C 117, 30.4.2004 page 43 Preamble (1)-(2); CA 2006 § 16:19; Government Proposal 103/2007 pp. 6, 15, 26 and 32.\footnote{470} Regulation 2157/2001 on SE OJ L 294, 8.10.2001 P. 1, Preamble (1), (6)-(7), (10) and (13); See also Section 1 articles 1-3; Werlauff 2003 pp. 99-100; Jauhiainen – Kaisanlahti pp. 55-118.\footnote{471} Regulation 1435/2003 on SCE OJ L 207 18.8.2003 P. 1 Chapter I articles 1., 2.1. and Chapter II Section 2 article 19.\footnote{472} Werlauff 2003 page 49.\footnote{473} Heinenstam page 19.
friendly in character due to mutual negotiations expressing parties’ will. Central is to set participating companies’ values and share exchange ratio. Shareholders accept the share exchange ratio in the form of an agreement between a company being acquired and an acquiring company.  

Central in a merger is the merging of two or more companies’ assets and liabilities, which are then transferred to an acquiring company. The acquiring company is a successor to the participating companies’ activities. The concept of a merger in the EU-law highlights the cessation of one or more of the participating companies. Legally a merger is a general succession. From the shareholder viewpoint, a merger’s character as a general succession implies share ownership’s continuation. Continuation concerns ownership rights, decision making powers and economic rights attached to shares. A merger can be equated with a dissolution of a company and breaking down of a general succession, if share ownership does not continue on the basis of former conditions, or if shares are redeemed in exchange of a cash payment.

From the employee point of view, a merger as a general succession denotes to employment relationship’s continuation with former rights and obligations as such. Essential derogations are however allowed, even dismissals. A merger affecting essential derogations or a dismissal has legal effects that are to be equated with company’s dissolution.

8.2.2. Division

A division is a kind of a mirror-image of a merger. Divisions are generally grounded by ownership or operative reasons. A division may be a part of company restructuring in a larger scale. It may be used as a preparatory measure for public listing. Operative reasons denote to a goal of increasing efficiency. A division may be carried out only partially or covering a larger scale of companies. As a consequence, a company may concentrate on its core business.

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474 Weston – Siu – Johnson pp. 5-6.
477 On decision-making powers and economic rights attached to shares see Reinikainen – Pelkonen – Lydman page 43.
478 CA Committee 1992:32 pp. 9 and 316.
479 See Directive on Transfers of Undertakings Chapter II articles 3-4.
480 Compare CA Committee 1992:32 page 316.
481 CA Committee 1992:23 page 326.
483 Immonen – Nuolimaa page 238.
Internal group structures may be arranged by a division. A parent-owned company may be divided into one or more companies, still owned by the parent. Conglomerate companies may be divided to smaller units, making business more transparent.\textsuperscript{484}

Divisions\textsuperscript{485} are based on mutual negotiations and parties’ will. A division results in two or more companies\textsuperscript{486, 487}.

The EU-level provisions on divisions are in the 6th directive. It concerns divisions of public limited companies at the national level.\textsuperscript{488} Directive’s definitions originate from the legislation of France, Italy and Germany.\textsuperscript{489} France was originally the only Member State with law regarding division.\textsuperscript{490} In the United Kingdom, divisions are even rarer compared to mergers.\textsuperscript{491}

The 6\textsuperscript{th} directive is conditionally mandatory in character.\textsuperscript{492} If Member States permit in their legislation public limited companies to carry out a division, the transaction has to be carried out under the directive’s provisions.\textsuperscript{493} If a Member State does not allow in its legislation a division, it does not have to implement the directive.\textsuperscript{494}

The directive regulates three kinds of divisions, taking place by an acquisition, a formation of new companies and under the supervision of a judicial authority.\textsuperscript{495} In a division by an acquisition a company transfers to more than one company all its assets and liabilities.\textsuperscript{496} In a division by formation of new companies a company transfers to more than one newly-formed company all its assets and liabilities.\textsuperscript{497} As a consequence, there will be at least two companies. In both of these cases, dividing company’s shareholders get in exchange shares in a recipient company and possibly a cash payment not exceeding 10 per cent of the shares’ nominal value. A division may be carried

\begin{thebibliography}{99}
\bibitem{484} Werlauff 2003 page 587.
\bibitem{485} CA 2006 § 17:2.
\bibitem{486} Edwards 2003 page 99.
\bibitem{487} Weston – Siu – Johnson pp. 347 and 385.
\bibitem{489} Edwards 2003 page 91.
\bibitem{490} Edwards 2003 page 99.
\bibitem{491} Edwards 2003 page 91; On the division see CA 2006 BR Part 27 Chapter 3, 919-934.
\bibitem{492} Werlauff 2003 pp. 567 and 592-593.
\bibitem{493} The 6th directive article 1.1.
\bibitem{494} Jauhiainen – Lappi – Aho page 46; Werlauff 2003 page 87; Edwards 2003 page 94.
\bibitem{495} The 6th directive Chapters I-III.
\bibitem{496} The 6th directive Chapter I article 2.
\bibitem{497} The 6th directive Chapter II article 21.
\end{thebibliography}
out by transferring only a part of a dividing company’s assets and liabilities to a company or companies being formed in the division procedure.498

Division is based on a draft plan made by the administrative or managing bodies in a dividing company. In the draft proposed division’s legal and economic grounds and the share exchange ratio are explained.499 The plan will be examined by independent experts, delivering a written report to shareholders.500 The report is purported to inform shareholders for decision-making in a general meeting501.502

Division leads to a transfer of company assets, liabilities and share ownership, with the company that is divided ceasing to exist; all of these consequences taking place simultaneously.503 A division has a general succession character.504 Employee protection is enacted in the directive on Transfers of Undertakings, referring to a transfer of employment agreements with their former rights and obligations.505 A division does not, however, prevent among the others dismissals based on economic, technical or organisational reasons entailing changes in the workforce506.507 This being the case, a division’s legal effect is from the employee viewpoint to be equated with company dissolution.508

In Finland, the implementation of the 6th directive in the 1990s changed the former legal state. Before the implementation, divisions could be carried out on tax-law basis, for example, by a transfer of business assets. Also reduction of share capital was and has been used, in exchange returning to shareholders company assets.509 The implementation of the 6th directive thus brought to the Finnish company law a completely new procedure.510

499 The 6th directive Chapter I article 7.
501 The 6th directive Chapter I article 9.
503 The 6th directive Chapter I article 17; Edwards page 101; Werlauff 2003 page 588.
504 Reinikainen – Pelkonen – Lydman pp. 311-312.
505 The 6th directive Preamble and Chapter I article 11; Werlauff 2003 page 591.
506 Directive on Transfers of Undertakings Chapter II Article 4.
508 Compare CA Committee 1992:32 page 316.
509 CA Committee 1992:32 page 325.
In Sweden, a division as a civil law procedure was enacted in the Companies Act renewal, having come into force from the beginning of 2006.\textsuperscript{511}

8.2.3. Other Companies Act Measures

Shareholders having in their ownership more than nine-tenths of the shares and voting rights attached to them have an obligation to squeeze-out minority shareholder shares. A minority shareholder has a right to demand this procedure.\textsuperscript{512} At this stage, share-ownership is already based on majority owning. Squeezing-out of minority shareholders can hardly, as such, affect employee status.

Company restructuring covers changes in a company form. As examples can be mentioned a change of a private limited company to a public limited company and vice versa.\textsuperscript{513} A change in a company form does not, as such, have straight employee effects.

8.3. COMPETITION LAW – HORIZONTAL, VERTICAL AND CONGLOMERATE MERGERS AND DIVESTITURES

Merger is also a competition law concept, denoting to forbidden monopolies and cartels.\textsuperscript{514} In competition law, there are three kinds of mergers: horizontal, vertical and conglomerate.\textsuperscript{515}

A horizontal merger takes place between two companies operating at the same production level.\textsuperscript{516} Involved corporations are former competitors. Restructuring is to enlarge company size, targeted to enable the new unit effective implementation of economies of scale. From the consumer point of view, corporations’ products are substitutes. Horizontal mergers may increase a company’s business capacity, making it more effective. Horizontal mergers may have negative effects on competition. Decrease in the number of companies active in business may increase market power, making collusion easier and paving a way to a monopoly.\textsuperscript{517}

Vertical mergers take place between corporations operating at different production levels. They are targeted to increase synergy. This takes place by combining different competence areas, for

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\textsuperscript{511} CA 2005 Chapter 24; Heinestam page 23 and more in detail pp. 138-149; Sandström pp. 348-351; af Sandeberg pp. 234-236.
\textsuperscript{513} CA 2006 § 19:1 and 19:3; Proposal 105/2005 for CA pp. 178-179; Mählen – Säiläkivi - Villa pp. 480 and 547-549
\textsuperscript{514} Werlauff 2003 page 565.
\textsuperscript{515} Kuoppamäki pp. 1052-1055.
\textsuperscript{516} Peng page 377; Weston – Siu – Johnson page 15.
\textsuperscript{517} Kuoppamäki pp. 1052-1053; Weston – Siu – Johnson pp. 6-7; Hylton pp. 311-313.
\end{flushright}
example, by acquiring a supplier or a buyer.\footnote{Peng page 377.} A company strong in research and development may be an attractive target to a company with strong marketing capabilities. Vertical integration is a way to create economic efficiency by eliminating costs of contracting and by increasing functions coordination. Vertical mergers may cause remarkable negative effects on competition by monopolising markets. This concerns both supply and distribution chains, raising a threshold for potential competitors to start or continue business.\footnote{Kuoppamäki page 1054; Weston – Siu - Johnson pp. 7 and 15; Hylton pp. 333-335.}

Conglomerate mergers take place at their purest between corporations carrying out unrelated business activities.\footnote{Peng page 377.} Also, different company product lines can be extended in related business. Conglomerate mergers can be used geographically by extending a corporation’s activities to markets with no previous overlapping.\footnote{Weston – Siu – Johnson pp. 7 and 15; Hylton page 344.}

Conglomerate mergers involve different kinds of economic functions. Financial conglomerates function as internal markets in capital funding. Managerial conglomerates function as sources of management services to different conglomerate’s segments, offering services on research and development, law and human resources, for example. Concentric conglomerates offer specific management functions across individual segments in a conglomerate.\footnote{Weston – Siu – Johnson pp.  8-10  and 15.}

Conglomerate mergers do not affect at the market number of corporations. Conglomerate mergers have thus no immediate effects on market structure. The negative effects of conglomerate mergers have to do with possible lessening of competition due to conglomerate’s larger resources, creating in the long run an entry barrier to competitors.\footnote{Kuoppamäki pp. 1055-1056.}

Divesture is a competition law concept. Divestitures are targeted to elimination or separation of different business branches or actions in order to alleviate the negative effects of a merger by making markets more competitive. Divestitures include sales of assets, product lines, subsidiaries, divisions or segments to a third party.\footnote{Merger Regulation 4064/1989 OJ L 395, 30.12.1989 P. 1-12 article  8 (2), Merger Regulation 139/2004 article 8 (2); ARC § 4:12; Kuoppamäki pp. 1254-1279; Immonen – Nuolimaa page 215; Weston - Siu – Johnson pp. 346 - 359.}
From the employee point of view, a merger and divestitures need not cause legal effects. Legal effects may, however, equal with those of a transfer of an undertaking and company law merger and division.

8.4. TAKEOVER BIDS IN SECURITIES MARKETS LAW

In a takeover bid, a securities holder makes a public offer to shareholders to acquire shares at a specified price. A bid may be targeted to achieve control in a company in exchange of either shares or cash. Takeover bid can be hostile in character, a target company’s management opposing it. In a friendly takeover, a target company is acquired by the consent of management and shareholders.\(^{525}\) Takeovers are securities market transactions.\(^{526}\) They are preferred especially in the United States and the United Kingdom.\(^{527}\)

Takeovers differ in character with mergers. The consummation of a merger requires always co-operation between the participating company boards. This is not always the case with takeovers, at least if they are hostile in character. Due to the co-operative element, a merger cannot, as a rule, be a part of a takeover. Mergers can be used to suppress a hostile takeover bid, by merging a takeover bid’s target to another company with friendly intentions.\(^{528}\)

Takeover bids are characterised by their publicity. They may be conditional or unconditional. They may also be restricted or unrestricted. In a restricted offer the number of shares taken by a bidder is specified and may lead to oversubscription.\(^{529}\) Bids may be targeted also to acquire a minority of shares.\(^{530}\)

In a takeover usually only a share-capital owner’s identity changes. This does not normally extend to an employer’s legal identity, continuing as such.\(^{531}\) A shareholder with company control has management powers to affect central business decisions. From the employee perspective, a takeover

\(^{525}\) Directive on takeover bids Article 2 1. (a); ASM § 6:1; Palm page 279 and 281-282; Edwards 2003 page 91; Airaksinen – Pulkkinen – Rasinaho II pp. 154-155; Palm pp. 281-282.
\(^{526}\) See directive on takeover bids Preamble (1)-(2); Weston – Siu – Johnson page 55.
\(^{527}\) CA Committee 1992:32 page 310; Edwards 2003 page 91.
\(^{528}\) Airaksinen – Pulkkinen – Rasinaho II page 155; Palm page 282.
\(^{529}\) Weston – Siu – Johnson pp. 5-6 and 12; Immonen pp. 34-36.
\(^{530}\) Palm pp. 281-282.
\(^{531}\) Barnard page 635.
may denote even great changes in business activities, their scale and scope, affecting consequently employee status, employment conditions and employment.532

8.5. TAX LAW

Change of shares,533 transfer of business assets534 and sales of shares535 are tax-law based restructuring activities.

Tax-law based arrangements are targeted to creation of a concern. A parent/subsidiary relationship is created between companies participating in the arrangement. In a change of shares a limited company acquires shares of another limited company yielding more than a half of voting rights in the latter. As a substitute the first one releases newly issued shares. Substitute may also be of money, but at the highest 10 per cent of the nominal value of the newly issued shares.536

Transfer of business assets denotes to an arrangement in which a company limited by shares transfers its business assets, debts and reserves to an acquiring company, getting as a substitute shares newly issued by the latter. The transfer may cover all the assets, debts and reserves of the transferring company or it may be limited to a part of this company´s business activities.537 The acquiring company continues transferors´ business activities.538

As such tax-law based transactions do not affect employee protection or their status. Tax-law based transactions are, however, preceded by legal transactions, which may lead to decision-making powers in business. Employee effects may thus take place due to management powers affected by a majority shareownerhip or an ownership of major assets.

532 See Directive on takeover bids article 6 on information concerning bids, especially 6 2. and 3. (i) on the offeror´s intentions with regards to the future business of the offeree company, with regards to the safeguarding of the jobs, including any material change in the conditions of employment, and in particular the offeror´s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies´ places of business. See Collins – Ewing – McColgan page 1066.
533 ABT § 52 f.1; Immonen page 315.
534 ABT § 52 d.1; Immonen 2006 pp. 25, 33 and 38.
535 Immonen page 33.
537 Mähönen – Säiläkivi – Villa page 558.
538 Immonen page 275.
8.6. SCALE OF RESTRUCTURING ACTIVITIES

Since the 1990s, when both Finland and Sweden joined the EU in 1995, there has been a rapid increase in company restructuring activities at the cross-border, national and local level. The increase has been affected by the membership as well as by the effects of globalisation, both factors denoting to changes in the economic environment. At the same time, there is to be perceived a formation of larger company entities and splitting and shattering of corporations to smaller units.\footnote{Ali-Yrkkö pp. 1, 15 and 19.}

Terminology of economic statistics differs somewhat from legal definitions. In economic statistics acquisitions, deals and mergers may be used as synonyms for mergers and takeover bids.\footnote{Ali-Yrkkö page 2.}

There were in the EU in 1995 about 8,800 mergers and acquisitions. In 1999, there were already 12,800 M&A transactions, representing a 46 per cent growth. In the United States, the growth during the same period was even faster, exceeding 150 per cent.\footnote{Ali-Yrkkö page 19.}

Company restructuring is dominated by domestic measures. In the period 2000–2006, a vast majority of the 80 per cent of the M&A transactions within the EU were domestic.\footnote{Eurofound News page 1.} During the 1990s, cross-border actions increased three-fold, totalling in the world in 2000 about 7,000. Also the monetary value of these transactions has increased substantially.\footnote{Ali-Yrkkö pp. 1 and 24.}

During the 1990s, Finland was the most active in the EU’s M&A market. The activity in Finland exceeded the EU average during that time. With regards to the number of deals, Finland ranked first during the 1990s. The deal value itself was in Finland clearly lower, although also this increased in 2000. When the relative size of the EU countries is taken into account, Finland has been ranked among the top three in the M&A market among the EU countries in the 1990s, its share of the EU’s M&A activity, this being a country’s share of the EU’s total gross domestic product GDP, being 2.6 compared to that of Sweden’s 1.9.\footnote{Talouslähde 43/2000 pp. 22-24; Ali-Yrkkö pp. 19-22 and 26.}

The high activity of Finland and Sweden is not only due to domestic transactions. Also foreign companies consider Finnish and Swedish companies interesting targets. With regards to the number
of outward cross-border deals in relation to the GDP, first place in the statistics is occupied by Luxembourg, followed by Ireland, Sweden and Finland. Evaluated in the light of outward deals’ value, Finland’s ranking is clearly lower compared to that of Sweden, it being fourth in the statistics after Luxembourg, the United Kingdom and the Netherlands.\textsuperscript{545} The situation did not change remarkably during the first part of the new millennium. Finland is ranked second as the target country, Sweden in third position and the United Kingdom in fifth. Evaluated in the light of deal value, Finland’s ranking has lowered to the sixth position. Sweden is ranked second one and the United Kingdom ranked third.\textsuperscript{546}

With regards to countries that have high M&A activity, one has to keep in mind the high failure percentages. Business economics shows that over a half of the restructuring operations fail.\textsuperscript{547} The failure percentage is evaluated to be even over 70 per cent.\textsuperscript{548} In countries with companies with the high M&A activity, failures are a fact to be taken into account in planning and carrying out the transactions.

8.7. EFFECTS OF COMPANY ACquisitions ON EMPLOYMENT AND EFFICIENCY

At the general level there is a presumption that company acquisitions in different forms, mergers included,\textsuperscript{549} have potential effects on employment, company efficiency and salaries. Systematic research on the subject is at the moment still fragmentary.\textsuperscript{550}

From the company perspective, company restructuring transactions are used as means to achieve social gains and gains for parties that are active in transactions.\textsuperscript{551} From the company perspective, M&A activities are also means to create economies of scale and scope, increasing profitability or efficiency.\textsuperscript{552} The effects of company restructuring transactions can be evaluated also from other perspectives. As a general rule, company acquisitions affect negatively on employment, decreasing the number of employed. In industry both international and domestic acquisitions and internal reorganisations affect negatively on the number of employed. The effect is at its strongest in

\textsuperscript{545} Ali-Yrkkö pp. 20-21.
\textsuperscript{546} Ali-Yrkkö updated 2006.
\textsuperscript{547} Vuorenmaa page 9.
\textsuperscript{548} Peng page 381.
\textsuperscript{549} On the term company acquisition see Lehto pp. 18-22.
\textsuperscript{550} Lehto page 8. On the former scarce research on the subject see Lehto pp. 12-13.
\textsuperscript{551} Weston – Siu – Johnson page 139.
\textsuperscript{552} Lehto page 15.
International acquisitions.\textsuperscript{553} Company acquisitions may lead to increases in efficiency at the cost of personnel.\textsuperscript{554}

In services outside commerce and construction domestic acquisitions clearly decrease the number of employed.\textsuperscript{555} The effects are even more considerable when a foreign company is the acquiror. In international acquisitions, the effects come at a later stage, within two years of the transaction, being considerable.\textsuperscript{556}

In commerce domestic acquisitions decrease the number of employed. The effects of international acquisitions are, however, even opposite or do not exist at all.\textsuperscript{557}

As a general rule, company acquisitions do not affect \textit{efficiency}, denoting to productivity. They may, however, have positive effects on efficiency. Domestic acquisitions having decreased the number of employed as a rule affect considerably positively on efficiency. In commerce efficiency is not affected. International acquisitions generally affecting decreases in personnel do not, however, affect increase in efficiency in any branch.\textsuperscript{558}

As a general rule, acquisitions increase a risk of \textit{closures}. At is strongest this effect is in acquisitions in which the acquiring company has a foreign owner. International acquisitions increase a risk of a closure only in industry. Domestic acquisitions although affecting closures also affect establishing of new units in all branches.\textsuperscript{559}

As a general rule, company acquisitions lead to decreases in business activities. Company acquisitions are not suitable means to extend business activities. Decreasing of business activities and employed and expansion of activities are measures not to be reconciled with each other.\textsuperscript{560}

\textsuperscript{553} See Lehto page 21 on research’s scope, being based on company acquisitions in different branches in Finland between 1989-2003, including 7,532 acquisitions. On the effects of acquisitions see Lehto pp. 6, 31 and 46-47.
\textsuperscript{554} Lehto page 10.
\textsuperscript{555} Lehto page 46.
\textsuperscript{556} Lehto page 31.
\textsuperscript{557} Lehto page 31.
\textsuperscript{558} Lehto pp. 36 and 47.
\textsuperscript{559} Lehto pp. 42, 44 and 47.
\textsuperscript{560} Lehto page 48.
9 LABOUR LAW MODELS TO STABILISE EFFECTS OF RESTRUCTURING

9.1. ON FURTHERING EMPLOYMENT SECURITY

Since the beginning of the Industrial Revolution work has been one of the fundamental values in the Western society. It has been a means of progress to affect changes in society. The present era with its emphasis on free enterprise has largely challenged this fundamental value. Employees’ belief in stability in their personal lives via work has been shaken. The right to paid work is still one of the fundamental citizenship rights.561

Evaluated form established company perspective, with the focus on company economics, restructuring is targeted to improve profits and share value, commonly in the short-term perspective. Restructuring transactions’ legislative control in different forms touches these activities’ basics, connected with circulation of capital. Legal interventions may be objected, considered to be contrary to wealth maximisation. They are interpreted preventing management’s right to improve company’s profitability and cost- and lost-minimisation as a part of freedom of contracts. But research shows that legislation’s effects in setting restrictions on capital’s use may be, even largely, exaggerated.562

Restrictions on capital’s free circulation may be grounded with a need to increase employee economic rights’ protection, being a part of restructuring transactions’ employment implications. From the public power’s perspective, restructuring transactions lead too often to social costs. They may take place in the form of economic support to unemployed and retraining for re-employment. Costs caused by health care, criminality and social exclusion may also be included.563 Decreases in tax incomes are common. In this field the public power interest is a large one.

Evaluation of the grounds for dismissal at the court level does not generally cover employers’ managerial decision-making. This is the case in Finland,564 Sweden565 and the United Kingdom.566

561 Foucauld page 599.
563 Collins – Ewing – McColgan page 980; See Toiviainen page 166 on the role of public power in coordinating different social interests.
564 Valkonen 2006 page 804; Tiitinen – Kröger 2003 page 412; Rautiainen – Äimälä page 260.
A concept of employer accountability has been proposed, limiting employers’ managerial powers. It is required to specify the justifications for collective redundancies. The character of collective redundancies as the last resort of a crisis measure is emphasised. Expressed grounds could be taken under supervision. A part of the concept of employer accountability is criteria for redundancy selection, denoting to establishing a generally applicable dismissal order. The concept covers also increasing of employer involvement and responsibility in re-employment, internally in a company or a group. As a part of the concept dismissal grounds’ more specific defining is needed, especially in restructuring and profit-making companies.

In the context of transfers of undertakings, in redefining an economic entity, a proposal based on the continuation of employment contracts has been made. Employment relationships’ and contracts’ forced continuance at the transferee has been proposed, without an employee’s individual choice. A transfer of an undertaking from the transferor to the transferee may involve needs of reorganising business also at the transferee. As a general rule, restructuring leads to workforce reductions. The forced continuance of employment contract at the transferee could offer employment prospects in individual cases. In mergers, leading to a dissolution of an acquired company, the model could be used in full.

The directive on Collective Redundancies requires fulfilling of certain numerical thresholds in order to become applicable. The requirements vary country by country according to the choice of the Member States. The requirements may be circumvented by limiting number of affected employees under the enacted thresholds. Abolishing of the enacted numerical thresholds has been proposed.

Extensions on enterprises’ legal responsibility in a group-context has been proposed, covering an obligation to re-employ employees under an unemployment threat within a group. The model extends a single employer’s responsibility outside the actual employment contract. In France, this kind of an obligation in a group context is acknowledged. The obligation could be extended even to

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565 Iseskog page 138; AD 1997 number 121.
566 Collins – Ewing – McColgan pp. 1069-1070.
567 Compare ECA 2001 § 7:4.3.
568 Morin – Vicens page 49-51 and 63-64.
569 Toiviainen 2004 page 159; Morin – Vicens page 64.
570 Morin pp. 371-372.
571 Lehto pp. 6, 31 and 46-47.
573 Directive on Collective Redundancies Section I article 1 (a) (i)-(ii).
574 Morin – Vicens pp. 55-56.
networks of enterprises, on a contractual basis. Generally in networks is needed further development in defining employment conditions and employer responsibility.  

Collective redundancies are linked with company level decision-making and defining of dismissal grounds. Collective dismissals affect dismissed themselves, employees further continuing at the employ and surrounding community at large. Irrespective of large scope of affected parties, it is not a common practise to initiate procedures connected with collective redundancies taking into account all the affected parties. This could take place by fostering an agreement between the parties under a third party. This should be proactive in character, with adequate means to challenge the contemplated dismissals, targeted to mitigate consequences. The scope of action could include preventive action before a dismissal, monitoring decision-making on dismissals and action after dismissals have taken place. Unifying of company and labour market policies has been proposed, to ensure more security in people’s life courses.

9.2. ACTION PLANS, SOCIAL PLANS AND THE ROLE OF EMPLOYERS AND PUBLIC AUTHORITIES

Employee protection in restructuring covers measures alleviating the consequences of workforce reductions. Generally these measures are managed by two different actors. They may be managed by employers or public power, or by the both of them. The measures cover also unemployment benefits systems.

In industrialised societies there is to be perceived the primacy of companies instead of people. In alleviating problems caused by economic system distortions, social systems use largely means labelled by reactivity. The measures are targeted to alleviate difficulties and problems already at hand, instead of actively preventing their creation in a proactive way, for example, by vocational training. The fixed order of priorities should be revised, by prioritising people.

Measures used in preventing or alleviating the consequences of workforce reductions may be divided into different categories, depending on their character. One category covers proactive measures to further employee employability by proactive training and education. The Finnish model

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575 Morin pp. 370-371 and 376.
576 Morin – Vicens page 54.
577 Morin – Vicens pp. 48-49 and 66, see on security in the course of life further pp. 48 and 56.
578 Bruun 2005 page 194.
580 Foucauld pp. 604-605.
on personnel plans and training and education objectives provides one example.\footnote{ACU 2007 § 4:16.1.} Another category covers measures to activate and further re-employment. As a example can be mentioned the Finnish action plans and principles on promoting employment\footnote{ACU 2007 § 8:49 and ECA 2001 § 7:12.} and the Swedish model on action plans.\footnote{Bruun 2005 pp. 196-197.} To this category belong also social plans common in the central and southern European countries, based on employers’ active role.\footnote{Hellsten pp. 37-38 and 62.} One category covers monetary benefits paid by an employer in the case of a loss of a job or employment affected by an employer.\footnote{Redundancy entitlement guide for employees pp. 1-2.}

In Finland, the obligation on action plans in promoting employment initiates, when an employer intends to dismiss at least ten employees due to financial or production-related reasons. The employer has, when commencing negotiations on workforce reductions, to provide employee representatives a report on an action plan to promote employment. In preparing the plan, the employer has together with the employment authorities to examine the public employment services supporting employment. The purpose is to strengthen co-operation between the employer, the personnel and the employment authorities, to speed up employees’ flexible re-employment. An action plan is negotiated in the co-operation negotiations with employee representatives. It contains among the others planned action principles on using public employment services and advancing education and applying for work during the notice period. The employer affirms the action plan only after the negotiations. If a consensus is not obtained, the matter is decided solely by the employer.\footnote{ACU 2007 § 8:49.1-2; Proposal for ACU 2007 pp. 41-42; Hietala – Kaivanto pp. 117-118; Rautiainen – Äimälä – Hollmén pp. 186-187. See also ACU 2007 § 1:1.}

If the intended workforce reductions affect under ten employees, an employer has to present at commencing the co-operation negotiations principles of action on an employer’s support during the notice period on employees’ independent applying for work, education or their employment with the public employment services.\footnote{ACU 2007 § 8:49.3; Proposal for ACU 2007 page 42; Hietala – Kaivanto page 118; Rautiainen – Äimälä – Hollmén page 188; See also ACU 2007 § 9:62.3; Proposal for ACU 2007 page 47; Hietala – Kaivanto pp. 143-144.}

In the Finnish model of action plans and principles the focus is on the use of public services. Measures take place in the available resources framework. The model does not, however, preclude companies’ own interventions. As a whole the model may not necessarily take into account in a
proactive way the share of responsibilities between the public power and companies, creating room for cost externalisation.\textsuperscript{588}

Employees’ right to an employment leave has been enacted in the ECA 2001. When an employment contract is terminated due to economic or production-related grounds, an employee has a right to a leave with full pay during the notice period. The leave’s purpose is to enable participation in drawing up of an employment programme,\textsuperscript{589} labour market training, practical training and on-the-job learning, job-seeking and job-interview or re-assignment of coaching. The length of the leave does not depend on the employment relationship’s length, but on the notice period’s duration. The length of the leave is from five to 20 working days. The leave’s purpose is to speed up the re-employment after dismissals based on economic or production-related grounds.\textsuperscript{590}

In dismissals based on economic or production-related grounds an employer has to inform an employee of the right to an employment programme and employment programme supplement. A person applying for work has a right to an employment programme in the case of at least three years of employment or, in fixed-term employment, in the case of an employment of at least three consecutive years or periods of at least 36 months in preceding 42 months. An employer has to inform the employment office of the termination without delay.\textsuperscript{591}

In Sweden, there has been since the 1970s a collective agreement-based system to alleviate the consequences of collective redundancies. In the first phase, the measures covered salaried employees who were not covered by educational and training measures managed by public authorities. In the 1990s, this agreement was renewed twice. In the 2000s, the system has been enlarged to cover workers, too.\textsuperscript{592}

The Swedish model on action plans is financed by employer-funded foundations. Assets are used to support re-employment, re-training and re-education or starting of one’s own business in the case of a redundancy, denoting to an employer-initiated dismissal. Employees and workers all make individual actions plans, whose realisation is paid by the foundations. Immediately after a dismissal has taken place employees and workers are granted a personal consultant, whose task is to support

\textsuperscript{588} Compare Elkington page 216 on unintended consequences.
\textsuperscript{589} See APES.
\textsuperscript{592} Bruun 2005 page 196.
the realisation of personal action plans. The Swedish model is based on employers’ financial inputs. The model postulates far-reaching responsibility on the employers’ side with regards to taking care of the consequences of restructuring. The personal level coaching of employees and workers can be mentioned as a positive mark in the model. The Swedish system may be interpreted to represent a model of an enterprise with large scale of stakeholders and social connotations.

In many European countries a social plan is a mandatory element before consummating dismissals on collective grounds. Social plans are mandatory in Austria, the Netherlands, Germany, Belgium, France and Spain.

In Germany, the employer has to seek an agreement on reconciliation of interests and a separate agreement on social compensation with a works council. Social plan is mandatory in cases fulfilling certain established criteria and are also legally enforceable. If an agreement on social plan is not reached, the matter can be brought to the State Arbitration Board.

The role of public authorities in collective redundancies varies, depending on national practises. Public power may have a supervisory role. It may have powers to grant prior authorisation, leading to a decrease in the number of affected employees. In the Netherlands authorities have powers to authorise or prohibit collective redundancies. In Italy, public power acts as a conciliator or even a mediator between the parties. In France, authorities may grant assistance and advice in a negotiation process. Government subsidies are also used.

In Germany, the emphasis has been on financial measures. In Germany, the revised model may include measures during notice period. Also employment’s duration may be extended. This being the case, a partial unemployment benefit is paid by the government employment service into addition to incomes paid by the original employer on a part-time basis. In exchange an employee

593 Bruun 2005 pp. 196-197.
596 Morin – Vicens page 51.
597 Barnard page 683.
598 Morin – Vicens page 52.
599 Morin – Vicens page 51.
600 Morin – Vicens page 51.
permits a transfer to another employer’s employ, being represented by an employment promotion company. Under the model the original employment relationship continues, not being terminated.\textsuperscript{601}

In France, the finding of an alternative employment is mandatory, either inside or outside the company.\textsuperscript{602} In France, retraining agreements are also used.\textsuperscript{603} French case law has established the proportionality principle, referring to a relationship between a social plan’s measures and an individual company’s resources.\textsuperscript{604}

In France, very large companies have a special obligation for joint action with other parties if company decisions are apt to threaten employment at the local level due to an establishment’s complete or partial closure. The joint action takes place, for example, with local authorities. Companies have to participate in developing alternative employment opportunities in the affected areas. The obligation extends an individual enterprise’s responsibility outside single employment contracts, covering a wider social context, irrespective of fault or accident on a company’s part.\textsuperscript{605}

In Italy, the finding of an alternative employment at the dismissing enterprise’s cost is merely an option, without practical significance. In Spain, the practical significance is even at a lower level. In Germany, Italy and Spain the support for dismissed is mainly the task of public authorities. But in these countries there is a trend towards increasing employer involvement in taking care of the dismissed. Employer responsibility in measures supporting unemployed due to employer-initiated dismissals is on an increase. Another model covers transferring a part of dismissal costs to former employers.\textsuperscript{606}

In Italy mobility lists are used. They entitle employees to rights and benefits designed to ease re-employment. Employees participate in redeployment programmes managed by public employment services at the local level. The results have not however been encouraging.\textsuperscript{607}

Unemployment compensation schemes are in use and are, in many cases, part of a job-search support programme.\textsuperscript{608} Abolition of government monopoly on job placement can be used.\textsuperscript{609} Also

\textsuperscript{601} Morin – Vicens page 60.
\textsuperscript{602} Morin – Vicens page 50.
\textsuperscript{603} Morin – Vicens page 60.
\textsuperscript{604} Morin – Vicens page 62.
\textsuperscript{605} Social Modernization Act Section 118; Morin page 371.
\textsuperscript{606} Morin – Vicens page 51; Compare Stiglitz page 190 on externalities.
\textsuperscript{607} Morin – Vicens page 61.
job-search assistance may be offered, combined with other measures.\textsuperscript{610} In relation to older employees schemes permitting exit from the labour market and guaranteeing incomes are in use, into addition to disability pensions.\textsuperscript{611}

The models in the different EU Member States on furthering employment due to employer-initiated workforce reductions differ remarkably in terms of the measures’ scope and company involvement and, consequently, cost levelling among companies, individuals and society.\textsuperscript{612} With regards to the measures’ scope and the equalling of social responsibilities between society and companies, the Swedish model can be evaluated to be the most developed one; next is the French model. Italy and Spain can be evaluated to be at a low level with regards to the measures’ scope in alleviating the consequences of workforce reduction and equalling social responsibilities between society and companies. With regards to the measures’ scope, the Finnish model can be placed between these two opposites. The Finnish model’s practical application depends largely on public power measures, those being on available resources.

At the EU-level there is not adopted a framework directive on actions plans and principles, neither on any other measures to further re-employment.\textsuperscript{613}

9.3. INCREASING EMPLOYABILITY

The discussion on challenges caused by restructuring has been largely focused on thinking in terms of employees’ adaptation denoting to continuous adaptation to change and individual risk-bearing, and job security denoting to protection against dismissals and social security measures. The focus could be widened to cover security in a wider perspective, denoting to a wider concept of economic security, security in people’s life courses. This has to do with models on guaranteeing security outside a particular job loss, forming also a part of social inclusion.\textsuperscript{614}

Creation of risk management has been proposed, due to increases in the frequency of systemic transitions. Systemic transitions are affected by technological change and economic downturns.\textsuperscript{615}

\begin{itemize}
  \item \textsuperscript{608} Morin – Vicens page 59.
  \item \textsuperscript{609} Morin – Vicens page 52.
  \item \textsuperscript{610} Morin – Vicens page 56.
  \item \textsuperscript{611} Morin – Vicens pp. 59-60.
  \item \textsuperscript{612} See Stiglitz page 190.
  \item \textsuperscript{613} See Bruun 2005 page 197.
  \item \textsuperscript{614} Collins – Ewing – McColgan page 1072, denoting to a concept of employment security, covering all citizens.
  \item \textsuperscript{615} Bollé 2002 page 498.
\end{itemize}
The increase of restructuring transactions further emphasise the need of creating risk management. Sharing of jobs and voluntary part-time employment are among the proposed tools, as well as a basic monetary benefits for all.\textsuperscript{616}

From the employee perspective, employability is a key concept. At the individual level, in addition to training, employability covers also rights to information based on transparency principle and mobility.\textsuperscript{617} The term covers promoting of job management planning at the company level, connected with offering vocational training. Ageing employees have generally been thought to need special attention. Development of life-long learning is important from their perspective.\textsuperscript{618} Development of life-long learning is however important to all age-groups, in order to update skills, irrespective of the level of former education and training.

In Finland, undertakings covered by the co-operation obligations\textsuperscript{619} have to prepare annually a plan on personnel and training objectives in co-operation negotiations. In the training and education objectives, employee training needs are assessed in order to maintain and develop competence and skills in changing business environment. Objectives include annual training needs for each personnel group and a yearly implementation plan. The contents of plans and objectives depend on an undertaking’s size. The larger is the undertaking, the greater are the demands set on their contents.\textsuperscript{620}

In restructuring personnel plans and training and education objectives, are governance tools.\textsuperscript{621} They serve different purposes in facilitating the realisation of procedure’s targets. In a merger different companies’ unification with their practises’ unification often create needs of updating skills. Restructuring generally leads to workforce reductions.\textsuperscript{622} From the employee perspective, still continuing at an employer’s employ, personnel plan’s and training objectives’ updating is important, facilitating skills development, for example, due to changed tasks.\textsuperscript{623} Long-term

\textsuperscript{616} Sennett 2007 pp. 172-174.  
\textsuperscript{617} Ichino pp. 440-441.  
\textsuperscript{618} Morin – Vicens pp. 61 and 63.  
\textsuperscript{619} ACU 2007 § 1:2.  
\textsuperscript{620} ACU 2007 § 4:16.1; Proposal for ACU 2007 page 33; Hietala – Kaivanto pp. 71-73. Compare Finnish rules on personnel plan and training objectives with directive 2002/14/EC Preamble, especially points (7) - (9) and the adopted obligations.  
\textsuperscript{621} Compare Vuorenmaa page 96 denoting to procedures’ governance as a prerequisite to their success.  
\textsuperscript{622} Lehto pp. 6, 31 and 46-47.  
\textsuperscript{623} If an employer terminates employment contracts for financial or production-related reasons, the necessary changes for the personnel plan and training objectives have to be made in the co-operation procedure on reducing the workforce,
committed company development based on employee know-how is an alternative to restructuring. Personnel plans and especially training and education objectives are central personnel policy tools in consummating company strategies based on employee know-how. The plan and objectives are tools in maintaining employment in a long-time perspective. The Finnish model on personnel plans and training objectives in its enacted form may be evaluated to have all the needed characteristics to further employee employability in a proactive way. In preparing and implementing the objectives, the length and quality of training and education needs receive special attention.

At the EU-level there is not a general framework on developing skills in a life-long perspective. This kind of a framework should be taken under preparation. The framework should cover substantive provisions. Special attention should be put on the length and quality of training and education.

Psychological support is often needed after collective redundancies due to their traumatic effects. This is significant as a part of measures to increase employee employability. This kind of assistance takes often place only accidentally.

In France, an employment agreement’s extension under an activity contract to cover into addition to paid labour also other kinds of activities has been proposed. In addition to paid work the contract could cover training, self-employment, volunteer work, different leaves and even inactivity. The arrangement’s framework, scope and parties still need defining. It has been proposed that the arrangement could cover several parties, governing together the arrangement. The parties could be enterprises, training institutions, public power and industrial and commercial chambers. The agreement could allow transfers from one legal status to another and from one enterprise to another without discontinuity. The agreement could be in force several years, from three to four, even five years. Financing has been proposed to be arranged by a common fund, financed by parties offering
training and work. The model unifies enterprise needs for flexibility with employee needs for security at the personal level, social security included, thus preventing exclusion.  

In France, also another model has been proposed with mandatory elements. In the model, the concept of work is defined widely. The concept of work could include paid employment and non-occupational work in different forms. It is performed for a consideration with monetary value or even without it, based on law or a contract. Issues on safety and health and social security are covered. The system is underlined by the principle on equal treatment. The model would grant protection in the transition periods between different employments and status changes, linking also training and employment. The model furthers at the individual level security over flexibility and governance over one’s own life.  

The proposed French systems need testing. Also their financing needs attention. In the long run savings from financing unemployment will be evident. Also the systems’ character has to be defined, be they optional or mandatory. The method of selecting participating enterprises has to be defined. They may be selected on a sectoral or regional basis. Enterprises’ financial situation has importance in the selection.  

9.4. SEVERANCE PAYMENTS

Severance payments are monetary benefits paid by an employer in the case of a loss of job or employment affected by an employer. Severance payments are based on law or negotiations with the employer. From the employee perspective, severance payments are a form of internalising social costs affected by restructuring, establishing economic security to employees.  

In the Nordic countries severance payments are not common. In Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Portugal and Spain there are advanced severance payments systems. They exist also in the United Kingdom.  

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628 Boissonnat pp. 563-564, Foucauld page 603. See also Supiot page 516 on work-related human rights.  
630 Foucauld pp. 603 - 604.  
631 Redundancy entitlement guide for employees pp. 1-2.  
632 Morin – Vicens page 60.  
633 Collins – Ewing – McColgan page 1072.  
634 Hellsten page 61.
In Germany severance payments’ amounts differ. They equal from about two to ten months’ salary, the latter in long employment relationships. In Germany and in the Netherlands an agreement on a severance payment is a part of the social plan. In France, severance payments are based on law, covering all employees with at least two years employment. The level of collective agreement-based severance payments is higher.

In Italy, severance payment consists of two parts, a universally applicable payment and a mobility payment. The universally applicable payment is paid irrespective of a dismissal’s reason. Its amount depends on an employment service’s length, being equivalent to 20 months’ salary in the case of an employment relationship having been in force at least 20 years. The mobility payment is different in southern and northern Italy, depending also on an employee’s age. In the case of an employee being over 50 years and a company being located in the south, the mobility payment is equivalent to 48 months’ salary.

In the United Kingdom, the severance payment system is based both on law and contracts. The sums are lower compared to the Continental European countries. As a precondition a two years’ employment is required.

Belgium is the only country in Europe with a separate severance payment applicable in closures. It is paid in a company closure based on a company’s own voluntary decision-making. As a precondition is required an employee’s service of at least of 12 months.

In Sweden, severance payments are covered by a confederation collective agreement since 2004. The agreement is made between the confederations representing salaried employees and employers. In Finland, severance payments are paid only on a voluntary basis, the criteria being set individually by an employer.

At the EU-level there are not adopted any provisions on severance payments.

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635 Hellsten pp. 13 and 61.
636 Hellsten pp. 10-11.
637 Hellsten pp. 16-18.
639 TUPE 2006 guide page 22; Collins – Ewing – McColgan pp. 1001-1003, Selwyn pp. 258 and 466; Smith – Thomas pp. 552, 562-564 and page 565 on calculating the payment.
640 Hellsten page 9.
641 Hellsten 2007 page 12.
642 Hellsten page 61.
From the employee perspective, severance payments provide financial support for a limited period, varying according to national practises. They do not have a character of increasing and facilitating re-employment. This can be considered a system’s weakness. Being however a form of internalising company costs in restructuring, they may be a catalyst for balancing share of responsibilities between companies, public power and individuals.

9.5. COLLECTIVE BARGAINING’S NEW ROLE

The European Commission has emphasised among the others a good business practise and collective agreements as a means to tackle adverse effects of restructuring.\(^{643}\)

As a standard collective agreements contain an employment contract’s minimum conditions. Collective bargaining mechanisms could be changed to take into account production changes. Corporations organise themselves widely in groups, irrespective of actual branch represented. Collective bargaining could be widened to cover group-level negotiations and agreements. This is the case in France since 2004.\(^{644}\) This model has advantages in restructuring with regards to arranging further employment. Combined with offering placement and re-employment, the model could increase prospects on employment contract continuation, thus increasing employee economic protection. But the model’s coverage is limited when based on collective agreements and is dependant on the collective agreements’ coverage in question. Legislative means could offer a wider coverage.

Location-based inter-enterprise bargaining or territorial bargaining covering enterprise networks, are in use. Instead of traditional minimum employment conditions these new forms of collective agreements are proposed to cover provisions on training or labour mobility in the network’s framework.\(^{645}\) The new forms of collective bargaining may have significance also in restructuring context, in guaranteeing continued employment in a network. Being based on collective bargaining the model’s coverage is dependant on the collective agreement’s coverage. A more extensive coverage could be achieved by legislative means, enhancing the coverage in varying employer formations.

\(^{643}\) Commission’s first phase consultation pp. 4 and  6.

\(^{644}\) Morin page 368.

\(^{645}\) Morin pp. 368-369.
The labour law models in use and proposals are based on the present division of law into different branches. In core restructuring, in order to be carried out in a balanced way to get successful end-results, have to do both with company and labour law at the company level. The solutions, in order to increase company restructuring transactions’ quality, have to cover both of these areas of law.
PART II

EU-LAW IN THE RESEARCH CONTEXT

1 ON LEGISLATIVE TOOLS AND PROGRAMMES AT THE EU-LEVEL

1.1. THE NATURE OF THE EU’S DIFFERENT LEGISLATIVE TOOLS

The EU is to promote economic and social progress and a high level of employment and the achievement of balanced and sustainable development. This takes place by strengthening economic and social cohesion and through the establishment of economic and monetary union.646

The European integration has developed in phases, from the common to internal market. This has taken place on the basis of changes in nation-state politics forming the European Community and the European Union.647 The goals of the Treaty Article 2 are to be carried out by realising the common, now internal market, together with the realisation of the four freedoms, targeted, for example, to further trade on goods and services between the Member States.648 The common market leading to internal market was targeted to be carried out at the end of the year 1992. The goal has yet not been achieved. The internal market law includes a common customs tariff with four freedoms on the free movement of goods, persons, services and capital, based on the Treaty Article 3c, together with the EU competition law.649 These areas of law are intertwined, forming the EU-law’s central part. The Treaty Article 56 forbids all restrictions on capital, complementing the four freedoms.

The EU-membership sets binding obligations on a new Member State. It has to accept the *acquis communitaire* of the Union as such. With the *acquis communitaire* is referred to the Treaties, regulations, directives and decisions, the EU-law having supremacy above the domestic law.650 The Member States have to apply the Union law and harmonise national law respectively. National legislation contradictory with the EU law cannot be applied.651

646 Treaty of Rome article 2.
648 Jääskinen page 105.
650 Treaty article 249.
651 Joutsamo – Aalto – Kaila – Maunu pp. 61-63 and 115; Raitio page 189; Nyström page 37; Jääskinen pp. 60-61 Fahlbeck page 16.
The Community and the EU have no general competence in adopting legislation. Legislative competence provides an assignment by the Member States, in areas and under procedures specified in the Treaties. The Community action is to be taken only if the proposed action’s objectives cannot sufficiently be achieved at the Member State level, especially due to the action’s scale and effects. The subsidiarity principle requires the Community action to be limited only to an essential. In the field of social policy, the subsidiarity principle has raised questions on the extent of the Community action. The expressed views vary from the need of an active Community role to an approach denying the need of Community action in this field. As a general principle, the Community action is not to go beyond what is necessary to achieve the Treaty objectives, referring to the proportionality principle.

Directives are issued by the European Parliament together with the Council, and by the Council and the Commission. Directives are used to adapt national legislation to achieve the Treaty purposes, especially in the common, now internal market. Directives are means to advance integration, at the same time, respecting differences in national legal systems. Directives are a form to apply in practise the subsidiarity principle in areas of shared competence, which are areas of common action between the EU and the Member States.

Directives are not targeted to unifying national law. They are binding with regards to obligations. Directives are primarily used to harmonise Member State legislation. They are used to set frameworks or minimum standards for the Member States. Directives are also a means to deregulate. They have been used in communication, electricity and gas, to facilitate competition at the internal market and generally its functioning.

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652 Treaty article 5 (1); Barnard pp. 63-65.
653 Treaty article 5 (2).
654 Treaty article 5 (2); On the subsidiarity principle see Raitio pp. 181-188 and Joutsamo – Aalto- Kaila – Maunu pp. 43-45.
656 Barnard pp. 72-75.
657 Treaty article 249; Joutsamo – Aalto – Kaila - Maunu page 69; Prechal page 3.
658 Joutsamo – Aalto – Kaila – Maunu page 69; Raitio page 17.
660 On the areas of shared competence see Raitio page 181; On the shared competence in the area of social policy see Joutsamo – Aalto – Kaila – Maunu pp. 675-676 and in company law see Joutsamo – Aalto – Kaila – Maunu pp. 486-489.
661 Prechal page 16; Raitio page 16.
663 Prechal pp. 3-4.
The word “harmonisation” has two meanings. It has a legal meaning, just referred. The word refers also to an ideal underlining the creation of the European Communities and the EU as a whole. Irrespective of original nation state differences, EU-law is targeted to create harmony in a coherent unity. In the harmonisation process national differences are combined and their mutual relationships are re-defined.664 Directives are targeted to a creation of equivalencies in national systems, differences still being allowed to some extent.665

Directives are a form of limited intervention and decentralisation. They are addressed to the Member States, deciding themselves means and methods to achieve equivalent results within set time limits.666

At the national level, the process of implementing directives involves transposition, application and enforcement. In the transposition the directive is transformed into the national law. This process is targeted to achieve at the Member State level a directive’s full internal substance and purpose. Within labour law the implementation may be left to labour market parties, if the full implementation is guaranteed. If this cannot be achieved, additional measures are needed from the Member State’s part. As a general rule, implementation process results legislative changes at the Member State level.667

Application concerns concrete cases’ administration. Enforcement refers to the observance, including in addition to courts, all national authorities. National law is to be interpreted and applied in consistency with the directives’ and the Treaty’s purposes. In the interpretation into addition to a directive’s wording primarily also a directive’s purpose has to be taken into account, referring to its objectives.668

The use of labour law directives669 is labelled by practicality. They facilitate setting common standards to the Member States, allowing, however, to apply or introduce more favourable

664 Laulom 2003 page 292.
665 Laulom 2003 page 293.
667 Prechal pp. 73-91.
668 Prechal page 306.
669 Nyström page 38; See also Bruun – Malmberg 2006 page 69.
legislation at the Member State level\textsuperscript{670, 671} Implementation of labour law directives has led to extensive changes at the national level.\textsuperscript{672}

Also the adoption of company law directives is labelled by practicality. They are targeted to enhance internal market. Company law harmonising is to increase predictability in dealing with Community companies, with a similar structure and comparable rights and obligations.\textsuperscript{673}

When evaluated on the basis of the Treaty Article 2 the use of directives as a means to enhance Treaty objectives involves a weakness, both in the fields of labour and company law. The achievement of the Treaty objectives is ultimately set at the individual directives’ level, allowing equivalencies and differences simultaneously. Directives’ scope primarily depends on the will of the Members States, not necessarily forming a coherent unity in the adoption process. Also the length of legislative processes is apt to affect end-results. The end results, by also taking into account the practical application, may in practise denote to disharmonisation instead of harmonisation.

Regulations are means of supranational legal action. They are applicable as such in all the Member States, after the time-limit set in the regulation.\textsuperscript{674} They can be issued by the Council, the Council and the Parliament together and the Commission on certain specified issues.\textsuperscript{675} In the European company law, harmonisation programme regulations have been used to adopt provisions on the European Company and European Co-operative Society.\textsuperscript{676} In European labour law, regulations have not been used until now.

1.2. COMPANY LAW HARMONISATION PROGRAMME’S DEVELOPMENT

Economic integration has to do with economic liberalisation. The internal market is a form of economic integration between the Member States. It includes regulation, mutual recognition and standardisation. Actions are targeted to improve the economies of the EU and its Member States. A
precondition is a removal of restrictions on the freedom of establishment. The freedom of establishment is a right to practise permanent economic activity in a Member State. In the use of this right it is forbidden to discriminate on a nationality basis. The right covers Member States’ nationals and companies established in accordance with the Members States’ laws, having their official address, central administration or principal business within the Community. The term “company” does not have an equivalent meaning in all the Member States. In some Member States, the term refers to partnerships, in others to corporate entities with a limited liability and legal personality. In interpreting the concept of “a company” into account has to be taken the different legal systems and concepts in the Member States.

The European company law harmonisation programme is under a constant change. The development, enforcement and later complementation of the programme are effected by three different factors. These are the Members States’ changing goals, the EU’s enlargement and changes in economy and commercial practises. It is also affected by ideas on regulatory approach and company law’s aims generally. The debate is now accelerated due to enhancing business efficiency to compete and a possible need of regulatory competition between the Member States. This would lead to a more diversity in company law at the national level, lessening a need for the Union action. Regulatory arbitrage’s practical consequence at the company level would be an enhanced competition between company law jurisdictions.

In geographical and political sense the company law harmonisation programme covers the EU and the EEA, including now Norway, Island and Liechtenstein. Enterprises with multinational playing field are outside the scope of the programme in business activities stretching outside the EU and the EEA.

The company law harmonisation programme was adopted already in 1961. It was created to facilitate the common, later internal market, by encouraging free trade and movement. It is to make possible to deal with companies with a closely similar legal structure and equal rights and obligations. Originally the programme was targeted to avoid company law competition between the

678 Villiers page 170; Villiers 1998 page 161.
679 See Treaty article 48.
682 Raitio page 69.
683 Villiers page 169.
Member States. Differences in shareholder and creditor protection and in management structure were seen catalysts to a legislative competition. Companies would prefer establishment in Member States with the most flexible legislation, thus distorting economic competition in the common market. The programme was to create space for cross-border business and decrease its costs. Economic improvement of the European Economic Community and the Member States was also targeted. 684

The company law harmonisation programme has also targets of creating a unified business environment and community-scale capital market. It is to recognise industrial development’s social and regional aspects. In carrying out the programme, macro-economic and protectionist perspectives are prevalent. Challenges posed by the globalisation have had a secondary role. 685 But very often the chosen macroeconomic and protectionist perspectives are not European, but national ones.

The freedom of establishment covers also removal of restrictions on company re-organisation at the national and cross-border level. The programme is targeted to facilitate companies’ reorganisation and production’s re-location, in fact, restructuring. 686

The programme is based on the Treaty Article 44 (2)(g), former Article 54 (3)(g), referring to the co-ordination of the safeguards for the protection of the interests of members and others. 687 The chosen legislative basis presupposes a qualified majority voting in the Council in addition to the opinion of the Economic and Social Committee. 688 The used term in the Treaty provision is “co-ordination”, other used Treaty terms are “approximation” or “harmonisation” of the legislation. However, there are not any significant distinctions between these terms. In legal literature the terms have been interpreted to refer to a legislative equivalence, not to a total unification in Member States’ company laws. The interpretation is based on the use of directives as the main tool of carrying out the company law harmonisation programme. 689 The use of the directives refers there to

685 Villiers 1998 pp. 174-175.
687 Jääskinen page 153.
688 Edwards 2003 pp. 5 and 9.
be a need to reconcile different economic and cultural environments, creating a basis for balancing different interests and goals.690

Even originally the company law harmonisation programme’s goal was not clear. It was targeted to “the co-ordination of the safeguards” by creating a common level of protection to the “interests of members and others”. The used expressions do not accurately define the safeguards’ scope. They do not either define the circle of those referred to as the members and others. The “co-ordination of the safeguards” has largely been realised by developing legislation on technical issues, like disclosure of information and procedural rules. The expression “members and others” has been interpreted to refer at least to shareholders. It refers wider to the third parties, without, however, accurately defining them. Employee interests have caused controversy. According to a prevailing opinion, they should be covered by the legislation adopted under the company law harmonisation programme.691 In practise, the company law’s focus has been on shareholders and creditors.692 The vagueness of the used expressions has created a need to balance different group interests.693, 694

The company harmonisation programme covers a wide scope of juristic persons. It covers companies under civil and commercial law and cooperative societies. It covers also all the other juristic persons under the private and public law with a profit-purpose.695

The company law harmonisation programme has been largely labelled by harmonising national laws with regards to companies situated within a single Member State. Since the late 1960s there has been a policy towards industrial concentration. This reflects economies of scale, based on an idea of efficient resource allocation, especially in marketing, advertising, and research and development.696

The programme has concentrated on public limited liability companies, instead of private ones. In the Member States the majority of limited companies are however private ones. This has led to a discussion on the programme’s true impact on business community’s everyday life.697 Also latest

691 Villiers 1998 pp. 50-51 and 63; Villiers page 177.
692 Villiers 1998 page 63.
693 Werlauff page 8.
694 Villiers page 177; Villiers 1998 pp. 18-19; Edwards 2003 page 8.
695 Jääskinen page 153.
696 Villiers 1998 page 53.
changes in the character of the programme, making legal measures merely objectives and leaving to the Member States power to define their actual contents, has led to similar discussion.698

A reason explaining the programme’s focus on public limited companies has to do with the character of a limited company as a legal entity. A limited company is one of the cornerstones in the commercial law, together with the contract and business tax law. The legal structure of a limited company, being based on investors’ limited liability and depending on an investment’s size,699 makes a limited company suitable for different kinds of projects. From an investor point of view, innovativeness and monetary risks can be combined in a manageable way. Available is also made a way of organising activities and assets within an enacted organisation.700

In a nutshell, the company harmonisation programme covers two lines of action. Directives are created to change national company laws in order to form equivalencies between them. Another line of action has to do with the creation of European company forms. There have been a lot of disagreements on the programme’s development. The disagreements have concerned corporate governance and especially employees’ status, linked with the established company governance structures at the national level. Due to the disagreements the development has been slow.701

At the EU-level the proposal for the 5th company law directive on the structure of public limited companies and their organs’ powers and obligations was first proposed in the beginning of the 1970s and, revised, in the beginning of the 1980s.702 The proposal concerns only public limited companies.703 The most controversial parts of the proposal have to do with employee participation rights.704 Another matter of controversy has had to do with company management structure. The proposal for the 5th directive has not thus far been approved at the EU-level, due to heavy opposition705.706 Its delay is also due to the EU’s legislative efforts in company restructuring in recent years being focused on cross-border activities, on the SE, SCE and cross-border mergers of

698 See Villiers 1998 pp. 48-49.
699 See Sandström page 16 on co-operation in a limited company, being based on a company’s assets, bound in the form of share-capital instead of investors acting in an individual capacity.
700 Sandström page 13; CA 2005 § 1:3.1.
703 The Proposal for the 5th directive Chapter 1 article 1; CA Committee 1992:32 pp. 132-133.
limited companies. These different legislative initiatives and efforts do not however replace each other.

The proposal is targeted to unify the structure of public limited companies in different Member States. The proposal is also targeted to unify different organs’ competence and obligations in relation to shareholders and all the other stakeholders. The unifying is targeted to create for public limited companies an equal playing field in the EU. It is also targeted to increase legal safeguard level with regards to different stakeholders.\(^{707}\)

Ultimately, the proposal was targeted to take into use of a two-tier system in the Member States, in the form of a supervisory body and a board of directors. As an interim measure unifying of members’ competence and obligations in a one-tier\(^{708}\) and two-tier system\(^{709}\) have been proposed.\(^{710}\)

In the directive there are proposed two different systems on organising management in public limited companies. It is a matter of the Member States to make a choice among them.\(^{711}\)

In a two-tier system a public limited company is proposed to have two obligatory organs. In addition to a supervisory body, it is to have a body responsible of the business management on a daily base, denoting to a board of directors.\(^{712}\)

A general meeting is to elect all the members of a supervisory body, if the number of the personnel exceeds in the national law enacted limit, not exceeding 1,000.\(^{713}\) If the number of the personnel equals or exceeds the limit enacted in national law, the Member States have on obligation to provide for the company’s employees a right to participation. Employee participation has thus been proposed as a mandatory element \(^{714}\). \(^{715}\) Employee participation may take place by electing a part of the supervisory body’s members. It may take place by appointing a part of the body’s members on the basis of co-optation procedure, including employee representatives’ right to oppose a named

\(^{707}\) Proposal for the 5th Directive Preamble; CA Committee 1992:32 page 133.
\(^{708}\) Proposal for the 5th Directive Chapter II Article 2.1 and Chapter IV; CA Committee 1992:32 page 136.
\(^{709}\) Proposal for the 5th Directive Chapter II Article 2.1 and Chapter III.
\(^{710}\) Proposal for the 5th Directive Preamble; CA Committee 1992:32 page 134; Nyström page 174.
\(^{711}\) CA Committee 1992:32 page 133.
\(^{712}\) CA Committee 1992:32 page 135.
\(^{713}\) Proposal for the 5th Directive Chapter III Section 1 article 4.1.
\(^{714}\) Proposal for the 5th Directive Chapter III Section 1 article 4.2.
\(^{715}\) Werlauff 2003 page 469.
candidate. It may take place by arranging representation outside the board by using a special body, denoted to as a works council, or on a basis of an agreement-based system. When the employee representation is organised by electing representatives to the supervisory body, the employees may elect at least one-third and at the maximum one-half of the members. When the employees nominate half of the members in the supervisory body, decisions are ultimately proposed to be taken by the members nominated by a general meeting.

When employee representation is organised in a body representing the employees, the body is proposed to be granted a right to get regularly information and consultation on company’s administration, situation, prospects, competitive position, credit situation and investment plans from the company’s management. The supervisory body is also to consult this body before granting a managing body a permission to certain measures. Measures include among the others closures and transfers of a company or an essential part of it, large-scale organisational changes and decisions on long-time co-operation with other companies. The information and consultation obligations are applicable also in employee representation organised on the basis of an agreement.

According to one estimate there have been adopted under the programme since 1968, 37 directives and ten regulations, in addition to draft directives still pending. In the legislative process directives with different character have been used. The earliest phase was labelled by directives with a detailed approach. There was a move to a framework approach in the 1990s, only general principles being specified. At the moment influencing of legislative process is emphasised instead

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716 Proposal for the 5th Directive Chapter III Section 2 article 4c.
717 Proposal for the 5th Directive Chapter III Section 3 article 4d 1 and Section 4 article 4e.
719 Proposal for the 5th Directive Chapter III Section 2 article 4b 1; Werlauff 2003 page 470.
720 Proposal for the 5th Directive Chapter III Section 2 article 4b 2.
721 Proposal for the 5th Directive Chapter III Section 3 article 4d 1.
722 Proposal for the 5th Directive Chapter III Section 3 article 4d 2.
723 Werlauff 2003 page 329; Proposal for the 5th Directive Chapter III Section 7 article 12.
724 Proposal for the 5th Directive Chapter III Section 4 article 4g 1-2.
725 CA Committee 1992:32 page 135; Werlauff 2003 page 469.
726 Enriques pp. 644-645 and 687-691, listing the adopted enactments title by title up to the publication of the list in 2006; Werlauff 2003 pp. 71-75; See also Immonen – Nuolimaa pp. 30-31 on the scope of the programme, stating it to be narrower.
of actual substance. The present phase is characterised by a progress towards a minimum of centralised legislation, details being decided by the Member States.

In the development of the company harmonisation programme four different stages have been identified. They are linked with the enlargements and changes in the legislative processes. This characterisation is not, however, fully comprehensive, due to the supra-national legislation on the SE and the SCE. In spite of flexibility characterising the programme it has led to extensive reforms in national company laws. These reforms have largely been carried out by fitting directives into existing structures, instead of carrying out structural changes at the national level or at the EU-level. The used technique has made difficult to achieve uniformity. Even achieving of equivalent results has been difficult.

The first and second generation directives are influenced by the German legislation, predating the first enlargement of the European Community. A narrow level of decision-making is left to the Member States. The directives of this generation are mandatory in character.

The second generation directives were adopted after the first enlargement, taking place in 1973, including the United Kingdom, Ireland and Denmark. The influence of new Member States is to be discerned in the directives. The directives are more flexible in character compared with the previous generation. They still contain precise objectives and requirements. Implementation methods are wide, covering use of options and different alternatives, acknowledging the need for national diversity and decision-making. There are to be discerned ultimately equivalent goals.

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728 Villiers 1998 page 51.
730 The 1st directive on disclosure and validity of obligations OJ L 65 14.3.1968 p. 8-12, the 2nd directive on regulation of the formation of public limited liability companies and the protection of their share capital, OJ L 023 31.1.1977 P. 0001-0013.
732 Among the others the 3rd and the 6th directives.
733 Villiers page 179; Villiers 1998 pp. 29, 36-46 and 224.

The first and second generation directives were adopted under the consultation procedure. The opinion of the Parliament is sought and, if appropriate, also that of the Economic and Social Committee. On the basis of these opinions the Committee of Permanent Representatives prepares a report for the Council. A proposal endorsed by the Committee would be adopted by the Council. If the opinion of the Parliament would not be adopted by the Council, it is not mandatory for the Council to deliver reasons of this solution, see Villiers 1998 pp. 87-88.
The third generation directives\footnote{The 11th directive on publicity requirements on branch companies OJ L 395 30.12.1989 P. 0036-0039 and the 12th directive on one member companies OJ L 395 30.12.1989 P. 40.} were adopted after the entry of Spain, Portugal and Greece. Directives are short and characterised by only essential requirements. The focus is on goals, not on methods of achieving the set goals.\footnote{Villiers 1998 pp. 29, 46 and 224. This generation of directives was adopted in co-operation procedure, adopted by the Single European Act. The procedure enhances the power of the Parliament but only to a limited extent in relation to the Council and the Commission, see Villiers 1998 pp. 72-73, 87 and 97.}

The fourth generation of directives is linked with the enlargement of Finland, Sweden and Austria. The directives have a framework character. They are merely statements of objectives or principles, representing a minimalist approach. Member States are left a right to choose implementation methods of the set objectives and principles.\footnote{Villiers 1998 pp. 28-30, 48-50 and 224. The fourth generation is adopted in the co-decision procedure, adopted in the Maastricht Treaty. This procedure enhances the status of the Parliament by allowing a rejection of a proposed legislation by a veto, see Villiers 1998 pp. 72-73 and 103-104.} The directive on takeover bids has been adopted under this phase.\footnote{Directive 2004/25/EC on takeover bids or the 13th directive.} The directive on cross-border mergers of limited liability companies\footnote{Directive 2005/56/EC on cross-border mergers.} has also been adopted during this phase. The development of the company harmonisation programme affects, however, also the scope of previously adopted directives. For example, the character of the second directive has largely been watered down by the development since 1995.\footnote{Professor Heikki Toiviainen 24.1.2008; See Case C- 212/97 Centros, especially paragraph 28; Werlauff 2003 page 102.}

In spite of the changes in the European decision-making procedures and an aspiration towards democratisation, the status of the Parliament is still considered to be a marginal one. The Member States use their power in the Council. Their power has still grown in the programme by the move to framework directives, leaving a growing amount of matters to be decided at the national level. The framework directives accommodate differences in Member States legislation to each other instead of harmonisation.\footnote{Villiers 1998 pp. 106-107 and 179.} With regards to further flexibilisation and fragmentation, furthered by the idea on legislative competition in the form of the race to the bottom,\footnote{Armour page 498.} there are good reasons to challenge the development of the company law harmonisation programme and its practical results.

At the national level one difficulty in the practical enforcement of the company law harmonisation programme has to do with the directives’ different language versions, forming simultaneously the
interpretation basis and ground for different interpretations. Another difficulty is the preference to interpret the directives in the national legal context. Both of these factors affect the outcomes.

The company law harmonisation programme was initially created to avoid competition between company law jurisdictions. The enhanced competition is apt to ruin one of the original programme’s goals. Before continuing with the further development of the programme some basic questions need to be expressed and answered. These have to do with the essence of a company, especially its purpose. Also the definition of stakeholders and their mutual relations are among the issues to be taken under discussion and evaluation. This concerns especially employees’ role in company management. In the present time of short-term investment spans, employees often represent permanence in company actions. In spite of this, the company law harmonisation programme has largely focused on shareholder interest with regards to corporate governance, omitting employees’ role in company management.

1.3. EU’S IDEOLOGIES AND DEVELOPMENT TRENDS IN PROTECTING EMPLOYEES IN RESTRUCTURING – GENERAL OUTLINES

According to the Treaty Article 136, the Community and the Member States have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Community and the Member States shall take measures which take into account of the diverse forms of national practises, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaty and from the provisions laid down by law, regulation or administrative action.

742 Villiers page 191.
743 Villiers 1998 page 162; Enriques pp. 651-652.
744 Villiers page 177.
745 Villiers page 194; A critical view on the development of company harmonisation programme is expressed also by Liukkunen pp. 170 and 180, emphasising on page 170 a need to take into account in addition to shareholders and creditors other stakeholders in developing the programme.
746 Lundberg – Bruun page 232.
748 See also Treaty articles 2-4; Jääskinen pp. 100-102.
On the basis of the Treaty Article 137, with a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States, among other things, in the fields of working conditions, protection of workers where their employment contract is terminated and information and consultation of workers.\textsuperscript{749}

The European Community has a competence\textsuperscript{750} to adopt in co-decision procedure with qualified majority voting\textsuperscript{751} minimum standard directives, among the others on workers’ information and consultation. Minimum standard directives on representation and collective defence of interests of workers and employees, including co-determination, are to be adopted by unanimous vote. In the case of minimum standards the Member States have a freedom to adopt a higher level of protection at the national level.\textsuperscript{752}

The Treaty goals are to be furthered by the European level legislative action, complemented by national laws. Also collective agreements at the Union level are an option, made between European labour market parties. Social dialogue between the labour market parties at the European level is an inherent part of the European social model.\textsuperscript{753} At the Union level, social dialogue takes place in the Economic and Social Committee, being represented among the others by the European level labour market parties, the Business Europe representing employers and the European Trade Union Confederation representing employees\textsuperscript{754,755}.

The EU’s labour law or actions on employee protection are confined to certain, in the Treaty specified areas, being connected with carrying out of the internal market. The diverse forms of national practises have to be taken into account, in particular in contractual relations. This refers to national differences in labour market practises and employee involvement.\textsuperscript{756} Also the need to maintain the Community economy’s competitiveness has to be taken into account.\textsuperscript{757}

\textsuperscript{749} Treaty article 137 (b), (d) and (e).
\textsuperscript{750} Based on the Treaty article 137 (1) and (2).
\textsuperscript{751} Treaty article 251; On the co-decision procedure see Jääskinen pp. 294-297.
\textsuperscript{752} Barnard pp. 68-69.
\textsuperscript{753} Jääskinen pp. 163-164.
\textsuperscript{754} Treaty articles 7.2 and 257; Jääskinen pp. 265-266, the latter page on the tasks of the Economic and Social Committee; Nystöm pp. 77-81.
\textsuperscript{755} On the development of the European social dialogue see Industrial Relations 2006 pp. 91-93.
\textsuperscript{756} One of the basic political values of the EU is honouring individual Member States’ national identity, see Treaty Article 6.3; Jääskinen pp. 101 and 353.
\textsuperscript{757} Joutsamo – Aalto – Kaila – Maunu pp. 674-677.
The main purpose of the Treaty has been and still is the furthering of internal markets, economic goals being the primary ones. In EU labour law, legislative intervention has originally been labelled by an idea of an improvement of economic conditions automatically leading to an improvement in social conditions. The EU-level labour law was thought to be needed only in a case of competition distortions. The minimalist legal philosophy at the EU-level was greatly affected by strong national traditions in the Member States’ labour and social law and different attitudes on the welfare state ideology. At the Member State level there was a tendency to build needed labour law and social standards according to national models. The minimalist EU-labour law philosophy originally lacked a concept of employees in employment relationships’ weaker party needing protection, prevalent in many of the Member States.

The European labour law’s original emphasis on improvement of economic conditions automatically leading to improvement of social conditions links the European labour law with the company law harmonisation programme. The programme was created to facilitate the achievement of the internal market and to improve the European Economic Community’s and Member States’ economies. Part of the economic integration is companies’ and production’s re-organisation. The programme is labelled by economic liberalisation. It is characterised by a belief in efficient economic decisions, leading as an end-result to an efficient economy, maximising also social welfare and benefiting all. A faith in economic progress easily precludes the possibility of market failures, affecting strongest in an economic system its weakest actors, employees included, leading to a need of protection.

The EU labour law’s development can be divided into six phases. They are connected either with economic changes within the Union or institutional changes. The first phase was in 1958–1972, labelled by an enhancement of free movement of labour. The second phase was in 1972–1980, labelled by social policy’s central role. A period of stagnation took place in 1980–1987. The coming into force of the Single European Act on 1 July1987 denoted a change in social policy decision-making, including the European labour law, and furthering of social dialogue between the European labour market parties. The Maastricht Treaty’s coming into force created

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759 See Raitio page 40.
760 Compare with Dine on a market state page 7, equalling with the ideological background of economic liberalisation.
762 Nyström pp. 55-58.
preconditions to develop EU-level social policy.\textsuperscript{764} An agreement on Social Policy was made between the then 11 Member States, the United Kingdom not included, which was annexed to the Treaty\textsuperscript{765, 766} The sixth phase covers the period of coming into force of the Amsterdam Treaty since 1 May 1999.\textsuperscript{767} This period has been labelled by an increasing importance of social policy issues.\textsuperscript{768}

At the Lisbon summit in 2000 the EU adopted a new approach, the Lisbon strategy, which was also labelled with social dimension. The Lisbon strategy is based on a new legislative technique, Open Method of Co-ordination, the OMC. The OMC is based on a general-level goal-setting, their national level implementation and further monitoring.\textsuperscript{769} The used technique may lead to increased fragmentation.\textsuperscript{770} It may mark the beginning of the seventh development phase in the European social policy.

The development of the company law harmonisation programme since 1995 has been labelled by fragmentation and diversified goal-setting. Legislative measures have shrunken to statements of objectives in a minimalist legal framework, not guiding legislative development at the Member State level. Due to the OMC there may be a similar development trend in the European social policy. The development trends both in the company law harmonisation programme and social policy seem to be overlapping.

The EU-labour law connected with the company law harmonisation programme on restructuring evolved largely in the 1970s. It was due to wide restructuring among industry, leading to unemployment, making the integration’s benefits uneven. As a result three different directives were adopted, directives on Transfers of Undertakings, Collective Redundancies and employee protection

\textsuperscript{764} An opposite opinion see Nyström page 58.  
\textsuperscript{765} Nyström pp. 58-59.  
\textsuperscript{766} Bruun – Malmberg 2006 page 60.  
\textsuperscript{767} Amsterdam Treaty OJ L C 340 10.11.1997; Raitio page 72.  
\textsuperscript{768} Nyström pp. 55-60 and ibid. on the last phase pp. 59-60. European labour law summarised see Hellsten 2007/a pp. 16-20.  
\textsuperscript{769} Liukkunen page 27; Industrial Relations 2006 page 157; Jääskinen pp. 186-188; Deakin 2006 page 241. Deakin 2006 also further on the development of the OMC page 241, the Treaty of Maastricht having paved the way for the Broad Economic Policy Guidelines. The Treaty of Amsterdam paved the way for the Employment Guidelines in relation to the European Employment Strategy. The OMC is based on the principles of both of these guidelines, extending the use of the method to new areas in the field of social policy, for example, pensions, social inclusion and fundamental rights.  
\textsuperscript{770} Bruun pp. 277 and 292.
in employer insolvency.\textsuperscript{771} The adoption was based on the unanimity of the Member States, due to the Treaty Articles 94 and 308 (former Articles 100 and 235).\textsuperscript{772}

Originally labour law on restructuring including collective redundancies varied in different Member States, leading to different costs. Cost differences were thought to disturb effective realisation of common, later internal market. There was a need to level out restructuring costs between the Member States´ companies. The labour law on company restructuring was targeted to create a level playing field for companies. As another reason was acknowledged a need to protect employees from the effects of the internal markets´ realisation by restructuring. Removal of barriers and productivity improvements would lead to better social conditions at the national level. This would also lead to increasing harmonisation of social standards.\textsuperscript{773} Also the economic crisis of the mid-1970s, due to the 1973 oil crisis, furthered the development of the EU-labour law. The EU-labour law´s development is connected with labour flexibility, creating competitive advantage by a low level of costs. Labour flexibility has since been a part of the European social policy and labour law discussion.\textsuperscript{774} Flexibility, when leading to fragmentation, instability and discontinuity, is openly in contradiction with efficiency, in its best denoting to skilled and fluent production processes.

The starting points of the EU-labour law in restructuring are to unify two different goals: economic growth is unified with social development.\textsuperscript{775} The basic ideas underlining the adoption of EU-labour law – enhancing of economic efficiency and social protection – differ, leading to needs of reconciliation and balancing of interests.

Removal of barriers and productivity improvements were though to lead to better social conditions at the national level. This was though to lead to increasing harmonisation of social standards. These goals have not been achieved, the development having been even the opposite one. This is due to pressures on cost-efficiency in hardened competition and budget deficits pressures in national economies, affecting financing of social protection and consequently its level.

\textsuperscript{772} See Hellsten 2007 pp. 7-11.
\textsuperscript{773} Kenner pp. 27-29.
\textsuperscript{774} Treu page 103. See Barnard page 78 on changes in directives´ form as a practical mark of flexibility, directives being in a framework form or targeted to a partial harmonisation or setting of minimum standards.
\textsuperscript{775} Bruun page 273.
The justifications of company restructuring law were confirmed in the 1980s in creating the Single Market by the Single European Act, and later in the 1990s in the creation of the EU by the Maastricht Treaty. Markets have the power to launch companies to mutual competition and restructuring transactions affected by differences in workforce costs. There was acknowledged a need to balance economic efficiency by increasing employee welfare. In creating competitive advantage the emphasis was, however, still primarily on cost advantages created by low costs instead of an approach of developing knowledge-based productivity, getting its expression also in goals targeted towards the continuance of employment agreements and employees’ general well-being. Irrespective of the fairly short investment spans of institutional investors, limited companies are generally founded for an unlimited period. Employee protection is apt to give protection also to business activities’ permanence, protecting the company itself.

The Maastricht Treaty widened the European Community’s competence in labour law and social policy. Measures on working conditions and information and consultation could be adopted by a qualified majority. Measures on employee protection in an employment contract’s termination, representation and collective defence of interests, including co-determination, were to be adopted on an unanimity basis. Demand on unanimity involves actually a veto right. The unanimity demand leads easily in legislative processes to inefficiency and their lengthening, due to a need to reconcile the Member States’ often differing positions.

The Maastricht Treaty affected social partners’ roles in the European legislative processes. Social partners were granted a formal role, to be consulted by the Commission before proposals for new directives are submitted.

The Amsterdam Treaty changed the Maastricht Treaty provisions. A title on Employment was included. It created an institutional framework for common employment policy, targeted to

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777 Heinestam page 17.

778 Bruun – Malmberg 2006 page 60.

779 New Treaty article 137(3), former article 2(3), denoting to a co-operation procedure.

780 Barnard pp. 17-18.

781 Villiers 1998 page 75.

782 Bruun – Malmberg 2006 page 60; On the Social Dialogue at the European level see more in detail Industrial Relations 2006 pp. 91-93.
adaptation to the information society.\textsuperscript{783} A change took place in the Article 137, having been adopted for the first time in the Maastricht Treaty. In Article 137, the co-operation procedure replaced the co-decision procedure of the Article 251. The Article 251 was extended, to cover adoption of measures designed to encourage co-operation between the Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion.\textsuperscript{784}

The EU’s approach since the Amsterdam Treaty is labelled by flexibility in relation to companies and security in relation to employees. Social rights are not seen only as consequences of growth, but essential conditions to create growth, having pro-competitive effects.\textsuperscript{785}

Member States are required to co-ordinate employment policies to promote employment,\textsuperscript{786} which are considered a matter of common concern. The focus is on co-ordination of employment policies based on active labour markets, less on employee rights at the individual level. The change of emphasis in the policy making is largely due to an interdependent relationship between the European economic policy and Member State policies. The Member States have an obligation of policy making, the choose of actual used methods being a matter of the Member States themselves. This has been evaluated marking a difference in the legislative technique compared with the formerly used ones.\textsuperscript{787} Creation of employment and actual employment options are consequences of innumerable individual decisions at the corporate and public power level, there being a continuous interdependence between the parties’ actions.

At the Lisbon summit in 2000 the EU adopted a new strategic approach. It set a goal to become the most competitive and dynamic knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion.\textsuperscript{788} The Lisbon strategy is labelled both with the economic and social dimension. The goal is to invest in people and build an active welfare state. Economic and social strengths are inseparable.\textsuperscript{789} Anticipation of

\textsuperscript{783} Barnard page 24.
\textsuperscript{784} Barnard page 23.
\textsuperscript{785} Barnard pp. 57-58.
\textsuperscript{786} Treaty article 126.
\textsuperscript{787} On the Amsterdam Treaty 2.10.2007 see Raitio pp. 14 and 70-74; Barnard pp. 22-26 and 57-59.
\textsuperscript{788} Jääskinen page 186; Liukkunen page 27.
\textsuperscript{789} Industrial Relations 2006 page 157.
change is emphasised. Structural changes are to be managed, in hope of lessening economic and social costs connected with an inevitable adaptation.\textsuperscript{790}

The previous legislative method used in the labour and social policy was labelled by a command and control technique, getting its form in the directives. At the Union level the new approach emphasises regaining conditions for full employment. This is based on a new legislative technique, the OMC. It is targeted to co-ordinate Member State actions. Social partners play an important role. The new legislative technique is still based on the EU’s direction. The OMC has four elements. It is based on setting of guidelines, covering also timetables for achieving the goals, taking place at the EU-level. The second element concerns local level action. At the local level benchmarks for performance are established and best practises identified. The third element covers target definition and adoption in order to implement the guidelines in practise. Regional and national differences are taken into account. Fourthly, the process includes monitoring and evaluation, having a character of mutual learning.\textsuperscript{791}

The actual carrying out of the Lisbon strategy has met with difficulties. The Member States have had disagreements on the priority of the Lisbon strategy’s goals. The disagreements have had to do with the mutual relationship of the economic, social and environmental goals and their emphasis. The EU approach has largely been evaluated to be labelled by the primacy of the economic goals, based on neoclassical economics. Ultimately the issues causing disagreements have to do with the governance of the globalisation.\textsuperscript{792} The two last enlargements of the EU, in 2004 and 2007, are of significance, inevitably affecting the EU’s legislative work. The increase in the number of actors affects the scope of issues, goal-setting and practical legislative work. It is also apt to increase the EU’s legislative project’s fragmentary nature, demanding constant reconciliation between the EU and the Member States.\textsuperscript{793}

The Treaty was further amended in Nice. Qualified majority resolution voting was not extended to social policy issues. The community Charter on Fundamental Rights was adopted, including the right to information and consultation within the undertakings in good time, in cases and under

\textsuperscript{790} Liukkunen pp. 27-28.
\textsuperscript{791} Jääskinen pp. 187-188; Deakin 2006 page 241. Deakin 2006 also further on the development of the OMC page 241. The Treaty of Maastricht paved the way for the Broad Economic Policy Guidelines. The Treaty of Amsterdam paved the way for the Employment Guidelines in relation to the European Employment Strategy. The OMC is based on the principles of both of these guidelines, extending the use of the method to new areas in the field of social policy, for example pensions, social inclusion and fundamental rights.
\textsuperscript{792} Jääskinen page 187.
\textsuperscript{793} Bruun pp. 277 and 292.
conditions provided by the Union law and national laws and practises, the Charter yet not having a legally binding force.\textsuperscript{794} According to the EU Charter, workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practises.\textsuperscript{795}

From the 1970s the EU labour law and social policy has been based on “the floor of rights” approach, carried out mainly in the form of directives with limited scope of application. Many of the directives include references to minimum standards, which have to be applied, but may also be improved at the Member State level. Also non-regression clauses have been used, in order to prevent the deterioration of norms due to implementation. This legislative approach has been called reflexive harmonisation. It refers to double goals of preserving national and local level diversity in the legislative processes in spite of the supranational steering. Previously employment relationships at the individual level and individual employee rights have been important scopes of action at the EU-level.\textsuperscript{796} The change brought by the OMC emphasise an approach of deliberate polyarchy and are silent on the role of minimum standards in the integration process.\textsuperscript{797} In sociology, the present era of the second modernism has been claimed to have challenged the democracy in its traditional representative form. This has also to do with states’ new role, emphasising individual responsibility, denying state’s responsibility of its own citizens.\textsuperscript{798} These ideas may be seen reflected also at the EU-level approach emphasising policies, instead of rights targeted to afford individual level protection.

The EU-labour law’s enforcement is dependent on the co-operation of the supranational and national levels, supplementing each other. The relationship of the Union with its Member States is thus a symbiotic one.\textsuperscript{799} The Member States have an obligation to fulfil their obligations under community law in every respect. They have also an obligation to achieve the labour market goals set in the EU-law, including the Treaty obligations.\textsuperscript{800} The Member States may not plead provisions, practises or circumstances existing in their internal legal system to justify a failure to comply with the Membership obligations. A Member State cannot plead in its defence that the “circumstances are of little practical significance” or that in legislation “other forms of protection

\textsuperscript{795} On workers’ right to information and consultation see Blanke pp. 280-289.
\textsuperscript{796} Bruun page 285.
\textsuperscript{797} Deakin 2006 pp. 242-244; Barnard pp. 61 and 132-135.
\textsuperscript{798} Sennett pp. 94, 96 and 152-153.
\textsuperscript{799} Malmberg page 64.
\textsuperscript{800} Nielsen page 41.
are provided”. A failure to adopt within the prescribed period all the measures necessary to comply fully with the enacted Community legislation is a failure in fulfilling the Membership obligations of the Treaty.\textsuperscript{801}

The most important means of the EU-level enforcement are the preliminary rulings of the ECJ\textsuperscript{802} together with different kinds of infringement proceedings. National law, practises and remedies supplement these procedures. National remedies have to be effective and deterrent to secure the EU-law’s effective enforcement at the Member State level.\textsuperscript{803} The character of the national remedies varies from one Member State to another. In France, the remedies are primarily administrative in character. In the Nordic countries, the enforcement may also be based on negotiations between the social partners. In the United Kingdom, judicial processes are used.\textsuperscript{804}

The development of the labour law and social policy at the EU and Member State level have largely been labelled by an urge to reflect in law societal changes already having taken place. The legislative style has not been anticipatory, targeted to a proactive social development as an integrated whole.\textsuperscript{805} Another practical difficulty has had to do with the formulation of used concepts, also with the lack of them. In the EU there is not, for example, a common definition on wage employment, the definitions being made at the Member State level.\textsuperscript{806} This issue is connected with the EU-law being drafted in several languages, different language versions each being authentic.\textsuperscript{807} The interpretation of the EU-law may require comparison between different language versions,\textsuperscript{808} targeted to a uniform interpretation in the light of the rules’ purpose and general scheme.\textsuperscript{809} Also the used concepts’ meanings may vary between Community and the Member State law, with Community law using terminology peculiar to it.\textsuperscript{810}

\textsuperscript{801} ECJ in Case 215/83 Commission v. Belgium Summary, paragraph 25 and Operative part of the Judgment.
\textsuperscript{802} On the role of the ECJ after the latest enlargements see Bruun pp. 292-293.
\textsuperscript{803} ECJ in Case C-383/92 Commision v UK paragraph 40.
\textsuperscript{804} Hepple pp. 225-226.
\textsuperscript{805} Foucauld pp. 599-600; Bruun page 292.
\textsuperscript{806} Supiot page 616; See Directive on Transfers of Undertakings Chapter I Article 2 1. (c) “representatives of employees” mean representatives of the employees provided for by the laws and practises of the Member States and (d) “employee” means any person who, in the Member State concerned, is protected as an employee under national employment law. “Establishment” applicable both in the company and labour law is a Community law concept and cannot be defined by reference to the laws of the Member States. See Case C-449/93 Rockfon on the directive on Collective Redundancies 98/59/EC, paragraphs 23 and 25-28. See Bruun page 285.
\textsuperscript{807} Case 283/81 CILFIT paragraph 18.
\textsuperscript{808} Case 283/81 CILFIT paragraph 18.
\textsuperscript{809} Case C-449/93 Rockfon Summary 2 and paragraph 28.
\textsuperscript{810} Case 283/81 CILFIT paragraph 19.
One aspect linked with the EU labour law’s enforcement at the national level has to do with its practical reconciliation with national legal systems and labour market practises. Finland and Sweden have been covered by the European Communities’ social dimension since the coming into force of the Agreement on the EEA since 1 January 1994.\footnote{Bruun – Malmberg 2006 page 59.} At the EU-level largely legislative means have been used to affect labour markets. The emphasis has to a large extent previously been on individual rights. These trends may differ largely with the labour market traditions prevalent in some of the Member States. Sweden can be mentioned as an example. The labour law in Sweden is to a large extent non-mandatory in character, granting to labour market parties a right to determine on collective agreements-basis the applicable employment terms and conditions, being a method of self-regulation. Demands set by the European labour law have been felt to put pressure on national traditions.\footnote{Edström 2007 pp. 81-82; See also Fahlbeck 2002 page 131.}

Finland’s approach has been labelled by a policy of consensus with regards to EU-law. Finland has a fairly positive attitude towards increasing the EU-competence in the field of labour law. Joint positions are sought.\footnote{Bruun – Malmberg 2006 pp. 64-65.}

Due to social and economic changes, there is still one aspect to be mentioned, having to do with the development’s consequences. EU-labour law has increased considerably in amount during, for example, Finland’s and Sweden’s memberships. From the Member State perspective, labour law cannot anymore be said to be national in character. It is under a constant change due to influences having not purely national origins. An aspect linked with this has to do with the close relations of labour and commercial law, the latter being essentially economic in character\footnote{Liukkunen pp. 5 and 58.}.

## 2 ON EMPLOYEE INVOLVEMENT

Employee involvement is generally grounded with efficiency reasons. Even negative changes are thought to be implemented more efficiently, if employees have been in the process preceding them. If employees understand reasons for changes and the grounds for decisions, they may consent to the decisions or at least avoid openly resisting them. Employee involvement is grounded as a way to suggest proposals to increase efficiency, decreasing a need to dismissals. It may open up new alternatives to be implemented in carrying out change operations. Also concession bargaining may

\footnote{Bruun – Malmberg 2006/a pp. 3 and 26; Bruun – Malmberg 2006 pp. 92-93.}
be used, in the form of avoiding redundancies in return for decreases in wages. At their best negotiating periods may create space for employer and public power interventions to reduce adverse social consequences, in the form of attacking unemployment.816

Employee involvement in the form of negotiating periods may grant employees time to reconcile to changes at the personal level, either by training or at least by job-seeking.817 This effect may, however, be largely overestimated, evaluated on the basis of the length of the negotiating periods and crisis psychology. In Finland, the negotiating periods vary from 14 days to six weeks.818 A loss of job is one of the most traumatic experiences in human life,819 causing a serious crisis, which solely in its acute form lasts about six weeks.820

Employee involvement may be grounded with the European ideal on democracy. Democracy is not to cover only public sphere, but should be extended to areas held traditionally to be private ones.821 This point of view can well be grounded on the concession theory, private entrepreneurship in its different forms being based on public power´s concession.822

Organisational psychology defines consultation as a part of an organisation´s power tactics. Power is used in a dependency-relationship to influence other party´s behaviour to get the party to act in accordance with the more powerful party´s wishes.823 Consultation´s purpose is to translate power bases into specific action by influencing others, in company context denoting to employees.824

Power bases denote either to formal organisational power or personal power at the individual level. Formal organisational power is position-based. It is based on formal authority in the form of legitimate power, expressing itself in organisational resources´ control and use. It may be based on an ability to coerce or reward.825 It may also be based on an access and a control over information, creating dependence. Personal power is based on a person´s expertise or personal traits in the form

819 Poijula page 11.  
820 According to Poijula page 40 a crisis may last from one to three months, or up to one year or even longer.  
821 Collins – Ewing – McColgan page 1072. See Elkington pp. 311 and 345.  
822 See Monks page 179 on the value of direct participation, stating corporations having been delegated the authority of profit-seeking in the form of a limited delegation, not extending to areas of public interest, being in the political action field.  
823 Robbins page 390.  
824 Robbins pp. 396-397.  
825 See Galbraith pp. 18-20, 37-38, 68-69 and 81.
of charisma. In the context of the present research formal power as a power base is more of significance compared to personal power.

In organisational psychology consultation is defined to be one of the tactics to influence other party’s behaviour. Its purpose is to influence the target, his/her motivation and support. This takes place by involving the other party in the decision-making, when the plans or changes are under consideration. There is strong evidence that consultation is one of the strongest and most powerful power tactics, in spite of its surface-level “soft” character.

Evaluated on the basis of organisational psychology, employee involvement in the form of consultation has to do with power-tactics in a dependency relationship and when regulated, in a legalised form. Consultation in its traditional form does not denote to the parties’ equality and power balance between them.

In the EU the legislative development has since the 1970s been focused on developing information and consultation procedures, by regulating minimum standards to be adopted at the national level. It has been evaluated that information and consultation have established themselves in the EU-law as a general labour law principle, especially after the adoption of the directive on Informing and consulting employees. Transnational corporations, whose attitude towards legislating cross-border information and consultation has been labelled by doubts, nowadays evaluate the EU-law in this field to be moderate. Attitudes on tightening of legislation are instead stricter.

At the EU-level employee involvement is generally defined to mean any mechanism, including information, consultation and participation, through which employee representatives may exercise influence on decisions to be taken within a company or an undertaking. At the EU-level there is

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826 Robbins pp. 391-394.
827 According to Robbins page 396 the power tactics are consultation, legitimacy in the form of relying on one’s position or organisational policies or rules, rational persuasion in the form of logical arguments and factual evidence, inspirational appeals in the form of appealing to other party’s values, needs, hopes and aspirations, exchange of benefits or favours, personal appeals based on friendship or loyalty, ingratiation such as flattery and friendly behaviour, pressure in the form of warnings, repeated demands and threats and coalitions by using other people’s aid to persuade the other party to agree.
828 See Galbraith pp. 37 and 41-42.
829 Robbins pp. 396-397.
830 Rodière in Morin page 367.
831 Bruun page 284.
832 Directive supplementing the Statute for SE with regards to employee involvement OJ L 207 18.8.2003 P. 25 Section 1 Article 2 (h); Directive supplementing the Statute for SCE with regards to employee involvement OJ L 207 18.8.2003 P. 25 Section 1 Article 2 (h).
not a common definition on employee involvement. It may include different forms of employee influence, ranging from indirect participation or workplace representation in the form of unilateral employer information or negotiation to full employee participation in a corporation’s governing bodies, denoting to direct forms of participation.833

Information means generally the informing of the body representative of the employees and/or the employee representatives by the competent organ of the company on questions that concern the company itself or its subsidiaries or establishments, at a time, in a manner and with a content that allows the employee representatives to undertake an in-depth assessment of the possible impact, and where appropriate, prepare consultations with the competent organ.834

Consultation means generally the establishment of dialogue and exchange of views between the body representative of the employees and/or the employee representatives and the competent organ of the company, at a time, in a manner and with a content which allows the employee representatives, on the basis of the information provided, to express an opinion on the measures envisaged by the competent organ which may be taken into account in the decision-making process within the company.835

With participation systems are generally referred to as systems in which employees may participate in an employer decision-making.836 Participation denotes to the influence of the body representative of the employees and/or the employee representatives in the affairs of a company or legal entity by way of the right to elect or appoint some of the members of the company’s or legal entity’s supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company’s or legal entity’s supervisory or administrative organ.837

834 Directive supplementing the Statute for SE with regards to employee involvement Section 1 Article 2 (i ); Directive supplementing the Statute for SCE with regards to employee involvement Section 1 Article 2 (i ); See also Directive 2002/14/EC on Informing and consulting employees article 2, defining information.
835 Directive supplementing the Statute for SE with regards to employee involvement Section 1 Article 2 (j); Directive supplementing the Statute for SCE with regards to employee involvement Section 1 Article 2 (j); Directive on Transfers of Undertakings Chapter III article 7 2; Directive on Collective Redundancies Section II article 2 ; Directive on Informing and consulting employees article 2 (g). See also Directive 94/45/EC on European Works Councils Section I Article 2 (f) defining consultation.
836 Liukkunen page 213.
837 Directive supplementing the Statute for SE with regards to employee involvement Section 1 Article 2 (k); Directive supplementing the Statute for SCE with regards to employee involvement Section 1 Article 2 (k).
At the individual Member States level workplace representation principles differ. There are differences in structures and levels of participatory rights. Representation may be based on law or collective agreements. Representatives may be elected from among all the employees, or they may have a trade union background. Also the employee involvement itself may take on different forms. It may contain unilateral employer information, co-determination or joint decision-making.  

The systems on employee involvement can be divided into five or ever into six, depending on their structure, scope of matters and degree of employee influence.

1 *Collective agreements system* is in the Nordic countries a part of the labour market negotiations system. In the Nordic countries collective agreements cover generally in addition to salary agreements also among the others matters on other working conditions, health and safety at work, training and personnel policy in general. In applying collective agreements at the local level employees are represented by a shop steward. Shop steward status and tasks in negotiations and in interpreting collective agreements at the local level are also a part of the applicable agreements. They have a role as trade union representatives at the workplace.

Collective agreements with a wide scope of regulated areas are common in Finland with regards to salaried employees and lower salaried employees, at present also in upper salaried employees’ employment relationships. In Sweden, the tradition of regulating labour markets with far-extending collective agreements between the parties has even a longer history. In Finland, collective agreements are negotiated between parties representing employees and employers in question, denoting to an unofficial recognition. In Sweden, the coverage of collective agreements was in 2001 over 90 per cent, in Finland over 80 per cent.

2 With *codetermination* is denoted to forms of employee involvement in practise limiting employer decision-making. This may take place in a company’s governing body. System based on works councils is common in Germany. Employees are represented in works councils functioning at the plant level. Works councils operate mainly with social matters. Matters

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838 Industrial Relations 2006 page 11.
840 Industrial Relations 2004 page 30.
842 Liukkunen pp. 46-47; Industrial Relations 2006 pp. 11 and 58.
have to do with human resources management and policies. Included are regulations on career management, working time, training and dismissals. Under certain conditions a works council can object to an individual dismissal. The German model on employee representation has acted as a model in the EU, in regulating European Works Councils, the EWCs, in Community-scale undertakings and groups of undertakings, in order to inform and consult employees in these kinds of undertakings and groups. In the EU there are about 750 EWCs, covering 13 million employees in Europe.

In principle limited companies are governed in Germany by a two-tier system. The daily management of a company takes place in an executive board. Supervisory body controls the company. Employees have their representation in the supervisory body.

In Germany there are four different employee representation systems. The practical application depends on company form, branch and number of employed. Employee representation is, however, carried out in the supervisory body. Employee representatives have at least one-third of the seats in the supervisory body. In corporations with 2,000 or more employees, employee representatives have one-half of the seats; shareholders electing directors to be the other half. Supervisory body appoints the management, makes decisions on profit-sharing, approves accounts and makes major investment decisions like acquisitions and closures. In corporations outside the application of enacted forms, employee representation may be organised on an agreement-basis. Agreements supplementing the enacted forms are also allowed.

Another model of co-determination is in use in Sweden. It takes place in the form of mandatory employee board membership. Employee representation has to be arranged, if a company has employed on the average at least 25 employees during the last accounting year. In the case of a

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844 Industrial Relations 2006 page 67.
846 Industrial Relations 2006 page 124.
847 Gugler – Mueller – Yurtoglu page 34.
849 Barnard page 703.
851 Gugler – Mueller – Yurtoglu page 34.
853 AER §§ 2 and 4.
company acting in different branches, the demand of the average employed is 1,000.\textsuperscript{854} Employee representatives are always a minority in the board.\textsuperscript{855}

3 Information and consultation in their traditional forms do not as a general rule limit the actual employer decision-making.\textsuperscript{856} Information is unilateral in character, taking place between the employer and employees, the latter being recipients of unilateral information.\textsuperscript{857} In consultation in its traditional form, the employee representatives may make their views known to the employer. The final decision-making has traditionally been conceived as an employer matter. The employees’ views may be taken into account in it, or may not be taken into account at all.\textsuperscript{858}

From company perspective consultation procedures help to use capital efficiently. Consultation is a platform to represent employees’ points of views. Consultation may help to promote at least to some extent employment security.\textsuperscript{859} However, this effect is highly dependable on the wholeness of consultation, referring to its initiation, length of the negotiating periods and matters covered by it.

In Sweden co-determination rights may be agreed upon by collective agreements.\textsuperscript{860} An agreement may be agreed among the others upon entering and terminating employment contracts, directing of work and generally on carrying out of an establishment’s activities. Central agreements are more common compared with the local ones.\textsuperscript{861} In Denmark, co-determination rights are generally agreed upon by collective agreements, too.\textsuperscript{862}

The Finnish Act on Co-operation within Undertaking in its previous in 1978 enacted form covered employee involvement largely in the form of either unilateral information or consultation in its traditional form.\textsuperscript{863} The prevalent ACU 2007 has many references to “negotiating in the spirit of co-operation in order to obtain consensus”.\textsuperscript{864} Finnish legal literature emphasises employer’s

\begin{itemize}
\item \textsuperscript{854} Lavén pp. 22, 47 and 49-53; Moberg pp. 36-39; af Sandeberg page 93; PTK pp. 11-12 and 18; Liukkunen page 230; See also Sandström pp. 241-242.
\item \textsuperscript{855} Moberg page 28; Skog pp. 198-199.
\item \textsuperscript{856} Liukkunen page 46.
\item \textsuperscript{857} Barnard page 704.
\item \textsuperscript{858} Barnard page 704.
\item \textsuperscript{859} Collins – Ewing – McColgan page 1072.
\item \textsuperscript{860} ACW § 32.
\item \textsuperscript{861} Iseskog pp. 323-325 and 372-375.
\item \textsuperscript{862} Industrial Relations 2006 page 67.
\item \textsuperscript{863} Committee Proposal 2003 page 27; Government Proposal for ACU 2007 page 16; Nieminen page 6.
\item \textsuperscript{864} See ACU 2007 §§ 4:20.1, 6:38 and 8:50.
\end{itemize}
decision-making rights and consensus’ un-binding nature and effects, it not being an agreement.\textsuperscript{865} Consensus denotes to unanimity in parties’ opinions and views in the framework covered by the consensus. Consequently, consensus may also denote to effects affecting employer’s decision-making in its framework. Due to the unanimity in consensus is inherent a factor limiting employer’s decision-making. If consensus were wholly unbinding in nature, not affecting employer decision-making in its framework, it could even be interpreted contrary to the very purpose of the ACU 2007, being to collectively develop\textsuperscript{866} operations of an undertaking and employees’ opportunities to exercise influence in the decisions made within the undertaking relating to their work, their working conditions and their position in the undertaking.\textsuperscript{867} In interpreting the concept of consensus the directives on Informing and consulting employees, Transfers of Undertakings and Collective Redundancies have to be taken into account. One of the purposes of the directive on Informing and consulting employees is strengthening of dialogue and promoting of trust within undertakings, in order to promote employee involvement in the operation and future of the undertaking and increase its competitiveness. When defining or implementing practical arrangements for information and consultation, the employer and the employees’ representatives shall work in the spirit of co-operation and with due regard for their reciprocal rights and obligations, taking into account the interests of both of the undertaking or establishment and of the employees.\textsuperscript{868} In the directives on Informing and consulting employees, Transfers of Undertakings and Collective Redundancies the enacted consultations with the employees’ representatives are carried out with a view to reaching an agreement, the end-result in the form of an agreement being in character a mutually binding legal instrument.\textsuperscript{869}

4 Also economic participation in a company may be included under the definition on employee involvement, either under shareownership\textsuperscript{870} or profit-sharing.\textsuperscript{871} In Finland, employees can

\textsuperscript{867} ACU 2007 § 1:1. See also Industrial Relations 2006 page 12 on research-results showing that in the Nordic countries work-place representation is developing into deeper involvement and co-determination.
\textsuperscript{868} Directive 2002/14/EC Preamble point (7) and article 1 3.
\textsuperscript{869} Directive 2001/23/EC on Transfers of Undertakings Chapter III Article 7 2 referring to consultations with a view to reaching an agreement, and directive 98/59/EC on Collective Redundancies Section II Article 2 1 referring to the same end-result, as well as directive 2002/14/EC on Informing and consulting employees Article 4 4 (c) and 2. (c): Consultation shall take place with a view to reaching an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations; In the context of the ACU 1978 see Nieminen pp. 23, 43-45, 60-62, 67-68, 324-326, 332-333, 358-359 and 380.
\textsuperscript{870} See EFA and Toiviainen 2004 pp. 13 and 136-138.
\textsuperscript{871} Liukkunen page 127; Barnard page 744; Industrial Relations 2006 page 57.
collectively act as shareholders on the basis of the Employee Fund Act. When employees as fund owners and managers invest its assets in the company being employed of, they act also as shareholders of the company. This forms a means of direct influence in company matters. Funds based on the EFA have not, however, gained popularity in Finland.

5 The fifth form of employee influence is occupational health and safety. In Finland, occupational health and safety is a form of co-operation between an employer and employees. The system is based either on collective agreements or law. According to law, in a workplace with a minimum of ten employees, the employees have a right to elect among themselves an occupational safety and health representative. Occupational safety and health co-operation covers all work-related matters, which have to do with employee safety and health. Occupational safety and health co-operation is outside the scope of the present research.

6 In the sixth form employee involvement takes place with a low coverage, in a few forms or may not take place at all. The United Kingdom can be interpreted as a country representing the sixth form of employee involvement. This can be grounded by a reference to a low recognition of trade unions at the work-place level to negotiate pay and employment conditions. In 2004 the recognition was granted only in 27 per cent of workplaces. Also the coverage of the collective agreements is low. In 2005 the pay of only 35 per cent of employees was set by collective agreements. The claim can also be grounded with a reference to the implementation of the directive on Informing and consulting employees. Only due to the implementation information and consultation got a statutory basis in the United Kingdom.

Another definition divides employee influence into two categories. Decisive is actual involvement in employer decision-making. Indirect participation by the employee representatives has as its goal to try to influence employer decision-making. This denotes to consultation is its traditional form. The scope of issues may cover also strategic and tactical matters. In direct participation employees participate in employer decision-making. Direct participation may cover in addition to strategic

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872 Toiviainen page 10.
874 Toiviainen 2004 page 136.
875 Act on Co-operation on Occupational Safety and Health at Workplaces § 1:1 and Chapter 5; Act on Occupational Safety and Health Chapter 3.
876 Act on Co-operation on Occupational Safety and Health at Workplaces § 5:29.1.
877 Occupational Safety and Health in Finland pp. 9-10.
878 Grimshaw – Marchington page 531.
879 Industrial Relations 2006 page 11; I&C Regulations.
matters also on a day-to-day basis shop floor matters, among the others project groups, team work, survey feedback and different kinds of schemes.\textsuperscript{880}

With regards to restructuring procedures under the Finnish Act on Co-operation within Undertakings 2007, co-operation procedure in reducing the use of personnel and \textit{resulting in an agreement} between an employer and employee representatives equals with direct participation.\textsuperscript{881}

This point of view has not been under evaluation in the Finnish labour law.

Survey feedbacks, scheme-making, project and team work are common practises in Finland, also in restructuring context. From the Finnish perspective a view on direct employee participation covering survey feedbacks, scheme-making, project and team work is an alien one. Traditionally in Finland these practises are considered to be a part of an employer’s human resources practises, thus a part of an employer’s management right and decision-making. Although employees can deliver their opinions in surveys, it is not guaranteed these actually leading to positive further action. Schemes cover matters still being under preparation, not necessarily guaranteeing employee perspective to be taken into account, at least in matters and procedures outside the Act on Co-operation.\textsuperscript{882} Although project and team work grant employees certain level of independence in carrying out work, the goals are ultimately set by an employer under direction right,\textsuperscript{883} and irrespective of a project or team, “employees shall perform their work carefully, observing the instructions concerning performance issued by the employer within its competence”.\textsuperscript{884} However, if employee point of view practically affects the end-result, either within or outside the procedures enacted in the Act on Co-operation, the procedure with its end-result denotes to direct participation, not only to employee involvement in the form of an unbinding consultation. Unilateral deviation from the end-result by the employer would be devastating with regards to further company development.\textsuperscript{885}

\textsuperscript{880} Industrial Relations page 58; Toiviainen 2004 page 10.
\textsuperscript{881} Compare ACU 2007 § 8:51.1-2 with directive 2001/23/EC on Transfers of Undertakings Chapter III Article 7 2 referring to consultations with a view to reaching an agreement, and directive 98/59/EC on Collective Redundancies Section II Article 2 1 referring to the same end-result, as well as directive 2002/14/EC on Informing and consulting employees Article 4 4 (e) and 2. (c): Consultation shall take place with a view to reaching an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations.
\textsuperscript{882} See ACU 2007 especially Chapters 4-8.
\textsuperscript{883} ECA 2001 § 1:1.1.
\textsuperscript{884} ECA 2001 § 3:1.
Research especially from Germany shows that employee representation, when functioning well, may impact positively on economic performance. The impact has been evaluated to be at least a moderate one. The effect is even more positive when employee representation is used in carrying out organisational or technological changes. Research also shows that employee representation especially in the Nordic countries is developing more to involvement and co-determination, playing an important role in work-place modernisation and performance. Employee representation, when creating value in described ways, has a role of economic character, by making the business activities of companies more productive and efficient. A precondition for productive and efficient carrying out of work is a climate of trust, making possible open and interactive communication.

3 MERGER AS A CIVIL LAW PROCEDURE AT THE EU-LEVEL

The concept of a merger denotes to a merger in company and labour law in civil law countries. The concept is used in a distinctive meaning, separating the research´ scope from competition law context.

3.1. THE 3rd COMPANY LAW DIRECTIVE ON MERGERS

3.1.1. SCOPE, GOALS AND DIFFERENT INTEREST GROUPS

The 3rd directive has dual goals. It is targeted to encourage companies in the different Member States to a more profound cooperation between each other. It is also targeted to economics- of-scale, to create for the European companies a stronger position at the world market. These goals have been grounded by a worry over the American corporations´ increasing influence at the European market since the 1960s. The adoption of the 3rd directive was a response to these worries. The 3rd directive, being based on the Treaty Article 54 (3)(g), is part of the general programme of abolishing restrictions on the freedom of establishment. The first proposal for the 3rd directive was made in 1970. The directive was finally agreed in 1978. It has been implemented in all the Member States, due to its mandatory character.

886 Industrial Relations 2006 pp. 12 and 77.
887 Proposal for ACU 2007 page 19. See also Elkington page 242; Julkunen pp. 76-78 on factors decesing trust; Siïén pp. 95-112.
888 Villiers 1998 pp. 203-204; Villiers – Boyle page 224.
890 The 3rd directive Preamble; Edwards 2003 page 93.
891 Villiers 1998 page 37.
Before the directive’s adoption there was among the original six Member States law on mergers only in France, Germany and Italy. In Germany mergers have been enacted in company law since 1861. Before the directive’s adoption a merger could be carried out in Belgium and Luxembourg only on tax-law-basis.

The 3rd company law directive concerns only mergers of public limited liability companies. In national law the Member States may apply the directive’s provisions to another kind of companies. It is thus possible to apply the directive’s provisions to private limited companies. The directive’s scope of application is apt to affect the directive’s practicality as a restructuring measure. This is due to a fact that in the Member States the majority of companies are private.

The directive covers only national level mergers. Outside its scope are cross-border mergers. Cross-border mergers of limited liability companies are regulated in the directive 2005/56/EC.

892 SOU 1992:83 page 313; See Palm pp. 284-285 on corporate finance system in Germany, being a concentrated one, in fact forming a brake to take-overs.
894 The 3rd directive or Directive 78/855/EEC article 1.1; CA Committee 1992:32 page 105; Werlauff 2003 page 83; Edwards 2003 page 94.

In Finland the 2nd directive led to amendments in the Companies Act. A division between private and public limited companies was made, depending on the amount of share-capital. See CA Committee 1992:32 pp. 2 and 381-382; CA 2006 §§ 1:1 and 3; Proposal for CA 109/2005 page 38; Toiviainen 2008 pp. 294-298; Airaksinen – Pulkkinen – Rasinaho pp. 7-8; Mihlön – Sääkkö – Villa page 18; Immonen – Nuolimaa pp. 32-33; Reinikainen – Pelkonen – Lydman pp. 20 and 22; CA 1978 § 1:1-2; Toiviainen 2001 page 83.

In Sweden the 2nd directive led to a division between private and public limited companies, the amount of the share-capital being decisive; CA 2005 §§ 1:2, 4-5, 7 and 14; Svensson page 30; af Sandeberg pp. 30-31; CA § 1:3; Böckmark - Svensson pp. 13-16.

Before the coming into force of the 2nd directive there was not in the United Kingdom a requirement on share capital in private limited companies, see Edwards 2003 page 60, now this being an “authorised minimum” of 50,000 pounds. See CA 2006 BR Part 1 4 (1) and (2), Chapter 2 761 and 763, Part 20 Chapter 1; Explanatory notes pp. 5 and 159-16, Mayson, French & Ryan page 55.

895 CA Committee 1992:32 page 311; Werlauff 2003 page 566. The Member States need not apply the directive to cooperatives, neither to companies under winding up, see the 3rd directive articles 1.2.-1.3, CA Committee 1993:32 page 105, Villiers 1998 page 38.
896 Villiers 1998 page 164.
897 The 3rd directive Chapter I article 2; CA Committee 1992:32 page 311.
899 See Directive 2005/56/EC Preamble point (2) and article 1.
The 3rd directive was not intended to remove completely differences in the Member States’ merger law.\textsuperscript{900} It was targeted to harmonise the Member States’ law in national mergers. It was also to introduce the concept of “a merger” into those Member States’ legislation not yet acknowledging mergers.\textsuperscript{901, 902}

A merger is targeted to achieve permanent changes in company structure.\textsuperscript{903} A merger when covering an acquisition of another company can be described as a takeover. A merger may be targeted to a formation of a new company.\textsuperscript{904}

Member States are required to make provisions on the acquisition of a wholly-owned subsidiary.\textsuperscript{905} In Sweden this form of a merger is the most commonly used.\textsuperscript{906} This is the case in Finland, too.\textsuperscript{907}

The directive has provisions on a merger between a parent and subsidiary company. Provisions concern a merger in a concern in which a parent company owns its subsidiary, the ownership covering at least 90 per cent of the shares but not all of them. In a merger the latter company is merged to a parent.\textsuperscript{908}

Outside the directive’s scope is a transfer of a company’s assets and liabilities not involving a dissolution of a company under acquisition or formation. As examples can be mentioned a disposal of a branch and a sale of certain specified assets. Also issuing of shares by an acquiring company is outside the 3rd directive. Takeovers are not covered, referring to an acquisition of shares not involving a transfer of assets and liabilities or a dissolution of a target company. Also company

\textsuperscript{900} SOU 1992:83 page 321.  
\textsuperscript{901} Werlauff 2003 page 566.  
\textsuperscript{902} Edwards 2003 pp. 93-94.  
\textsuperscript{903} Sandström page 337.  

\textsuperscript{904} The 3rd directive regulates three kinds of mergers: \emph{an absorption merger}, consisting of a merger by an acquisition of one or more companies by another, \emph{a combination merger}, which is a merger by a formation of a new company and \emph{a subsidiary merger}, consisting of a merger by an acquisition of one company by another holding all of its shares. See the 3rd directive Chapter I articles 2-4 and Chapter IV article 24. See Werlauff 2003 page 567, Heinestam page 20. Member States may allow an absorption merger in insolvent companies, if the participating companies have not yet begun to dissolve their assets, see the 3rd directive Chapter I article 4, CA Committee 1992:32 pp. 105-106 and Edwards 2003 pp. 95-98.

\textsuperscript{905} The 3rd directive Chapter IV article 24, CA Committee 1992:32 page 109, Edwards 2003 pp. 91 and 97-98, this kind of a merger not requiring decision-making in a general meeting. However, this may take place if the draft terms are made public at least one month before the coming into force of the planned operation. The shareholders of the acquiring company are entitled to inspect all the relevant documents.  
\textsuperscript{906} Heinestam page 21.  
\textsuperscript{907} Government Proposal 103/2007 page 20.  
\textsuperscript{908} The 3rd directive Chapter IV article 27, CA Committee 1992:32 page 109, Edwards 2003 page 98.
restructuring or reorganisation within a single undertaking is not covered. Outside the directive’s scope is a transfer of a company’s assets to a company newly formed.\textsuperscript{909}

A merger when completed leads to a transfer of assets and liabilities between involved companies. Shareholders of a company being acquired become shareholders in an acquiring company or a company being formed, an acquired company or a company being a party in the formation ceasing to exist.\textsuperscript{910}

The first feature characterising a merger has to do with a transfer of share-ownership.\textsuperscript{911} The second feature has to do with the transfer of assets and liabilities from a company being acquired or being a party in the formation process to an acquiring company or a company being formed. The third feature has to do with a dissolution of a company being acquired or being a party in the formation, without a separate process of winding-up or liquidation\textsuperscript{912}.\textsuperscript{913} The directive requires all these measures to take place simultaneously, in order there to be a merger in the 3\textsuperscript{rd} directive’s meaning.\textsuperscript{914} More than one existing company has to be involved.\textsuperscript{915}

The directive’s terminology is at least to some extent unclear or even contradictory with regards to obligations set on the Member States. According to the Preamble, “protection requires the laws of the Member States relating to mergers of public limited liability companies be coordinated”. The directive’s Article on its scope speaks of “coordination measures”.\textsuperscript{916} The used expressions refer primarily to a goal of harmonisation. The Preamble states that “provision for mergers should be made in the laws of all the Member States”, implying to an obligation to legislate on mergers as a

\textsuperscript{909} Edwards 2003 pp. 91-92.
\textsuperscript{910} The 3\textsuperscript{rd} directive Chapter II article 19; Jauhiainen – Lappi – Aho pp. 35-36; CA Committee 1992:32 page 108; Edwards pp. 95 and 112-113.
\textsuperscript{911} CA Committee 1992:32 page 312.
\textsuperscript{912} Werlauff 2003 page 568.
\textsuperscript{913} Heinestam page 20. See Jauhiainen – Lappi – Aho page 35 and CA Committee 1992:32 page 311: The 3\textsuperscript{rd} directive’s principles have to be applied in all company arrangements the consequences of which resemble those of a merger in the directive enacted form. The directive has to be applied irrespective of the naming of the arrangement or the way of actually carrying it out.

See the 3\textsuperscript{rd} directive Chapter V article 31 and Werlauff 2003 page 568: If the legislation of a Member State permits mergers to be carried out by acquisition, formation or acquisition of a wholly-owned subsidiary, without all the transferring companies ceasing to exist, the directive is applicable. Actually, the procedure is a division, now enacted in the 6\textsuperscript{th} directive, Edwards 2003 pp. 99-116.

\textsuperscript{914} Edwards 2003 pp. 95 and 97.
\textsuperscript{915} Edwards 2003 pp. 91-92.
\textsuperscript{916} The 3\textsuperscript{rd} directive article 1.1.
procedure. The Member States shall make provision for rules governing merger.\textsuperscript{917} Also this statement contains an implication to legislate a merger procedure. The directive has been interpreted to impose on the Member States an obligation to have rules in their legislation on mergers and detailed regulation on the merger procedure itself \textsuperscript{918} \textsuperscript{919}

According to the Preamble, the directive is intended for “the protection of the interests of the members and third parties”. In the Preamble these two different groups, the members and the third parties, are not defined. From the context a conclusion can be drawn that members as a group includes shareholders, employees and creditors, including also debenture holders and other persons having other claims on the merging companies.\textsuperscript{920}

In the Preamble the scope of protection has been defined differently with regards to different groups and constituents. In relation to the shareholders the Preamble speaks of them being “adequately informed” and “their rights be suitably protected”. The protection of the employee rights “is regulated by the Directive”, referring to the directive on Transfers of Undertakings, based on the Treaty Article 94, former Article 100.\textsuperscript{921} According to the Preamble, the creditors must be protected so that the merger “does not adversely affect their interests”. Creditor protection is based on the financial situation of the merging companies, taking into account former creditor protection, if lacking.\textsuperscript{922}

In the Preamble mentioned group “the third parties” is without a further definition. This could include also public power, due to, for example, education, training, health service and infrastructure inputs. A merger’s consequences may affect public power also in the form of tax incomes losses and increased costs of unemployment.\textsuperscript{923} In relation to the third parties, the Preamble states that “the disclosure requirements of the directive 68/151/EEC\textsuperscript{924} must be extended to include mergers so that third parties are kept adequately informed”, not referring to actual substantive legal safeguards in this context. The statement may actually create for example to the public power in a merger

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\textsuperscript{917} The 3\textsuperscript{rd} directive article 2.
\textsuperscript{918} Werlauff 2003 page 83.
\textsuperscript{919} Villiers 1998 page 37.
\textsuperscript{920} Villiers 1998 page 40.
\textsuperscript{921} The 3\textsuperscript{rd} directive Chapter II article 12; Directive 2001/23/EC on Transfers of Undertakings ; CA Committee 1992:32 page 107; Edwards 2003 pp. 93-94 and 109.
\textsuperscript{922} CA Committee 1992:32 pp. 107-108.
\textsuperscript{923} See Lehto page 31; Government Proposal 103/2007 page 23.
\textsuperscript{924} Directive 68/151/EEC or the 1\textsuperscript{st} directive.
procedure a status only as a receiver of information. If the group of the third parties were to cover also employees, they would consequently be only adequately informed.

Primarily a merger is targeted to guarantee share ownership’s continuation also in the acquiring company or company being formed. Legally a merger is a general succession. The directive is intended to increase shareholder protection in mergers. This takes place by sharing information to shareholders before a general meeting approving a merger. The shared information should be objective in character.

A general succession implies a continuation of share ownership. Continuation concerns ownership rights, decision making powers and economic rights attached to shares. From a shareholder point of view a merger can be equated with a dissolution of a company and breaking down of a general succession, if share ownership does not continue essentially on the basis of former conditions, or if shares are redeemed in exchange of a cash payment.

Shareholders are primarily substituted in the form of shares. The purpose is to guarantee the continuation of the share ownership also in the acquiring company. The use of a cash payment as a substitute has been regulated in detail, not exceeding 10 per cent of the nominal value or the accounting par value of the shares. The limitation also highlights the target of share ownership’s continuation.

A merger denotes a permanent change in debt-relationship, due to a transfer of debts and a dissolution of a company being acquired or being a party in the formation. This creates needs for creditor protection and information on the actual merger procedure. The same reasons ground the need of employee involvement and protection, too.

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925 CA Committee 1992:83 page 312.
928 On decision-making powers and economic rights attached to shares see Reinikainen – Pelkonen – Lydman page 43.
929 CA Committee 1992:32 page 316.
930 CA Committee 1990 page 312. Member States’ legislation may allow the cash payment to exceed 10 per cent of the nominal value or the accounting par value of the shares, see the 3rd directive Chapter V article 30, CA Committee 1992:32 page 105, Werlauff 2003 pp. 567-568.
931 Heinestam page 20; Werlauff 2003 page 566.
Employee protection and their status in a company law merger are of interest, due to a merger’s character as a general succession, implying to employment relationships’ continuance.  

Irrespective the general succession character, a practical experience shows mergers often resulting in employment relationship terminations.  

When the 3rd directive’s actual scope based on references to enacted measures is used as a starting point for defining interest groups covered by it, a clearly narrower scope of “members and third parties” may well be found. The narrower definition would not necessarily cover employees. The 3rd directive’s Preamble and its Article 12 both refer to employee rights being regulated by the directive on Transfers of Undertakings, referring to another legal instrument as the source of employees’ legal protection. Consequently, the provisions of the 3rd directive leave open the actual level of employee protection, by a reference to another legal source. The employee implications of a merger as a company law procedure can thus be evaluated to be only partially regulated under the 3rd directive. On the basis of the Preamble and Article 12, it can also be claimed that employee protection does not even actually come under consideration in a company law merger procedure at least under these 3rd directive’s provisions. It is not exaggeration to claim that the 3rd directive’s Preamble furthered by its Article 12 may be interpreted to leave employees outside the directive’s scope. This takes place by the Preamble’s two-fold reference to another legal instrument as a source of a legal protection. Irrespective of the wording of the 3rd directive’s Preamble and its Article 12, creating room for a narrow interpretation with regards to interest groups and employee protection under the 3rd directive, this research is based on a wide interpretation and approach on the covered interest groups covered by the directive, covering also employees and the public power.

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932 Werlauff 2003 page 575.  
933 See Lehto page 31; Government Proposal 103/2007 page 23.  
934 See the 3rd directive Preamble and Chapter II article 12.  
935 See also Werlauff 2003 page 575.
3.1.2. EMPLOYEES IN THE 3RD DIRECTIVE MERGER PROCEDURE

In summary a merger procedure contains negotiations between the participating companies, an agreement on merger’s conditions and its acceptance in a general meeting or administrative or management body.936 The directive’s legal security safeguards contain guarantees especially in the form of delivering adequate information.937 A part of the safeguards are provisions on a merger’s publicity. When carried out, it has to be made public.938

The merging companies’ administrative or management bodies have an obligation to draw up – “shall draw up”939 – a merger’s draft terms in a written form. The draft terms are a preliminary contract between the participating companies on a merger’s conditions.940 The drawing up of the draft terms highlights a merger’s character as an agreement, based on negotiations, and the need of central members’ approval of the conditions.941 In its enacted form in the 3rd directive a merger has been evaluated to reflect an Anglo-American view of a merger as a contract.942

The draft terms shall specify among the others at least data needed to identify the participating companies, the share exchange ratio and the amount of any cash payment, the terms relating to the allotment of shares in the acquiring company and the date from which the holding of the shares entitles the holders to participate in profits, the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them and any special advantage granted to members of the merging companies’ administrative, management, supervisory or controlling bodies.943 The focus of the draft terms is on a merger’s effects on shareholders and security holders. The directive’s requirements on the draft terms contain, however, only minimum conditions, leaving for the Member States room of independent action with regards to extending them.944

938 The 3rd directive Chapter II article 18; CA Committee 1992:32 page 108; Villiers 1998 page 40; Edwards 2003 page 112.
939 The 3rd directive Chapter II article 5.1.
940 The 3rd directive Chapter II article 5.1, Chapter III article 23.1. and Chapter IV article 24; Werlauff 2003 page 571.
941 Edwards 2003 page 103.
942 Werlauff 2003 page 569.
943 The 3rd directive Chapter II article 5.2; CA Committee 1992:32 page 106; Edwards 2003 page 103. In a merger of a wholly-owned subsidiary the share exchange ratio, terms relating to an allotment of shares and the date entitling the holders to participate in profits are not to be mentioned, due to a fact that there is no allotment of shares, see Edwards 2003 page 103.
The merging companies’ administrative or management bodies have an obligation to draw up a written report, explaining a merger’s draft terms and setting out their legal and economic grounds, in particular the share exchange ratio. The report is to describe the arisen valuation difficulties. The report is done for each of the participating companies separately.

The information in the draft terms and management’s reports has to do with a merger’s effects on shareholdings and the date on which the transfer of rights and liabilities comes into force. Both of these aspects denote to a merger’s a character as a general succession.

Although the 3rd directive’s Preamble makes room for an interpretation also employees being covered by the directive’s safeguards, there is not enacted an obligation to take into account in the draft terms and management’s reports any evaluations on a merger’s implications on employees. This area is in the Member States’ independent legislative decision-making.

Employee implications are of primary importance, for example, in evaluating a merger’s character as a general succession. They concern further employment. In addition to the continuation of employment relationships, they cover all factors affecting employment environment and conditions. Employment implications if leading to unemployment are important from the public power perspective, especially at the local level.

The draft terms and management reports’ minimum contents leave employees outside the circle of stakeholders. Evaluated on the basis of these documents a merger denotes to the principle of validity of contracts, but in a modified, even in an unbalanced form, when evaluated from the employee perspective.

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946 Werlauff 2003 pp. 571-572.  
948 See directive 2005/56/EC article 5 (d), stating expressly to be mentioned in the common draft terms the likely cross-border merger’s repercussions on employment and article 7 on management’s report, explaining cross-border merger’s implications for employees, and made available for employees’ representatives or employees, see also CA 2006 § 16:22.2 point 5 and 16:22.3-4, Government Proposal 103/2007 pp. 35 and 37-38.  
950 See Lehto page 31.  
Mergers are largely furthered by competitive reasons. A merger’s consequences on a company’s status at the product markets, affecting directly a company’s further success and thus its employees, are outside the draft terms and management reports minimum contents. Outside these documents’ minimum contents is also an outline on a merger procedure’s actual carrying out, a merger’s goals actually becoming realised only by it.\footnote{See Ellsworth pp. 1 and 163, Elkington pp. 272 and 315 and Porter pp. 675-677. Compare Vuorenmaa pp. 1, 96 and 118. Werlauff 2003 page 573. The 3rd directive Chapter II article 10 and Chapter III article 23; See Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC with regards to the requirement of an independent experts’ report on the occasion of a merger or division of public limited liability companies OJ L 300, 17.11.2007 P. 0047-0048 article 2. CA Committee 1992:32 page 107; Villiers 1998 page 39; Edwards 2003 page 105. National law provisions may make possible to appoint experts jointly for all the merging companies. This being the case also the report may be drawn up jointly, Werlauff 2003 page 572. The demand on the expert report is not applicable in an acquisition of a wholly-owned subsidiary, see the 3rd directive Chapter IV article 24. Compare with directive 2005/56/EC article 8 (3) and CA 2006 § 16:23, Government Proposal 103/2007 pp. 39-40. The 3rd directive Chapter II article 13 and Chapter III article 23; CA Committee 1992:32 pp. 107-108; Edwards 2003 page 110.}

One or more experts, acting on behalf of the merging companies, but independent of them, have an obligation to draw up a written report to the shareholders. The report is to contain a statement on the share exchange ratio, whether it is fair and reasonable. The report is to indicate the methods used in arriving at the proposed share exchange ratio and whether the methods are adequate.\footnote{See Ellsworth pp. 1 and 163, Elkington pp. 272 and 315 and Porter pp. 675-677. Compare Vuorenmaa pp. 1, 96 and 118. Werlauff 2003 page 573. The 3rd directive Chapter II article 10 and Chapter III article 23; See Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC with regards to the requirement of an independent experts’ report on the occasion of a merger or division of public limited liability companies OJ L 300, 17.11.2007 P. 0047-0048 article 2. CA Committee 1992:32 page 107; Villiers 1998 page 39; Edwards 2003 page 105. National law provisions may make possible to appoint experts jointly for all the merging companies. This being the case also the report may be drawn up jointly, Werlauff 2003 page 572. The demand on the expert report is not applicable in an acquisition of a wholly-owned subsidiary, see the 3rd directive Chapter IV article 24. Compare with directive 2005/56/EC article 8 (3) and CA 2006 § 16:23, Government Proposal 103/2007 pp. 39-40. The 3rd directive Chapter II article 13 and Chapter III article 23; CA Committee 1992:32 pp. 107-108; Edwards 2003 page 110.}

The circle of the experts’ reports’ recipients is a narrow one. It does not cover employee representatives or employees themselves. The experts’ reports are focused on shareholders’ economic status resulting from a merger. Employee implications, employment perspectives included, a merger procedure’s carrying out to guarantee its success and its consequences on a company’s long-term status at the product-markets, affecting directly its further success, are out of the evaluation.


The 3rd directive’s creditor concept is without doubt affected by a traditional view on creditors having a monetary claim or a debt with the company. Also a wider creditor concept can be proposed. It is based on the effects of a company’s actions on society, the environment and
employees, forming a creditor status, affecting these parties’ expectations of long-term company actions.

The 3rd directive does not define the level of creditor protection, it has only to be adequate. The demand on the adequate protection concerns also the debenture holders of the merging companies. Different creditor groups’ bargaining power affects the scope of adequate creditor protection. If the demand on an adequate creditor protection is evaluated on the basis of the widened creditor concept, this inevitably leads to a re-evaluation with regards to the concept of “adequate creditor protection”, due to company actions’ long-time social effects.

Holders of securities, to which special rights are attached, have to be given in the acquiring company rights equivalent to those possessed by them in the company being acquired, unless they have approved the merger or have a right to get their securities repurchased by the acquiring company. The 3rd directive does not define the concept of “holders of securities, to which special rights are attached”. The concept has been interpreted to cover different kinds of rights; for example, convertible loans, exchangeable loans and share options. It has been expressed to cover also debenture holders. Employees as share option holders are covered by the provision.

The securities holders’ rights have to be considered in the draft terms. The level of the securities holders’ rights has to be “equivalent” to those possessed by them in the company being acquired. The status of the securities holders in the 3rd directive merger procedure is consequently in two aspects stronger compared to the employees.

The draft terms must be published for each of the participating companies at least one month before the general meeting deciding upon a merger. The shareholders are granted a right to inspect a merger’s draft terms, merging companies’ annual accounts and annual reports for the preceding year.

957 See Stiglitz page 190.
958 Compare Dine page 228 on a company’s members. This concept can be used in defining a company’s creditors.
959 Compare Elkington pp. 272 and 315.
960 Villiers 1998 page 41; Edwards 2003 page 110; Werlauff 2003 page 575. The wording of the directive on the creditor protection’s level is a compromise between the Member States, see Edwards 2003 page 110.
961 The 3rd directive Chapter II article 14 and Chapter III article 23; Werlauff 2003 page 576.
962 The 3rd directive Chapter II article 15; Edwards 2003 page 110; Werlauff 2003 page 576.
963 CA Committee 1992:32 page 108.
964 Edwards 2003 pp. 110-111; See the 3rd directive Chapter II article 14.
965 The 3rd directive Chapter II article 5 2.(f); Villiers 1998 page 42.
966 The 3rd directive Chapter II article 15; CA Committee 1992:32 page 312.
967 The 3rd directive Chapter II article 6 and Chapter III article 23; Edwards 2003 page 104; Werlauff 2003 page 570.
three financial years and management and expert reports. The shareholders have a right to get copies of the documents, too. The rights to inspect documents and get copies of them have not been extended to cover employee representatives or employees. The existence of these rights depends on a national level legislation, and, if lacking, on company decision-making.

A merger has to be approved in a general meeting in each of the participating companies. The shareholder approval complements the merger’s character as an agreement. Delivered information is targeted to grounded decision-making. The general meeting approval requires a majority of not less than two-thirds of the votes attached to shares or subscribed capital present. The Member States may provide a simple majority to be sufficient, if at least half of the subscribed capital is represented. In the case of more than one class of shares there has to be a separate vote by each class of shares being affected. In an acquiring company instead of a general meeting the administrative or management body of an acquiring company may approve a merger. This applies also in mergers of a wholly-owned subsidiary. In an acquiring company shareholders holding a minimum percentage of subscribed capital, at the highest 5 per cent, are entitled to require a general meeting to approve the merger.

A merger’s approval is either a shareholder issue in a general meeting or an issue of an administrative or a management body. Employees as a stakeholder group are outside the approval procedure, except when shareholders or represented in an administrative or a management body.

968 The 3rd directive Chapter II article 11 and Chapter III article 23.
969 See ACU 2007 § 3:1.
970 The 3rd directive Chapter II article 11.3 and Chapter III article 23.
972 Compare directive 2005/56/EC article 7 on making management’s report available to employees’ representatives or the employees themselves and CA 2006 § 16:22.3-4 and Government Proposal 103/2007 page 38.
974 The 3rd directive Chapter II article 6 and Chapter III article 23; CA Committee 1992:32 page 106. Invitation to a general meeting must be published at least one month before, see the 3rd directive Chapter II article 8 (a), CA Committee 1992:32 page 312.
976 The 3rd directive Chapter II article 8 and Chapter III article 23; Villiers 1998 pp. 39-40; Edwards 2003 page 106; Werlauff 2003 pp. 570-571.
977 This takes place under conditions regulated in the directive, the 3rd directive Chapter II article 8, CA Committee 1992:32 page 106, Edwards 2003 pp. 108-109.
978 See AER § 4.
A merger has to be made public with regards to each of the merging companies.\textsuperscript{981} This is to guarantee the procedure’s lawfulness.\textsuperscript{982}

As regards employees in a merger procedure, the 3\textsuperscript{rd} directive’s provisions have to be evaluated parallel with the directive on Transfers of Undertakings’ provisions. The directive on Transfers of Undertakings requires the transferor and the transferee, in a merger consequently the parties of the company law transaction, to inform the representatives of the employees affected by the transaction of its date, reasons and legal, economic and social implications for the employees and any measures envisaged in relation to them. The transferor, or, in the case of a merger, the parallel party of the company law transaction, must give the information to the affected employee representatives in good time before the transaction is carried out. There is not enacted any specific time limit.\textsuperscript{983} The transferee, in a merger, consequently, the acquiring company or the company being formed, must give such information to the employee representatives also in good time. The information is to be given in any event before employees are directly affected by the transaction with regards to their conditions of work and employment.\textsuperscript{984} Where measures are envisaged in relation to employees, the representatives of the employees are to be consulted in good time on such measures with a view to reaching an agreement\textsuperscript{985, 986}.

The company being in a merger under the acquisition procedure, its existence ceasing as a result of a merger, may have only a limited framework to fulfil the information obligations with regards to the consequences of a merger. The limitations are affected by it not necessarily knowing to a relevant extent the acquiring company’s strategic business plans affecting employees, limiting its framework in delivering information. With regards to the acquiring company or the company being formed in relation to fulfilling information obligation, the national level provisions offer a valuable guideline with regards to its initiation. In Finland, crucial is a date of registration for enforcement, referring to a fully completed merger in a company law sense.\textsuperscript{987} Evaluated on the basis of the 3\textsuperscript{rd} directive and the directive on the Transfers of Undertakings, in Finland only at this stage employees and also public power may get a role in a national level merger procedure in its enacted form. In core they have a role as recipients of information on a completed merger, being in a status of the

\begin{footnotes}
\item[981] The 3rd directive Chapter II article 18; Edwards 2003 page 112.
\item[982] Werlauff 2003 page 577.
\item[983] Malmberg page 74; van Peijpe page 85.
\item[986] Nyström page 275.
\end{footnotes}
third parties. In Sweden, however, employee representatives have to be consulted on a transfer of undertaking, covering also a merger, before an employer makes a decision on the transaction’s carrying out, covering both the transferor and the transferee, in the case of a merger the participating companies.

3.1.3. ANALYSIS ON THE 3RD DIRECTIVE´S EMPLOYEE IMPLICATIONS

A merger in the 3rd directive enacted form is characterised by the Member State level enactments implementing the directive and control of a merger procedure, in addition to shareholders being primarily substituted in the form of shares, use of independent experts having an evaluative role in the process, enacted time-limits and requirement on publication, in fact registration. Other features have to do with the management´s report on a merger´s central terms with their publication and a requirement on financial material as a decision-making basis for the shareholders. Also the goal of employee protection has been mentioned to be covered.

The 3rd directive on a national level merger is the oldest restructuring measure in the EU company law. Taking into account the high percentage of failures, the procedure in its enacted form cannot be evaluated to be effective.

The 3rd directive´s provisions focus on regulating the status of shareholders, creditors and securities holders. Rules on minority protection are principally targeted to continuance in capital issuing, affecting directly company´s future capital acquisition. The better is the level of minority protection, the easier and cheaper it is for a company to secure its capital acquisition in the long run. The rules on creditor protection are also grounded with company financing. The better is the level of creditor protection, the better are the chances of individual companies to get credit. Also public power has been mentioned to have a role, due to tax-law and public fees.

The 3rd directive on mergers reflects a concept of a company as a bundle of financial relationships, these narrowly defined. The directive´s focus is not on an enterprise, referring to independent

990 CA Committee 1992:32 page 312.
991 Werlauff 2003 page 567.
992 Compare Lehto page 48.
993 Skog page 23.
994 Skog page 22.
consummation of economic activities in a stable manner; this taking into account a protective manner in addition to shareholders´ interests also a wider circle of interest groups and interests, employees included.

The primary group protected by the 3rd directive are shareholders. The protection is targeted to share ownership´s continuation as such, evaluated from involved monetary values´ perspective. The protection is also targeted to secure stability in the shareholder/company relationship.

Employee protection based on the economic character of employment agreements and their stakeholder status is, in practise, unenacted and outside the 3rd directive´s scope, except the two-fold reference to the directive on Transfers of Undertakings.

Under the 3rd directive in its enacted form, in the draft terms and management´s and experts´ reports no mention is done in relation to the employees. In the draft terms and reports no mention is done in relation to the third parties. Restructuring and business activities generally need a certain social basis as a necessary prerequisite, referring largely to the public power´s role.

The draft terms and administrative or management bodies´ written reports do not cover the actual carrying out of the integration process, targeted to a merger´s goal realisation. However, due to M&A´s high failure percentage, this is of utmost importance. Outside the covered issues are also the merger´s effects on a company´s future status at the product-markets, resulting in further employment with employee implications, important in a knowledge-based production.

The administrative or management bodies´ written reports are to set out the legal and economic grounds for the merger. The reports´ focus is on the company/shareholder relationship. From the shareholder point of view the share exchange ratio and allotment of shares have to do with a merger´s consequences, targeted to continuance and stability. Except references to the status of securities holders and to an adequate creditor protection, otherwise the directive´s provisions do not cover a merger´s consequences. An employee perspective is wholly precluded. The meanings of

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995 See Barnard - Deakin page 133, Werlauff pp. 31-36 and 61-64; Werlauff 2003 pp. 189-190 and 199-200.
997 See Supiot page 518 emphasising the protection of employees´ physical and economic security as a value being fundamental in all forms of work; See also Villiers 1998 page 202 emphasising economic values inherent in an employment relationship.
998 Compare Elkington pp. 84-86, 155-156, 300, 311, 319, 324, 327, 331 and 345. See Porter pp. 657 and 665 and Ellsworth page 221.
the words “grounds” and “consequences” differ remarkably, the latter being a future-oriented one. Thus also differ remarkably the actions’ implications in relation to companies’ different constituents. The chosen way of thinking precludes a proactive and future oriented point of view, important especially with regards to employment prospects.

The written experts’ reports concentrate on the shareholder/company relationship. Reports do not cover the employee/shareholder and employee/company relationship. Wider social implications, especially those concerning employment, are excluded. Also an evaluation on a merger’s consequences on a company’s status in the product-markets and a merger procedure’s carrying out to achieve its goals are not covered.

In a nutshell, both a merger’s draft terms and the enacted reports lack a wider stakeholder perspective. The chosen point of view represents a narrow definition of the stakeholders, considered primarily as a relationship between shareholders and company, or secondly as a relationship between the shareholders, creditors – being based on a narrow-creditor concept – and the company, the management acting as these groups’ agent.999

Evaluated on the basis of the 3rd directive, the economic rights of shareholders, creditors and employees in a merger procedure differ in character from each other, to the employees’ detriment. The grounds of this difference are not found in the directive.

The strengthening of the 3rd directive’s contents is important. This concerns especially draft terms’ and management’s and experts’ reports’ scope from employee point of view in a future-oriented way, in this acknowledging a wider stakeholder concept. This can be grounded with a need to increase the success of the mergers, employment concerns and employees’ role in a knowledge-based production. These starting-points should direct the scope of all the enacted documents. From the company point of view, all these aspects have to do with proactive business development.1000

The obligation to publish the draft terms contains an idea of a wider stakeholder point of view. In the enacted form the practical realisation of this is anyway a limited one. With regards to employees, it may in practise have only a surface-value, due to the draft terms’ contents.

999 See Villiers 1998 page 198 proposing company law development concentrating more on the relationship between the employees and shareholders. Compare on the enlightened shareholder value CA 2006 BR Part 10 Chapter 2 172; Explanatory notes page 50.
1000 Compare Porter pp. 657 and 665.
Publication with its practical significance is also affected by information and consultation obligations’ scope and timing at the national level. In Sweden, employee representatives have to be consulted on a transfer of undertaking, covering also a merger, before an employer makes a decision to carry out a transaction. In Finland, in the case of the acquiring company, decisive for the information obligations’ timing is a merger’s registration for enforcement.

A merger is an agreement, requiring parties’ consent. The 3rd directive does not require any kind of employee involvement in a merger’s approval. Consequently, the 3rd directive denies employees stakeholder status in a merger’s adoption procedure.

Due to the scope of the draft terms and management and expert reports, taking also into account the scope of the directive’s Article 12, making reference to the directive on Transfers of Undertakings, a merger’s future implications and consequences on the employees are only in a very limited way if at all taken into the shareholders’ attention in a general meeting. Another practical problem has to do with short investment spans. These form a practical obstacle to a long-term company development in a merger context. In an administrative or a management body employees are not either necessarily represented.

An enacted shareholder minority has a right to object a merger’s adoption, by rejecting its acceptance in a general meeting. This kind of a right has not been extended to cover employees. Part of the minority rights in an acquiring company is a right to demand a merger’s approval in a general meeting, instead of an administrative or a management body. This kind of a right has not been extended to cover employees.

The re-evaluation of a national level merger procedure is linked with basic company law principles’ evaluation at the EU- and national level. This kind of evaluation has not taken place thus far under the EU company law modernisation programme. The matter is connected and challenges also

1004 Compare Elkington to dimension pp. 272 and 315.
the prevalent models on employee involvement at the EU-level, now lacking in the form of national level participation rights.1006

Resulting from basic company law principles’ evaluation renewals in the merger’s adoption procedure could be taken under consideration, by strengthening employees’ stakeholder status. In the established legal concept framework this could take place by granting employees a status equalling with the minority shareholders with regards to a merger’s adoption. This would cover rights to object the approval1007 and demand a merger’s approval in a general meeting instead of an administrative or a management body. General meeting and an administrative or a management body are platforms for strategic decision-making in company matters. The evaluation of the 3rd directive on mergers reveals employees having no stakeholder status in these bodies’ decision-making. With regards to shareholders, the use of minority rights in a general meeting has not been evaluated as a forbidden restriction on competition or the right of establishment1008, or a hindrance to the free movement of goods or services. This interpretation is applicable on employees as regards extending their rights in the adoption procedure. In order to secure employees’ approval, a better and more profound planning of the merger procedure is needed, strengthening also the carrying out of a company’s business as a whole and the achievement of a merger’s goals.

The 3rd directive in its present form effectively makes possible for companies to define economic efficiency in business in a narrow way. It makes possible to externalise restructuring costs,1009 in the form of making employees redundant,1010 the costs not showing in the company’s own balance sheet. This point of view is difficult to reconcile with the EU’s emphasises on employment, being now a matter of common concern, not only on the Treaty Article 136 basis a matter of the EU and its Member States, but a matter of co-operation between public power and enterprises.1011

The present legal division of a merger procedure with regards to different stakeholders under two different directives is largely due to the present division of law into branches. The division

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1006 On cross-border employee involvement including participation rights see Directive supplementing the Statute for SE with regard to employee involvement Section I article 2 (h) and (k), Section II article 4 and Annex article 7 and Directive supplementing the Statute for SCE with regard to employee involvement Section I article 2 (h) and (k), Section II article 4 and Annex ; On employee involvement in SE see Jauhiainen – Kaisanlahti pp. 151-247, especially pp. 157-164. See also Villiers 1998 page 192. Compare Elkington on corporate governance pp. 311 and 345 and Monks pp. 137 and 179.

1007 Compare Toiviainen 2004 on employees´ veto-rights page 159.

1008 Compare Kuoppamäki 2007 pp. 200-201, especially page 201.

1009 See Monks page 49.

1010 See Lehto page 31.

1011 See also Directive 2002/14/EC Preamble point (10).
effectively conceals differences in the enacted procedures and protection with regards to different stakeholders, forming also a hindrance to open evaluation of matters under consideration. The procedures should be unified. This implies to a need to unify the 3rd directive and the directive on Transfers of Undertakings. This unification could make the process, level of enacted protection and different stakeholders’ status more transparent. The process makes visible employment relationships’ economic nature, equal and comparable with the commitments made by shareholders and creditors with the company. Re-evaluation would be of importance due to the principle on validity of contracts, forming for all the stakeholder groups the basis of their relationships with the company, irrespective of concession or contract law theories as company formation theories.1012

The present analysis is underlined with the concept of corporate citizenship. It is based on enterprises’ social and – outside the scope of the present research – environmental responsibilities.1013 The initiation on the corporate citizenship may be partly voluntary. It may be partly imposed on enterprises. Its focus is on a company’s social, political and civil rights in relation to its business activities. It makes an enterprise an active player also in the social field, based on a wide definition of its stakeholders, including the society in general, and motivated by economic and political grounds.1014 The concept of corporate citizenship needs to be evaluated and developed further, especially in the field of restructuring. The concept implies a wider circle of responsibilities and stakeholders in the field of restructuring compared with the established way of thinking, reflected in the 3rd directive. Also the concept on workability of contracts is worth of emphasising in this context, referring to a need to balance different parties’ interests.1015

3.2. DIRECTIVES ON TRANSFERS OF UNDERTAKINGS, COLLECTIVE REDUNDANCIES AND INFORMING AND CONSULTING EMPLOYEES

3.2.1. DIRECTIVES’ BACKGROUND AND GOALS IN BRIEF

The directives on Transfers of Undertakings1016 and Collective Redundancies1017 were part of the Social Action Programme of 1974–1976.1018 Both of the directives are targeted to address the

1012 See Werlauff 2003 pp. 44-46; Dine pp. 264-272; Armour pp. 500-501.
1013 Supiot page 608.
1014 On the corporate citizenship see Crane – Matten pp. 61-71, especially page 64 and Crane – Matten 2007 pp. 70-79, especially page 73. See Stiglitz page 190. See Elkington pp. 73, 155-156, 216, 272, 300, 311, 315 and 331.
1015 Ämmälä page 97.
consequences of company restructuring measures at the company and individual, employee level. At the employee level the consequences are primarily social in character. They may take a form of income losses and unemployment and denote to needs of re-training and education.

The directive on Informing and consulting employees implements a framework on information and consultation, which is applicable also in restructuring. The directive has been evaluated to emphasise proactive action, instead of the former emphasis on alleviating consequences caused by restructuring by reactive measures.

The directives on Transfers of Undertakings and Collective Redundancies have a dual character. They are targeted to facilitate restructuring to make companies more competitive and efficient. From the employee perspective, their goal is to mitigate negative effects caused by restructuring. They have a protective nature. They are also intended to increase industrial democracy at the company level. Both of the directives were targeted to create measures for specific economic and industrial circumstances. They have a crisis measures character in alleviating economic decline´s consequences.

Due to these directives´ character there is inherent in both of these legislative instruments an inner tension. This inner tension is due to the double goals of facilitating restructuring, thus free enterprise, and the employee protection. This tension has given heed to criticism against the directives. At least partly this tension is difficult or even impossible to reconcile. Inevitably one of the two goals has a predominance over the other.

All these three directives are built on an idea of restructuring as a managerial prerogative, a part of this being a dismissal right. The directives do not thus question managerial rights and their basis. Due to their starting points all these directives are firmly built on the civil law countries´ traditional

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1019 Barnard page 619; See also Nyström page 251; Directive 80/987/EEC on employee protection in employer insolvency, later directive 2002/74/EC, was part of the enacted measures.
1020 See Barnard pp. 735-736; SOU 2004:85 pp. 11, 17, 30 and 63-70.
1023 Barnard page 619; See also Nyström page 251.
1024 Kenner page 28.
1025 O´Leary pp. 242-243 in the context of the directive on Transfers of Undertakings.
1026 Barnard pp. 622-623 in the context of the directive on Transfers of Undertakings.
1027 Barnard page 619.
division on company and labour law, being separate spheres of law with established legal concepts. Formally common law does not acknowledge this kind of a division. The same division is in practise present also in the UK’s common law system.

Originally the directives on Transfers of Undertakings and Collective Redundancies were enacted to be applicable at the national level. In the 1986 internal market programme there was a move towards trans-national, cross-border restructuring, affecting also both of these directives’ character. In addition to still being applicable at the national level, they got a trans-national scope of application on the basis of the revisions.1028

3.3. DIRECTIVE ON TRANSFERS OF UNDERTAKINGS

3.3.1. BACKGROUND, GOALS AND REMEDIES

Employee rights in a merger and generally in a transfer of an undertaking are targeted to be protected in the directive on Transfers of Undertakings.1029 Before the directive’s enactment, employees’ legal status in a merger varied in the Member States. In France, employment agreements’ continuation in succession, sale and merger has been the legal state since 1928. Employment agreements in force at a transaction’s date were automatically transferred to a new employer. General succession covered, in addition to assets, also employees. In the United Kingdom, employee legal status had been the opposite one. Here, an employment agreement was considered to be personal one, not transferable. The new employer was not guaranteed workforce and employees in their turn were not guaranteed employment agreements’ continuation. In adopting the directive on Transfers of Undertakings the French position won, granting primacy to continuation of employment agreements1030.1031

The directive’s adoption is underlined by economic and social factors. The directive satisfies business demands in a competitive environment, labelled by a continuous change. From the employee perspective changes in business environment are however largely beyond employees’

1028 Barnard pp. 619-620; Malmberg 2004 pp. 794-795; See Liukkunen’s doubts on cross-border character pp. 262-264 and further ibid. page 265 on transfers within the EEA, the latter included. See Hellsten 2007 on the directive on Transfers of Undertakings pp. 21-25. See also Directive 2005/56/EC Preamble point (12).
1029 Directive 2001/23/EC Title, Preamble (3) and Chapter I article 1 1. (a); Nystöm page 255.
1030 Directive 2001/23/EC Preamble (3) and Chapter II Article 3 1.
1031 Barnard pp. 620-621.
control. Basically the directive is a market integration measure. There is inherent a strong market imperative. The directive takes for granted and as a fact changes in company structures, taking place by transfers of undertakings, due to economic trends. Due to structural changes the directive acknowledges also as a necessity a need to provide employees protection in a change of an employer, by safeguarding employee rights. The directive is purported to ensure that undertakings’ restructuring within the internal market does not affect negatively employees in concerned undertakings. Employee protection is held to be a part of public policy. Primarily the directive is to guarantee that employee rights arising out of employment contracts or relationships are not diminished as a result of transfer. The employees should thus be guaranteed the former level of protection, irrespective of the transfer. The directive is also targeted to harmonise costs for Community undertakings entailed by protective rules.

In the directive there is inherent an inner tension due to its two-fold goals. The inner tension between the goals of free enterprise to facilitate restructuring and employee protection has given heed to criticism against the directive. This tension is difficult or even impossible to reconcile, one of the two goals inevitably having a predominant role over the other.

The directive does not cover company law structures prevalent in the different Member States. The directive takes thus for granted the present division of law into branches, with different concepts, procedures and stakeholders. In company law there is not a concept equivalent to that of “a transfer of an undertaking”. For the directive’s purpose a transferor means any natural or legal person who by reason of a transfer ceases to be an employer. A transferee means any natural or legal person who, by reason of a transfer, becomes an employer.

1032 O’Leary pp. 241-244; Paasivirta page 466.
1033 Kenner page 39.
1034 Kenner page 33.
1036 See C-135/83 Abels paragraph 18; Kenner page 343.
1037 Case 324/86 Daddy’s Dance Hall A/S paragraph 14.
1038 C 105/84 Dammols Inventar paragraph 27.
1039 Malmberg page 72.
1042 Barnard page 619 compared with pp. 622-623.
1043 Liukkunen page 255.
1044 Liukkunen page 252.
The directive is in character a minimum directive. The Member States are allowed to apply or introduce laws, regulations and other provisions, which are more favourable to employees than the directive’s provisions. The Member States are also allowed to promote or permit collective agreements or agreements between social partners more favourable to the employees than the directive’s provisions.\textsuperscript{1048}

The directive is according to its title “on the approximation of the laws of the Member States”.\textsuperscript{1049} It is, by partial harmonisation, to reduce differences in national law. It is not targeted to completely eliminate differences in the national law. The directive is neither intended to establish a uniform level of protection based on common criteria. Consequently, the level of protection is inevitably different in the different Member States.\textsuperscript{1050}

The directive is to level out costs on undertakings set by it. The directive is based on a structure combining the EU-level and national rules, complementing each other. Many essential concepts affecting the directive’s application and interpretation, being thus matters of costs are settled finally at the Member State level.\textsuperscript{1051} Some of the directive’s key concepts are defined on the basis of national laws and practises. The term “employee” in the directive’s context denotes to any person who is protected as an employee under national employment or labour law. The directive is consequently not applicable to persons not protected under the national employment law as employees.\textsuperscript{1052} Member States may provide that after the transfer’s date the transferor and transferee are jointly and severally liable on obligations having arisen before the transfer’s date, based on an employment contract or relationship being in force on the date of transfer.\textsuperscript{1053} The option to enact joint-liability means in practise that the Member States may choose between two different systems in organising economic responsibility in employment relationships in transfers of undertakings. In one of the models the transferee is alone responsible of the employer obligations. In another model the responsibility is divided between the transferor and transferee.\textsuperscript{1054} If an

\begin{itemize}
\item \textsuperscript{1048} Directive 2001/23/EC Chapter IV Article 8; Nyström page 274. See Hellsten  2007 pp. 20-21.
\item \textsuperscript{1049} See also Directive 2001/23/EC Preamble points (1) and (4).
\item \textsuperscript{1050} Case 105/84 Danmols Inventar paragraph 26; Case 324/86 Daddy’s Dance Hall paragraph 16; Barnard page 622; Nyström page 257; Kenner pp. 30 and 33; Malmberg page 72.
\item \textsuperscript{1051} See Barnard page 670.
\item \textsuperscript{1052} Directive  2001/23/EC Chapter I Article 2 1. (d) ; Case 105/84 Danmols Inventar paragraphs 27-28, Case C-29/91 Redmond Stichting paragraph 18, Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Ziemann paragraph 24; See also Barnard pp. 623-624, Kenner page 350 and O’Leary page 283; On the other hand see C-343/98 Collino and Chiappero paragraphs 38 and 40-41 and O’Leary page 278; Nyström page 278.
\item \textsuperscript{1053} Directive 2001/23/EC Chapter II Article 3 1.; Joined Cases 144 and 145/87 Berg and Busschers paragraphs 13-14; O’Leary page 283; Nyström page 272; Hietala – Kahri - Kairinen – Kaivanto 2006 page 103; ECA 2001 § 1:10.2.
\item \textsuperscript{1054} Nyström page 272.
\end{itemize}
employee refuses to be transferred, consequences are defined at the national level.\textsuperscript{1055} When the directive`s obligations are infringed, sanctions are defined and set at the national level\textsuperscript{1056, 1057}

It is difficult to see how costs are in practise levelled due to a this kind of dual legal structure, combining the EU-level and national rules, complementing each other.\textsuperscript{1058} Due to this dual-level mechanism on costs – levelling the directive`s role as a common market business mechanism can be challenged. The issue is linked with the company law harmonisation programmes`targets and employees`role in business. The company law harmonisation programme was created to facilitate the internal market, by encouraging free trade and movement. It is to make possible to deal with companies with a closely similar legal structure and equal rights and obligations. It is targeted to avoid legal competition on company law between the Member States. Companies would prefer establishment in Member States with the most flexible legislation, thus distorting economic competition in the common market. The European Economic community`s and the Member States`economic improvement are also targeted.\textsuperscript{1059} The programme has also targets of creating a unified business environment and community-scale capital market. It is to recognise industrial development`s social and regional aspects.\textsuperscript{1060} By combining the company harmonisation programme`s targets and the directive on Transfers of Undertakings`dual cost mechanism, one can with good reasons doubt the directive`s long-term constructive effects on achieving internal market goals, business at the company level and employees. The employees`role in business is a part of the issue, whether they are a cost-factor or essential assets in knowledge-based production.\textsuperscript{1061}

The directive`s employee protection covers three dimensions. First, the directive guarantees an employment relationship`s automatic transfer with its rights and obligations, existing at the transfer`s date, from the transferor to the transferee\textsuperscript{1062, 1063} This concerns also employees with fixed-term and part-time contracts.\textsuperscript{1064}

\begin{footnotes}
\item[1055] Joined Cases C-132/91, 138/01 and 139/91 Katsikas Summary 1 and paragraphs 31-37.
\item[1057] Barnard page 622.
\item[1058] Compare Barnard page 670.
\item[1059] Villiers 1998 pp. 15 and 19; Edwards page 3; Edwards 2003 page 3.
\item[1060] Villiers 1998 pp. 174-175.
\item[1061] See Ellsworth pp. 31, 51 and 221, Hyvvinointi versoo tuottavuudesta page 14, Porter pp. 657 and 665 and Elkington pp. 75-76.
\item[1062] Directive 2001/23/EC Chapter II article 3 1..
\item[1063] Barnard page 621; O`Leary pp. 243-244.
\item[1064] Directive 2001/23/EC Chapter I article 2 2.(b)-(c), making reference to directive on fixed-duration and temporary employment relationships; Barnard page 624; O`Leary page 283; Kenner page 351.
\end{footnotes}
Secondly, the directive protects employees against dismissals based on a transfer by the transferor and transferee. The transfer itself cannot constitute a ground for a dismissal. The dismissal protection is, however, granted a wide exception. Dismissals may take place for economic, technical or organisational reasons entailing changes in the workforce. The way of formulating dismissals grounds creates, in fact, space for circumventing in the directive enacted dismissals protection, lessening generally employee protection’s level, even opposite to the directive’s protective purpose.

Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys concerned a transfer of a motor vehicle dealership as a Ford dealer for a particular territory. There was not a direct contractual relationship between the new dealer Novarobel and the old dealer Anfo Motors on the assignment of the old dealer’s business. The transfer did not cover assets. The new dealer took on a part of the old dealer’s staff. The new dealer was also recommended to the former customers. The new dealer Novarobel took over 14 of Anfo Motors’ 64 employees. The employees taken over by Novarobel retained their duties, seniority and all other contractual rights. The transferor Novarobel dismissed most of Anfo Motors’ over 60 employees. Only 14 employees were kept at the employ. Dismissals even of this scale do not in themselves preclude the directive’s applicability, it expressly allowing dismissals based on economic, technical or organisational reasons. Irrespective of the directive’s applicability, from employee perspective the wide dismissal powers give heed to question the directive’s protective character. Summarised on the basis of the Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys, the directive on Transfers of Undertakings grants employee protection, but in a framework defined by an employer, granting the protection in fact maybe only to a minority of employees.

Although many other of the directive’s concepts are defined in the directive itself or by making a reference to national law or practises, in the directive dismissal grounds are left without a further definition and without a further reference to national law. This can imply two kinds of interpretations. Either the dismissal grounds for economic, technical or organisational reasons entailing changes in the workforce denote to such a wide scope of employer action that further definitions are not needed, the formulation denoting even an unlimited scope of action within the

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1065 Directive 2001/23/EC Chapter II article 4 1.; Barnard pp. 621-622; O’Leary page 244.
1066 Compare Lehto pp. 6, 31 and 46-47.
1067 Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 8.
1068 Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys Summary 1 and paragraph 15.
1069 Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 7.
1070 Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 26.
enacted framework, transfer itself as a ground not included, or the grounds are defined finally on the basis of national law in each one of the Member States, limitations setting if ever actually taking place at this level.\textsuperscript{1071} From the employee perspective, the legal state at the EU-level on defining dismissal grounds may be evaluated to be unsatisfactory, taking also into account the directive’s basically protective nature.

The third dimension of employee protection covers information and consultation. The directive requires the transferee and transferor to inform and consult employee representatives\textsuperscript{1072, 1073}

The directive has been evaluated to be largely procedural in character.\textsuperscript{1074} This may be due to differences in national labour market systems and national level law. Another reason has to do with political goals, the European level legislative instruments being end-results of political processes.\textsuperscript{1075}

On the basis of the Treaty the Member States have an obligation to guarantee the EU-law’s application and effectiveness. The choice of penalties is left within their decision-making powers. The Member States must ensure that the EU-law infringements are penalised under analogous conditions with those applicable to infringements of national law of similar nature and importance. This concerns both procedural and substantive conditions. The penalties have to be effective, proportionate and dissuasive.\textsuperscript{1076}

\begin{footnotesize}
\begin{enumerate}
\item On the British interpretations on dismissal grounds see TUPE 2006 Regulations 7 (1) and Explanatory Memorandum No. 246 point 7.2. (b), TUPE 2006 guide pp. 18 and 20-21, Bowers pp. 422-424, Collins – Ewing – McColgan pp. 1036-1042 and 1044-1045, Barnard page 665.
\item Directive 2001/23/EC Chapter III Article 7 1.-2.; The concept of ”representatives of employees” is defined on the basis of national laws or practises, see Directive 2001/23/EC Chapter I article 2 1. (c).
\item Barnard page 622; O’Leary page 244.
\item Kenner page 33.
\item See Liukkunen page 49 and \textit{ibid.} page 56 commenting employees’ involvement in the EU’s cross-border company arrangements. The lack of deeper substantive harmonisation is due to differences in employee involvement systems between the Member States. See Hellsten 2007 page 18 referring to employees’ representatives’ information and consultation procedures as the procedural part.
\item Case C-382/92 Commission v. UK Summary 4; Barnard pp. 669-670.
\end{enumerate}
\end{footnotesize}
The Member States have an obligation to introduce into the national legal systems measures necessary to enable the employees and their representatives to pursue with their claims, if they consider themselves to be wronged by a Member State’s failure to comply with the directive’s obligations. At the latest stage this is to take place by a judicial process, after possible recourse first to other competent authorities.\textsuperscript{1077}

3.3.2. \textit{DIRECTIVE’S SCOPE}

3.3.2.1. \textit{General Outlines}

Before the adoption of the directive on Transfers of Undertakings there were in the Member States two different approaches regarding the concept of a transfer. The French view was a broad one. A transfer covered a transfer of an activity. Under German law, the concept had a narrower meaning, referring to a transfer of an organised entity. The directive’s development has been labelled by seeking equilibrium between these two different approaches, the German one later winning the case.\textsuperscript{1078}

The directive on Transfers of Undertakings is applicable in transfers, in which the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.\textsuperscript{1079} The directive is applicable in the EU Member States and in the EEA. Decisive in the application is the location of the business being transferred.\textsuperscript{1080}

The directive is applicable to “any transfer of an undertaking or business to another employer as a result of a legal transfer or a merger”.\textsuperscript{1081} The directive on Transfers of Undertakings is a litigated one, both at the European as well as at the national level. The litigations have concerned especially the definitions of “a legal transfer” and “a transfer of an undertaking, business or part of a business”, thus the directive’s scope.\textsuperscript{1082}

The directive is to cover any legal change in an employer’s person on a precondition that all the other transfer’s conditions are otherwise met. In principle the directive is applicable in all transfers,

\textsuperscript{1077} Directive 2001/23/EC Chapter IV Article 9; Nyström page 274.
\textsuperscript{1078} Nielsen 2002 page 65.
\textsuperscript{1079} Directive 2001/23/EC Chapter I article 1 2.
\textsuperscript{1080} Malmberg 2004 pp. 794-795 and 807; Barnard pp. 646-647; Nyström page 256; Hellsten 2007 pp. 21-23.
\textsuperscript{1081} Directive 2001/23/EC Chapter I Article 1 1. (a); Nyström page 256. See also Directive 2005/56/EC Preamble (12).
\textsuperscript{1082} Barnard pp. 620 and 627; O’Leary pp. 244-245; Nyström pp. 256-257; Malmberg page 72; Hellsten 2007 pp. 17 and 20-21.
which are based on a contract or a merger, there being a change in the natural or legal person responsible for carrying out the business, thus transferring the economic risk associated with the business in question,\textsuperscript{1083} and having an employer status towards the employees, regardless of an actual change in an ownership.\textsuperscript{1084}

The directive’s applicability is principally subject to three conditions: (1) the transfer has to concern an undertaking, a business or a part of a business; (2) there has to be a change of an employer; and (3) the transfer has to be a result of a contract.\textsuperscript{1085} The directive is intended to ensure the continuity of employment relationships, existing within an economic entity, irrespective of a change of ownership.\textsuperscript{1086}

On the basis of the ECJ’s case law the directive’s applicability can be summarised also on the following criteria: (1) there is a change in the legal or natural person responsible for carrying out the business;\textsuperscript{1087} and (2) the decisive criterion being, whether the unit in question retains its identity, following in particular from a fact that its operation is actually continued or resumed by the new employer\textsuperscript{1088-1089}.

The definitions of “a legal transfer” and “a transfer of an undertaking, business or part of a business” differ. The differences in definitions refer thus to these concepts’ separateness.\textsuperscript{1090} Legal transfer within the directive’s meaning has to do with a sale, contracting out or leasing, for example. The concept “a transfer of an undertaking” is largely based on the application of the Spijkers-criteria and facts relevant on the basis of this case\textsuperscript{1091-1092}.

\textsuperscript{1083} Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 18.
\textsuperscript{1084} Case 287/86 Ny Mølle Kro paragraph 12; Case 324/86 Daddy’s Dance Hall A/S paragraph 9; Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 28; O’Leary page 246.
\textsuperscript{1085} Case C-51/00 Temco paragraph 21; See Case C-29/91 Redmond Stichting Summary 1, there not being a contractual relationship. A legal transfer is defined to include a situation in which a public authority terminates a subsidy paid to a legal person, leading to a termination of this legal person’s activities. The subsidy is transferred to another legal person, having a similar aim.
\textsuperscript{1086} Case C-51/00 Temco paragraph 23.
\textsuperscript{1087} Case C-478/03 Celtec paragraph 33.
\textsuperscript{1088} Case C-478/03 Celtec paragraphs 34-35.
\textsuperscript{1089} Hietala – Kahri – Kairinen – Kaivanto 2006 pp. 98-100.
\textsuperscript{1090} Compare C-29/91 Sophie Redmond Stichtings Grounds of the Judgment point 9.
\textsuperscript{1091} See Case 24/85 Spijkers Summary, a business retaining its identity, having regard to all the facts characterising the transaction. The business is disposed of as a going concern, indicated by a fact that its business is continued or resumed by the new employer, and the similarity of the activities.
\textsuperscript{1092} Barnard page 627.
The directive is applicable in transfers relating only to an undertaking’s part or an ancillary activity.1093 The directive is applicable in the transferred part and to employees assigned to this part.1094

3.3.2.2. Mergers included, takeovers not

A merger in the directive on Transfers of Undertakings’ meaning denotes to a merger within the meaning of the 3rd directive, its Articles 3 (1) and 4 (1). Under the directive on Transfers of Undertakings a merger has to involve a change in an employer’s identity.1095

The directive is not applicable in a sell of shares. Takeovers by an acquisition of share-capital are excluded.1096 The directive is not applicable even in a majority sell of shares, the company getting a new owner, if the employer’s identity is not changed.1097 In a takeover usually only share-capital owner’s identity changes. This change does not normally extend to an employer’s legal identity. In the United Kingdom, the most common form of restructuring is a takeover undertaken in the form of selling shares.1098

The directive on Transfers of Undertakings does not cover takeovers, irrespective of their possible and even probable employee implications and employment effects. The employee implications and employment effects are affected by the use of rights involved in share ownership, forming the basis for the use of management right, having in core to do with decision-making on business.1099

Employee protection and status should cover all forms of restructuring, takeovers included.

1093 Joined Cases C-127/96, C-229/96 and C-74/97 Hernandéz Vidal and Others paragraph 33.
1094 Case C-209/91 Rask and Christensen paragraph 16; Case 186/83 Botzen and Others paragraphs 14-16; Barnard pp. 624-625; Hietala – Kahri – Kairinen – Kaivanto 2006 page 101, comparing the case-law of the ECJ and the Finnish one state the Finnish one putting more emphasis on the prevailing circumstances.
1095 Barnard pp. 634-635; Nyström page 256. See also Barnard page 635 footnote 116 on the applicability of the directive in mergers denoted in EC Merger Regulation, Preamble point 45. See also Cases T-96/92 Grandes Sources and T-12/93 Vittel, making explicit reference to the applicability of the directive, and Kuoppamäki’s comments on the cases pp. 1238-1243, especially pp. 1240-1243. See also Liukkunen pp. 278-279. On Finnish legal theory between the character of a merger and a transfer of a business in labour law sense see Rautiainen – Äimälä pp. 138-143.
1096 Kenner page 34.
1097 Blanpain 2001 page 170; Nielsen page 316; Barnard page 635; Kenner page 34; Nyström page 256.
1098 Barnard pp. 635-636, See Cases T-96/92 Grandes Sources and T-12/93 Vittel. Both were based on the application of EC Merger Regulation, the concentrations being formed due to a takeover-bid. The ECJ made explicit the application of the Transfers of Undertakings directive in both of the cases, see T-96/92 Grandes Sources Summary 1 and T-12/93 Vittel Summary 1 and paragraphs 51-52, 55 and 58.
1099 Valkonen 2006 page 804.
Employee status in and due to takeovers should be viewed also as a part of corporate governance, denoting to company management.

3.3.2.3. Legal transfer

A legal transfer’s scope cannot be assessed only on the basis of textual interpretation. This is due to differences in the provision’s different language versions. It is also due to differences in a concept of a legal transfer in Member State laws. The concept of a legal transfer has to be given a sufficiently flexible interpretation. It has to be kept in line with the directive’s goals of safeguarding employee rights in a transfer of an undertaking.1100

The concept of “a legal transfer” relates to a transfer’s method. The transfer has to do with contractual relations, leading to any legal change in an employer’s person. The ECJ has adopted a wide purposive interpretation on the concept of “a legal transfer”.1101

There does not have to be a direct contractual relationship between the transferor and transferee for the directive to be applicable. The transfer can be realised in two stages, a third party acting as an intermediary,1102 provided that the economic entity in question retains its identity. This third party can be an owner or a person putting up capital.1103 The transfer can be carried out also as a part of a web of different contractual relations. These can also be indirect in their character.1104

Case 324/86 Daddy’s Dance Hall concerned a non-transferable lease of restaurants and bars owned by A/S Palad’s Teatret. A/S Palad’s Teatret had made a non-transferable lease on the restaurants and bars with Irma Catering A/S. The lease was terminated, Irma Catering dismissing its staff. A/S Palad’s Teatret made a new lease with Daddy’s Dance Hall, who immediately re-employed the

1100 Case 135/83 Abels paragraphs 11-12; Case C-29/91 Sophie Redmond Stichting paragraphs 10-11; O’Leary page 245.

1101 Barnard pp. 628-630. See Case 135/83 Abels paragraph 30, legal transfer being based on a judicial decision; See C-29/91 Sophie Redmond Stichting Summary 1 on a legal transfer based on an administrative decision, see Barnard page 633; See C-51/00 Temco Summary 1 on a transfer in which a contractor has entrusted the contract of cleaning its premises to a party which has the contract performed by a subcontractor, later terminating this contract and entering a new contract with a second undertaking, the second undertaking taking on under a collective agreement part of the subcontractor’s staff, see Barnard page 634; The directive was held inapplicable in a transfer of administrative functions from a municipality to an administrative collectivity C-298/94 Annette Henke paragraph 17-18; See C-175/99 Mayeur paragraphs 38-40 on carrying out of publicity and information activities on behalf of a city, the activities being economic in nature and falling within the scope of the directive, Barnard pp. 644-646 and O’Leary pp. 275-279.

1102 Hietala – Kahri – Kairinen – Kaivanto 2006 page 98.

1103 Case 324/86 Daddy’s Dance Hall A/S paragraph 10; Case C-13/95 Ayse Sützen paragraph 12; Case C-51/00 Temco paragraph 31.

1104 Case C-51/00 Temco paragraph 33, O’Leary page 249; Kenner page 349.
former lessee’s employees. There had not been an interruption in the running of the business. The new lessee bought the former lessee’s stock.\textsuperscript{1105} The operation was carried out in two stages. The undertaking was first transferred from the original lessee to the owner, who then re-transferred the undertaking to a new lessee. This did not prevent the applicability of the directive, as far as the economic unit retained its identity.\textsuperscript{1106}

The Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys concerned a transfer of a motor vehicle dealership, without a direct contractual relationship between the new dealer and the old one and also without a transfer of assets between them, the majority of the staff having been dismissed. The directive was held applicable.\textsuperscript{1107} Evaluated from the perspective of employee protection, the concept of a legal transfer covering a transfer of an economic entity \textit{including employees}\textsuperscript{1108} is essentially affected in a weakening sense by the interpretation in the Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys, allowing dismissals even of the majority of the employees, the transaction not also covering business assets.

In the Case C-13/95 Ayse Süzen Mrs Süzen had been employed by Zehnacker to act in cleaning operations in a secondary school under a cleaning contract made between the school and Zehnacker. The school terminated the cleaning contract, leading to Zehnacker terminating Mrs Süzen’s employment contract. The school made another cleaning contract with another undertaking. There had not been a transfer of business assets.\textsuperscript{1109} The directive is held applicable, if the transfer relates to a stable economic entity, whose activity is not limited to a performance of one specific works contract. The term entity refers to an organised grouping of persons and assets, facilitating pursuing an economic activity with a specific object. A transfer of significant tangible or intangible assets is required, or the new employer taking over a major part of the workforce, in the terms of numbers and skills, assigned by the former undertakings to perform the tasks.\textsuperscript{1110} Evaluated from the employee perspective, defining a legal transfer on factors assessed in the Case C-13/95 Ayse Süzen, they are in the employer’s sole decision-making.

\textsuperscript{1105} Case C 324/86 Daddy’s Dance Hall paragraphs 3-5.
\textsuperscript{1106} Case C 324/86 Daddy’s Dance Hall paragraphs 7 and 9-10.
\textsuperscript{1107} Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraphs 6-7, 15, 26, 30 and 32.
\textsuperscript{1108} Case C-478/03 Celtec paragraph 27.
\textsuperscript{1109} Case C-13/95 Ayse Süzen paragraphs 3-4 and 9-10.
\textsuperscript{1110} Case C-13/95 Ayse Süzen paragraphs 12-18 and 23. See C-51/00 Temco Summary 1, the cleaning contract being entrusted to an undertaking, entrusting it to a subcontractor, later terminating the contract and entrusting it to a second undertaking, and further paragraph 33, stating the preconditions for the directive’s applicability, emphasizing the taken on of an essential part of the staff, in the terms of their number and skills.
The directive is applicable in transfers within the same group of companies. The directive was held applicable in a transfer between two subsidiary companies in a same group, the companies being each distinct legal persons.\textsuperscript{1111} The Case C-234/98 Allen concerned a transfer between two companies in a group. Amalgamated Construction Company Ltd. ACC was a wholly-owned subsidiary of AMCO Corporation plc. As a whole AMCO Group had in its ownership about 12 companies. Among these companies was also another wholly-owned subsidiary, AM Mining Services Ltd, AMS. AMS diversified its activities, obtaining work incidental to the underground driveage work, like cleaning and drifts maintenance. It took on such work in Prince of Wales Collieries in Yorkshire. ACC carried out there driveage work for the British national coal-mining company and after its privatisation, to its successor. Due to a bid on the driveage work, ACC won the contracts, although AMS’s labour costs were lower. Work was subcontracted to AMS. ACC dismissed its employees, who were engaged by AMS.\textsuperscript{1112} The companies have the same ownership, management, premises and are engaged in the same works. These facts are not relevant in interpreting the directive’s applicability. The directive applies also to a transfer between two subsidiarity companies, each being distinct legal persons with specific employment relationships with their employees. Decisive in assessing the directive’s applicability is a transfer of a stable economic entity, referring to an organised grouping of persons and assets facilitating the exercise of an economic activity pursuing a specific object.\textsuperscript{1113}

The concept of “a legal transfer” includes different kinds of arrangements. Included are leasing arrangements. In the case 287/86 Ny Mølle Kro Mrs Hannibalsen had leased a tavern to Inger Larsen, who failed to comply with the lease’s terms. Mrs Hannibalsen rescinded the lease and took over the tavern’s operations herself. There had not been any change in the restaurant’s ownership. The business operated on a regular basis only during the summer, resulting outside this time in the staff’s absence. A seasonal closure does not denote to a business having ceased to be a going concern.\textsuperscript{1114} The case is considered equivalent with an undertaking’s sell, leading to a need of employee protection.\textsuperscript{1115}

The directive is applicable in a transfer taking place in stages. The undertaking is retransferred – there not being any breaches of the lease contract – from the lessee to the owner who in his/her turn

\textsuperscript{1111} C-234/98 Allen Summary 1 and paragraphs 17 and 39; Barnard page 634; Kenner page 349.
\textsuperscript{1112} C-234/98 Allen paragraphs 4-7.
\textsuperscript{1113} C-234/98 Allen paragraphs 16-17, 21, 23-24, 27-29 and 39.
\textsuperscript{1114} Case 287/86 Ny Mølle Kro paragraphs 3-4, 14-15 and 19-20.
\textsuperscript{1115} Barnard page 629; O’Leary pp. 245-246.
transfers the undertaking to a new owner. The directive is applicable provided that the transferred undertaking retains its identity. In the Case 101/87 P. Bork and Others P. Bork International had leased a factory from another company, taking over the staff. P. Bork International terminated the lease, the factory ceasing to operate. All the employees were dismissed. Another company purchased the factory, beginning to operate it and taking over a considerable part of the staff. The new factory owner purchased later stock, spare parts, tools, auxiliary equipment and furnishings from P. Bork International. The main issue was, whether P. Bork International’s obligations as an employer were transferred to the new factory owner. The fact that the transfer was effected in two stages, does not preclude the directive’s applicability, provided that the entity in question retains its identity, and is transferred as a going concern, its operation with same or similar activities actually continuing or being resumed by the transferee. In order to assess these conditions all the circumstances of the case have to be taken into account. Included are, whether tangible or intangible assets and the majority of the staff are taken on, and a consideration on the similarity of the activities before and after the transfer and the possible cease of the activities.

The directive is applicable also in contracting out. A company’s decision to renounce some of its in-house activities is the central factor in subcontracting. Contracting out is targeted to cost savings, being a form of economies of scale and scope. It may be grounded by the contractor’s better management skills or its lower wage costs. Services previously provided in-house are offered out to tender, being later performed on contractual basis by an outside contractor. Often the services under the tender are ancillary to a company’s main activity, but this need not to be the case, outsourcing being used for any kind of activities.

The Case C-209/91 “Rask” concerned a transfer of Philips company’s four staff canteens on the basis of an agreement, the ISS taking full and entire responsibility of the staff canteens. These canteens had been formerly carried out by an undertaking itself for its staff. The responsibility to carry out a canteen was transferred on the basis of an agreement to another, who assumed the obligations of an employer towards the employees. The transaction was held to be within the scope of the directive on Transfers of Undertakings. The transaction could not be excluded from the

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1116 O’Leary page 248; Barnard pp. 629-630.
1117 Case 101/87 P. Bork and Others paragraphs 3-4 and 10.
1119 Barnard pp. 631 and 634.
1120 Rautiainen – Äimälä page 145.
1121 Rautiainen – Äimälä page 146.
1122 Barnard pp. 630-631; O’Leary page 252; Collins – Ewing – McColgan page 1053.
directive’s scope solely because of the nature of the service of the transaction, concerning only an ancillary activity of the undertaking, without a necessary connection with the company’s main objects. Nor was the applicability of the directive precluded because of the provision of services was exclusively for the benefit of the transferor, who in his/her turn paid in return a fee to the transferee for the granted services.1123

3.3.2.4. Transfer of an Undertaking

When a legal transfer in the directive’s meaning has been assessed, the next task is to determine “a transfer of an undertaking” within the meaning of the directive. A transfer of an undertaking denotes to a transfer of an economic entity retaining its identity, meaning an organised grouping of resources, having the objective of pursuing an economic activity, whether or not that activity is central or ancillary.1124

Decisive in the evaluation is whether the business in question retains its identity.1125 The business has to be disposed of as a going concern, the entity in question retaining its identity, being indicated by a fact that its operation is continued or resumed by the new employer, with the same or similar activities.1126 The facts cannot be considered in isolation to each other. An overall assessment has to be done, at the latest stage being a task of a national court.1127

Mr Spijkers was employed as an assistant manager in a company, its business covering an operation of a slaughter-house. The company’s business activities had ceased. The entire slaughter-house, land and certain specified goods were bought by another company. This company began to operate the slaughter-house for its own and the former company’s joint account. This company took over

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1123 Case C-209/91 Rask and Christensen paragraphs 2-5 and 17; Barnard page 631; O’Leary pp. 253-254. The directive has been held applicable in contracting out, also in the form of contracting back, when one of the parties is a public body, contracting out its home-help service for persons in need or awarding a contract for maintaining surveillance of its premises to an undertaking and after the termination of these contracts, contracts out the service to another undertaking. The applicability of the directive requires the transfer of an economic entity between these undertakings. The term “economic entity” refers to an organised grouping of persons and assets enabling an economic activity pursuing a specific objective. Mere the similarity of the service successively provided by the old and the new undertaking on the basis of the contracting out agreement does not in itself justify the conclusion of a transfer. There was not a contractual link between the two undertakings successively entrusted with the tasks in question. This was not held to be decisive in the assessment, see Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Ziemann paragraphs 22 and 34, Barnard page 633.

1124 Directive 2001/23/EC Chapter I Article 1 1. (b).
1125 Case 24/85 Spijkers paragraph 11.
1126 Case 24/85 Spijkers paragraph 12; Case C-13/95 Ayse Süzen paragraph 10; Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 16; Case C-29/91 Redmond Stichting paragraph 23.
1127 Case 24/85 Spijkers paragraphs 13-14; Case C-29/91 Redmond Stichting paragraphs 24-25; O’Leary pp. 250-251 and 256; Barnard pp. 636-637.
the vast majority of the employees, except Mr Spijkers.1128 The directive on Transfers of
Undertakings is intended to ensure employment relationships´ continuity, irrespective of any
ownership changes.1129 A transfer of an undertaking does not occur only on the basis of its assets
being disposed of. It is necessary to consider, if the business is disposed of as a going concern. This
is indicated by a fact that the new employer actually continues or resumes its operation, with same
or similar activities.1130

In order to determine if the business is disposed of as a going concern, the following facts have to
be taken into account in the assessment, forming “the Spijkers-test”: the type of the undertaking or
the business, are the tangible assets of the business transferred, this meaning buildings and movable
property, the value of the intangible assets at the time of the transfer, whether or not the majority of
the employees are taken over by the new transferee at the time of the transfer, are the customers
transferred or not, the degree of similarity between the activities carried out before and after the
transfer and the period, if there is any, for which the activities of the transferred business entity
were suspended.1131

The main two concepts in the case Spijkers are “activity” and “economic entity”. In the background
of these concepts is the French labour and commercial law debate. The labour law debate
emphasises “activity”, denoting to business activities´ similarity between the old and new employer.
The commercial law debate – of the German origin – emphasises “economic entity”, referring to a
transfer of an organised entity.1132 There has been a change in the case law of the ECJ, the emphasis
now being on the commercial law approach, emphasising “economic entity”.1133

The change in the emphasis also affects the employee protection, the factors of the Spijkers-test
being based on employer-decision-making.

The Case C-392/92 Schmidt had to do with applying the labour law “activity” test.1134 The directive
was held applicable when an undertaking entrusted on a contractual basis the responsibility of its
cleaning operations to another undertaking, having performed these operations before the transfer

1128 Case 24/85 Spijkers paragraph 3.
1129 Case 24/85 Spijkers paragraph 11.
1130 Case 24/85 Spijkers paragraph 12.
1131 Case 24/85 Spijkers paragraph 13; See also Case C-51/00 Temco paragraph 24 and Joined Cases C-171/94 and C-
172/94 Merckx and Neuhuys paragraph 17; Kenner page 346; Nyström pp. 259-260; Malmberg pp. 72-73.
1132 Nielsen 2002 page 65.
1133 Compare Case C-13/95 Ayse Süzen Summary; Barnard pp. 637-638.
1134 Case C-392/92 Schmidt Summary; Compare Barnard pp. 637-638 and 640-641.
itself. The transfer related to the transferor’s ancillary activity and was performed only by a single employee. The transfer was not either accompanied by a transfer of tangible assets. The decisive criterion in determining the directive’s applicability in the case “Schmidt” had to do with the retention of the transferred business’s identity, being indicated by the transferee continuing or resuming the same or similar activities, shown by a fact work being offered to the employee. In this judgment the factors defined in the Spijkers-test were altered, the emphasis being on the continuation of the similar activities and the employees’ re-employment. The judgment led later to a heavy criticism within the legal community, political circles and business.

The Case C-48/94 Rygaard concerned O. Rygaard, who was a worker in a construction company Svend Pedersen A/S, working on a building site. Svend Pedersen A/S expressed a wish that a part of construction works could be carried out by another company, being later tendered and leading to an agreement on sub-contracting. The continuation of work in a building site in order to get the work completed is not a transfer of a business in the directive’s meaning. The activities of an entity cannot be limited to a performance of only one specific contract. The transferor undertaking had merely made available to the new contractor certain workers and materials in order to make it able to carry the works in question. The directive’s applicability is related to a stable economic entity, not to performing one specific works contract. In the decision is to be seen a move towards the commercial test of economic entity.

The directive is applicable also in second-round contracting-out. The first factor to be established is the existence of a stable economic entity having the capability to be transferred. Secondly, is to be established if the transfer of the activity is followed by a transfer of significant assets or, in the labour-intensive sectors, a major part of the staff, in terms of skills and numbers. The transfer of a service contract as such is not a transfer of a part of a business within the directive’s meaning. In the

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1135 O’Leary pp. 254-255.
1136 Case C-392/92 Schmidt Summary and paragraph 20.
1137 Case C-392/92 Schmidt paragraph 17; Nyström page 260.
1138 O’Leary page 256.
1139 See Kenner pp. 346-347; Malmberg page 73; The case C-392/92 Schmidt also had to do with the interpretation of a part of a business, see Nyström page 264.
1141 Case C-48/94 Rygaard paragraphs 5-9.
1142 Case C-48/94 Rygaard paragraph 23.
1143 Case C-48/94 Rygaard paragraph 20; See also Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others paragraph 26, O’Leary pp. 258-259; Kenner page 38.
1144 Case C-48/94 Rygaard paragraphs 20-23.
1145 O’Leary pp. 258-259; Barnard pp. 639-640; Nyström pp. 261-262; See also Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others paragraphs 26 and 29; Case C-234/98 Allen and Others paragraph 24.
labour intensive services like cleaning the transferee has to take on a major part of the workforce in order the directive to be applicable.\textsuperscript{1146}

In the Joined Cases C-127/96, C-229/96 and C-74/97 Hernandéz Vidal and Others an undertaking terminated its cleaning contract with an outside contractor. The work is later carried out by the undertaking itself.\textsuperscript{1147} An essential requirement for the directive’s applicability is the assessment of a transfer of an economic entity. The mere similarity of the activities themselves does not justify a conclusion of a transfer of an entity.\textsuperscript{1148} In certain sectors, like cleaning, the assets are often reduced to the basics. The activity is essentially based on manpower. In the absence of other production factors, an organised grouping of wage-earners, being specifically and in a permanent way assigned to a common task, may amount to an economic entity.\textsuperscript{1149}

The Case C-13/95 Ayse Süzen was a move towards the commercial test of an economic entity.\textsuperscript{1150} The case concerned a dismissal of a contract on cleaning premises, second-generation contracting out.\textsuperscript{1151} An undertaking terminated a cleaning contract with an outside undertaking in order to transfer that contract to another undertaking, by making a new contract of the similar service with the second undertaking. The transfer was not accompanied by a simultaneous transfer from one undertaking to the second of significant tangible or intangible assets or a major part of the workforce assigned by the previous employer to the performance of the transferred tasks. The major part of the workforce is to be determined on the basis of the employee numbers and skills.\textsuperscript{1152} The loss of a service contract to a competitor does not in itself indicate a transfer of a business within the directive’s meaning. When a service undertaking loses a customer it does not fully cease to exist.\textsuperscript{1153} In order the directive to be applicable, the transfer has to relate to a stable economic entity. The used term “entity” refers to an organised grouping of persons and assets, which facilitate the exercise of an economic activity having a specific objective.\textsuperscript{1154}

\textsuperscript{1146} O’Leary page 263.
\textsuperscript{1147} Joined Cases C-127/96, C-229/96 and C-74/97 Hernandéz Vidal and Others paragraphs 5-6.
\textsuperscript{1148} Joined Cases C-127/96, C-229/96 and C-74/97 Hernandéz Vidal and Others Summary and paragraph 35; Barnard page 633; O’Leary pp. 263-264.
\textsuperscript{1149} Joined Cases C-127/96, C-229/96 and C-74/97 Hernandéz Vidal and Others paragraph 27.
\textsuperscript{1150} Barnard page 641.
\textsuperscript{1151} See Kenner page 38.
\textsuperscript{1152} Case C-13/95 Ayse Süzen Summary and paragraph 23; O’Leary pp. 259-260.
\textsuperscript{1153} Case C-13/95 Ayse Süzen paragraph 16.
\textsuperscript{1154} Case C-13/95 Ayse Süzen paragraph 13; See Kenner pp. 346-348, Nyström page 259 and Malmberg page 73.
The similarity of the service provided by the old and new contracts awardees does not give support to a conclusion on the transfer of an economic entity. An entity cannot be reduced to an activity being entrusted to it. An entity’s identity has to do also with other factors. The identity is described by its workforce, management staff, the organisation of the work, operating methods and available operational resources.  

The answer to a question concerning a transfer within the directive’s meaning is to be based on an overall assessment. The degree of importance attached to each of the factors describing the situation will vary, depending on the used production or operating methods. If an economic entity is in certain sectors able to function without any tangible or intangible assets, the maintenance of the identity of an entity cannot depend on the transfer of these kinds of assets.  

In the labour-intensive sectors a group of workers engaged in a joint activity on a permanent basis may form an economic entity. In cleaning and surveillance assets are often minimal, the activity being based on workforce. This kind of an entity is able to maintain its identity after the transfer if the new employer continues the activity in question and takes over a major part of the employees in numbers and skills, assigned by the previous employer to the transferred tasks, making the new employer able to carry out the transferor’s activities or a part of them on a regular basis. In these surroundings an organised grouping of wage-earners being specifically and on a permanent basis assigned to a common task may well amount to an economic entity in the absence of other production factors. Evaluated from the employee perspective, the emphasised factors have to do with employer decision-making, not being affected by the employees.

The directive on Transfers of Undertakings is held applicable when a legal person governed by public law has successively awarded the operation of scheduled local bus routes to two legal persons.  

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1155 Case C-13/95 Ayse Süzen paragraph 15; Barnard page 641; O’Leary pp. 261-262; See also Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others paragraphs 30 and 35.  
1156 Case C-13/95 Ayse Süzen paragraph 18; Barnard pp. 641-642; O’Leary page 262; See also Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others Summary and paragraph 32.  
1158 Case C-13/95 Ayse Süzen paragraph 21; Barnard page 642; O’Leary page 262; See also Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal and Others paragraph 27; Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Ziemann paragraph 32; Case C-234/98 Allen and Others paragraph 29; Case C-51/00 Temco paragraph 33. See Case Abler C-340/01 Summary, stating that the directive 2001/21/EC was held applicable in a case concerning second-round subcontracting, the second contractor using substantial parts of the tangible assets used previously by the first contractor, not, however, having an intention to take on the first contractor’s employees; Rautiainen – Åimälä page 147.  
1159 Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Ziemann paragraph 26; Joined Cases C-127/96, C-229/96 and C-74/97 Hernández Vidal paragraph 35.
undertakings, on the basis of a procedure under the directive on award of public service contracts, there not having been a direct contractual link between these two undertakings.¹¹⁶⁰

In the Case C-172/99 Oy Liikenne Ab Hakunilan Liikenne lost the operation of bus routes to Liikenne, which as a successor began to operate the routes. Hakunilan Liikenne made redundant 45 drivers, of whom 33 were employed by Liikenne, employing almost 20 other drivers. Liikenne employed the former drivers of Hakunilan Liikenne with terms and conditions laid down in the national collective agreement, the terms and conditions being in the overall assessment worse compared to those former applied by Hakunilan Liikenne.¹¹⁶¹

The applicability of the directive is dependant on the transfer of an economic entity retaining its identity. This is characterised foremost by a transfer to a significant extent of tangible assets, these contributing significantly and being necessary to the performance of the activity in question, scheduled public transport by bus. When Liikenne had replaced Hakunilan Liikenne as an awarder, there had not been between these two undertakings a transfer of vehicles or other assets connected with the operation of the bus routes. While waiting for 22 new buses, which it had ordered, Liikenne had only leased two buses for two or three months from Hakunilan Liikenne. Liikenne had also bought from Hakunilan Liikenne some of the employed drivers’ uniforms. There was not a transfer of significant tangible assets between these two undertakings in the described situation, the directive not being applicable.¹¹⁶² The criteria established in Süzen were applied strictly.¹¹⁶³ It is worth of noting that the inapplicability of the directive on the Transfers of Undertakings, resulting in a national level interpretation, was based on an employer’s decisions on business assets. The employment relationships were not transferred. From the employee perspective, the end-result with its legal effects equals with that of a company dissolution.

The 3rd directive on mergers reflects a concept of a company as a bundle of financial relationships, these narrowly defined. The directive’s focus is not on an enterprise, referring to carrying out of independent economic activities in a stable manner;¹¹⁶⁴ this taking into account a protective manner

¹¹⁶⁰ KKO 1999:48a, Case C-172/99 Oy Liikenne Ab paragraphs 14-15 and 44.
¹¹⁶¹ Case C-172/99 Oy Liikenne Ab paragraph 9.
¹¹⁶³ Kenner page 350.
in addition to shareholder interests also a wider circle of interest groups and interests, employees and their interests included. The concept of a transfer of an undertaking within the directive on Transfers of Undertakings has been largely developed by ECJ case law. The concept does not necessarily denote to a legal person. This is apt to create difficulties in proactively evaluating different entities’ character with regards to the application of the directive on Transfers of Undertakings. The concept of a transfer of an undertaking has neared itself with the company law concept of a company, due to the emphasis on economic entity.

3.3.2.5. Privatisation of a public body

In a public body privatisation the transfer results from a public authority’s unilateral decision-making, not from an agreement. The directive is applicable, if the transfer does not consist of exercising public authority.\textsuperscript{1165}

Based on the competition law, the ECJ has held that the management of public telecommunications equipment and the placing of this kind of an equipment at the disposal of the users against a fee is business activity.\textsuperscript{1166} Although the operation of the public telecommunications network would be entrusted to a body forming a part of public administration, the way of organising these tasks could not hinder this body to be classified as a public undertaking.\textsuperscript{1167}

A transfer was carried out as an administrative concession to a private-law company established by another public body holding its entire capital. The transfer considered an entity operating telecommunications services for public use and managed by a public body within the State administration. The entity had become a subject of a transfer for a consideration as a result of decisions made by the public authorities. The directive on Transfers of Undertakings was applicable.\textsuperscript{1168}

3.3.2.6. Insolvency and other kinds of economic difficulties

The Member States are granted an option to legislate outside the directive’s scope transfer of rights and obligations and dismissals if the transferor is in a bankruptcy or under an analogous insolvency

\begin{footnotes}
\footnote{1165}{Case C-29/91 Redmond Stichting Summary 1-2 and paragraphs 21, 23-24 and 31; Case C-343/98 Collino and Chi apperò paragraphs 31, 34 and 41; O’Leary pp. 277-278.}
\footnote{1166}{Case 41/83 Italy Summary 1.}
\footnote{1167}{Case C-69/91 Decoster Summary 1 and paragraph 15.}
\footnote{1168}{Case C-343/98 Collino and Chiappero paragraphs 26 and 41.}
\end{footnotes}
proceeding, these proceedings having begun with a goal to liquidate the transferor’s assets under a supervision of a public authority.1169

Insolvency law is characterised by special procedures. Their intention is to weight up various involved interests, especially those between various creditor classes. Consequently, there are in the Member States special rules, which may at least partially derogate from other provisions of general nature, including provisions of social law.1170 1171

The directive on Transfers of Undertakings does not impose on the Member States an obligation to extend the directive’s rules to transfers taking place in an insolvency proceeding, instituted with a view to liquidate the transferor’s assets under the competent judicial authority’s supervision.1172 If the Member States do not legislate otherwise, the directive is not applicable when the transferor has been proclaimed insolvent and the undertaking or the business under transfer proceedings is a part of these transferor’s assets.1173 1174 The Member States have an obligation to take appropriate measures targeted to prevent the misuse of insolvency proceedings that deprive employees of their rights guaranteed in the directive.1175

Outside the enacted derogation are proceedings taking place at an earlier stage, consisting not yet of an actual liquidation. If the collective suspension of debt payment is targeted to reaching a settlement to ensure an undertaking’s operations’ continuation in the future, by safeguarding its assets, the proceedings fall out of the enacted derogation.1176

The directive is applicable in a voluntary liquidation. A company in a voluntary liquidation transfers all or only a part of its assets to another company, under whose direction the employees

1169 Directive 2001/23/EC Chapter II Article 5 1.; O’Leary pp. 269 and 284; Barnard page 647; Nyström page 268.
1170 Case 135/83 Abels paragraph 15.
1171 Barnard page 647, O’Leary pp. 268-269.
1172 Case 135/83 Abels paragraph 23; Kenner page 351.
1173 Case 135/83 Abels paragraph 3; Case 105/84 Danmols Summary; See C-399/96 Europièces paragraph 36 stating that the directive is applicable where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker takes orders.
1174 O’Leary pp. 272-274.
1176 Case 135/83 Abels paragraphs 28-30; Case 186/83 Botzen and Others Summary and paragraph 9; See also Case C-362/89 d’Urso Summary 2 and Case C-319/94 Dethier Summary 3 and paragraph 32, the undertaking in question being wound up by the court, continuing its trading; Barnard pp. 649 and 651-653; O’Leary pp. 269 and 272-275; Kenner page 351.
are to carry out their work, the directions to the employer company being given by the company in liquidation.\textsuperscript{1177}

In summary, the directive on Transfers of Undertakings is not applicable in a transfer if the undertaking in question is subject to liquidation proceedings, unless the Member States provide otherwise. The directive is however applicable in a transfer by an undertaking subject to pre-liquidation proceedings and under a voluntary liquidation.\textsuperscript{1178}

If the Member States have not used the option to legislate on the exclusion of the directive on Transfers of Undertakings’ application in relation to a transferor under liquidation proceedings, they have still available another option to legislate a transfer in these kinds of surroundings. They may provide that the transferor’s debts arising from employment contracts or relationships and payable before the transfer or before the opening of the insolvency proceedings are not to be transferred to the transferee. This may take place on a precondition that such proceedings give rise to protection at least equivalent to that provided for by the directive on employee protection in employer insolvency.\textsuperscript{1179} The transferor’s debt arising out of employment contracts and payable before the transfer or before the initiating of the insolvency proceedings is not transferred to the transferee. Debts may cover, for example, unpaid wages, holiday pays and bonuses. The use of this option preconditions that employees are granted at least protection guaranteed by the directive on employee protection in employer insolvency.\textsuperscript{1180}

In Finland the transferee, or – using the Finnish terminology – the assignee is not liable for the employee’s pay or other claims deriving from an employment relationship having fallen due before the assignment, except if controlling power in the bankrupt enterprise and in the assignee enterprise is or has been exercised by the same persons on the basis of ownership, agreement or other arrangement.\textsuperscript{1181}

As a general rule in Sweden the former employer, the transferor, is responsible for economic obligations having arisen before the transfer, this rule however not being applicable in a liquidation.

\textsuperscript{1177} Case C-399/96 Europièces paragraph 36.
\textsuperscript{1178} O’Leary page 270; See O’Leary page 287 on the strain between the directive’s protective and free enterprise goals.
\textsuperscript{1179} Directive 2001/23/EC Chapter II Article 5 2. (a); Council directive 80/987/EEC, later directive 2002/74/EC, which has been implemented in Finland by the Wage Security Act.
\textsuperscript{1180} O’Leary page 284.
\textsuperscript{1181} ECA 2001 § 1:10.3; Proposal for ECA 2001 page 67; Tiitinen - Kröger 2003 page 286.
A transfer of an undertaking does not cover a transfer of rights and obligations in an undertaking in liquidation.¹¹⁸²

In the United Kingdom, the transfer of rights and obligations is not applicable on a transferor under bankruptcy or other analogous liquidation proceedings. Insolvent company’s employees are to claim their wages and potential dismissal compensations from the Public Authority, in practise from the Secretary of State. Also assets of the insolvent company may be used to an extent being guaranteed by the social security system.¹¹⁸³

3.3.2.7. Summary on the Preconditions of the Directive’s Applicability

In summary the preconditions for determining of a transfer of an undertaking and the overall assessment, at the last stage by the national courts, are the following: There has to be a change in contractual relations in the person, either a legal or a natural person, being responsible to carry out the business, simultaneously incurring the employer obligations towards an entity’s employees. The existence of an economic entity has to be assessed. An economic entity is an organised grouping of persons and assets through which an economic activity is exercised, having a specific object. This entity has to be organised in a stable manner. The transfer may concern only a part of an entity. The entity’s tasks are not limited to a performance of one specific contract. The economic entity has to retain its identity. This is marked especially by the continuation of the entity’s activities by the new employer, and the continuity of its workforce and management staff in addition to the way of organising its work, operating methods or operational resources used by it.¹¹⁸⁴

The national court has to take into account in its determination the type of an undertaking or a business in question. In the determination the degree of importance attached to each criterion varies, being connected to the activity in question, at the last stage to the production or operating methods used in the undertaking. In certain sectors an economic entity is able to function without any significant tangible or intangible assets. In these cases the maintenance of an entity’s identity cannot

¹¹⁸² AEP § 6b.1-2; Bylund – Elmér – Viklund – Öhman page 92.
¹¹⁸³ TUPE 2006 Regulations 8 (7), TUPE 2006 Regulations 8-9, Explanatory Memorandum no. 246 point 7.2 (d), Collins – Ewing – McColgan pp. 1043-1044.
¹¹⁸⁴ O’Leary page 267; See also Nyström page 271.
depend on the transaction of assets. In the determination made by national courts the employees’ role is a passive one. Issues under consideration are outside their powers and influence.

Outside the scope of application are transfers concerning entities not being stable and economic in character and targeted to carrying out of specific contracts, administrative functions, transfers under liquidation process when targeted to a transferor’s assets’ liquidation and activities in which assets are of importance in the actual carrying out of that activity, the transfer not including the transfer of these assets.

The conditions set in the commercial test of an economic entity make possible for the transferee to avoid the application of the directive’s obligations. In assets-based transfers this takes place by not taking on the majority of the assets. In labour-intensive sectors this takes place by not employing the major part of the employees. In addition to the above-mentioned options of circumventing the provisions, another challenge from the employees’ perspective in the directive’s context is the definition of concept of an economic entity or an undertaking, not denoting to a legal person. The concept of an economic entity or an undertaking in the directive’s context is a special concept, getting its interpretation ultimately on a case-by-case basis. This also essentially weakens a proactive evaluation on the character of a business transaction; in turn, affecting proactive evaluation of the scope of employee protection in these transactions.

3.3.3. CONCLUSIONS ON THE DIRECTIVE ON TRANSFERS OF UNDERTAKINGS’ SCOPE AND APPLICABILITY

In the directive on Transfers of Undertakings there is inherent a tension between economic and protective goals. Evaluated on the basis of the codification of the directive on Transfers of Undertakings and the case-law of the ECJ, the economic emphasis seems to have got a stronger hold what comes to the directive’s scope and thus its applicability.

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1185 Joined Cases C-127/96, C-229/96 and C-74/97 Hernandéz Vidal and Others paragraph 31; Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Ziemann paragraph 31; Case C-234/98 Allen and Others paragraph 28.
1186 Kenner page 36.
1187 Nyström page 271.
1188 Barnard pp. 642-643; O’Leary pp. 265-266.
1189 Directive 2001/23/EC Preamble point (2) compared with point (3); See also C-135/83 Abels paragraph 18 on the protective purpose.
1190 Directive 2001/23/EC Preamble point (8); O’Leary pp. 281-282, especially page 282 pointing out to the established case-law of the ECJ.
1191 See also Hellsten 2007 pp. 20-21.
The directive’s applicability depends on the assessment of an economic entity, instead of assessing the transferred work’s similarity. The requirement on a transfer of an economic entity retaining its identity, now being an established principle, was first established in the case Spijkers, followed in the Süzen.

In the EU-company law a company is a bundle of economic relationships. Shareholders, creditors and management are a company’s stakeholders, as shown in the evaluation of the 3rd directive on mergers. Consequently, in company law, covering also restructuring measures as shown on the basis of the 3rd directive, the employees are outsiders as a stakeholder group. This is due to a fact – difficult to explain and understand – that employment contracts are labelled lacking a character of economic contracts, comparable to the ones made by the shareholders and creditors with the company.

In the European company law employees are outsiders as stakeholders because of their employee status. This affects straight the level of their protection and status in company restructuring law, resulting in these measure’s practical carrying, as shown in evaluating the 3rd directive on mergers. When the EU-labour law is evaluated on the basis of the directive on Transfers of Undertakings, there seems to be found also an outsider-status with regards to employees, but a different one compared to the one found in the company law. As a starting point in the directive on Transfers of Undertakings employees are held stakeholders. The employee status is ultimately defined at the national level, being variable, affecting the actual end-result of getting – or not getting – protection under the directive. In the United Kingdom, only employees are covered by the provisions on transfers of undertakings. In the United Kingdom, the provisions on transfers of undertakings are not applied to workers. Out of the scope of application are self-employed and hired workers and employees. New company strategies have increased the use of self-employed and other atypical forms of work, this in its turn affecting the circle of directly covered by the provisions on a transfer of an undertaking.

See Joined Cases C-127/96, C-229/96 and C-74/97 Francisco Hernández Vidal SA paragraph 35 stating as a precondition on the directive’s applicability a transfer of an economic entity, referring to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. The mere fact that the maintenance work carried out by first by the cleaning firm and then by the undertaking owning the premises is similar does not justify the conclusion that the transfer of such an entity has occurred.


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In the directive on Transfers of Undertakings takeovers are outside the directive’s scope, there not being a change in the employer’s person. As a general rule, a takeover leads to decision-making powers in a target company. This affects company strategy, furthered by business actions affecting employees, further employment included. Because of possible employee implications and corporate governance aspects takeovers should be covered by the directive on Transfers of Undertakings.

With regards to mergers, there is hardly doubt on meeting the requirement of a transfer of a stable economic entity, denoting to a transfer of an undertaking, due to a merger’s character as a company law enacted measure. In other kinds of transfers the meeting of the basic requirement of the directive’s applicability is more problematic, when evaluated on the basis of the criteria set by the consolidated directive on Transfers of Undertakings and the ECJ. The interpretations are not based on a concept of a legal person. The criterion set by the ECJ creates wide options to circumvent the provisions’ application. Due to the wide case-law there are also good grounds to claim that the evaluation on the directive’s scope, thus its applicability, has to be done even on a case-by-case basis. Both of these factors are apt to create insecurity on the employees’ part with regards to legal transactions’ character and the directive’s applicability, against the directive’s protective goals.

Outside mergers, the primary precondition for the directive’s application is the fulfilment of the test on an economic entity, referring to a transfer of a stable economic entity with the transfer of assets and/or workforce, these being matters outside employee decision-making powers and influence. According to both the Spijkers-criteria as well as the criteria set in the case Süzen the transfer of assets and workforce\(^\text{1194}\) are special conditions to be fulfilled in the assessment of a transfer of an undertaking. The fulfilment of this test is a precondition, thus a threshold, to get the protection granted in the directive. The protection granted by the directive is thus preconditional, depending on the employer’s decision-making on the economic entity’s qualities and character. An economic entity’s form of organisation and decision-making on the assets and workforce are matters of employer decision-making and, generally speaking, outside the employees’ powers and influence. The way of organising the transferred entity may lead to employees getting a status outside the scope of the directive, equalling their status with that of an outsider.

\(^{1194}\) See also Case C-51/00 Temco on second-round contracting out, Summary on a transaction not involving assets. The second undertaking had taken on under a collective agreement a part of the subcontractor’s staff. The directive on Transfers of Undertakings was applicable, provided, that the staff taken on by the second undertaking is an essential part, in the terms of the number and skills, of the staff assigned by the subcontractor to the performance of the subcontract.
The preconditions on the applicability of the directive affect straight the actual scope of protection ultimately granted to the employees. The directive’s emphasis, when evaluated on its criteria on scope and applicability, seems to be on facilitating restructuring and free enterprise, instead of employee protection, leading to a situation in which the employees may not at all get protection.

3.3.4. STATUS OF EMPLOYEE REPRESENTATIVES

If an entity being a party in a transfer preserves its autonomy, also the status and function of employee representatives\(^\text{1195}\) remain unaffected. This covers representation’s terms and conditions, provided that the conditions necessary to constitute employee representation are still fulfilled. If the conditions necessary for the employee representatives’ re-appointment or reconstitution are not fulfilled, the original representatives’ status and function will not be preserved.\(^\text{1196}\)

Safeguarding the status of the employee representatives, as such, is conditional. First, it depends on business preserving its autonomy. Secondly, the protection depends on workforce changes resulting from the transfer. If the transfer results in workforce changes, this may make necessary to change the representatives’ number or employee representation’s structure.\(^\text{1197}\) If the employee representatives’ term expires due to a transfer, they still continue to enjoy the protection provided by the provisions in force or an established practise in the Member States.\(^\text{1198}\) They inevitably vary, depending on the national labour market practises.

When the transferor is subject to bankruptcy proceedings or any analogous insolvency proceedings instituted with a view to liquidate its assets under competent public authority’s supervision, the Member States may take necessary measures to ensure that the transferred employees are properly represented until the employee representatives’ new election or designation.\(^\text{1199}\) Under this rule, the Member States do not have an absolute obligation to ensure the proper representation.

\(^\text{1195}\) On the definition of “employees’ representatives” see Directive 2001/23/EC Chapter I Article 2 1. (c): representatives of employees provided for by the laws and practises of the Member States; Nyström page 274.
\(^\text{1196}\) Directive 2001/23/EC Chapter II Article 6 1.; Barnard page 668; Nyström pp. 274-275; Hietala – Kahri – Kairinen – Kairanto 2006 page 103; In Finland the status of the shop stewards is not enacted in the ECA 2001. The status of the elected representatives is enacted in the ECA 2001 § 13:4, their status prevailing if the entity or its part retains its independence.
\(^\text{1197}\) Barnard page 668.
\(^\text{1198}\) Directive 2001/23/EC Chapter II article 6 2.; Barnard page 668; Nyström page 275.
\(^\text{1199}\) Directive 2001/23/EC Chapter II article 6 1.; Barnard page 668.
3.3.5. DIRECTIVE’S SAFEGUARDS

The directive on Transfers of Undertakings is targeted to extend employee protection guaranteed in individual Member State laws generally to an undertaking’s transfer. The directive is to ensure that an employee is protected in his relations with the transferee to the same extent as he/she was with his/her relations with the transferor under the individual Member State’s legal rules. The directive is intended to achieve only partial harmonisation within the EU’s Member States. It is not intended to establish a uniform level of protection within the Member States, based on common criteria. In core, the directive is purported to protect employees performing an identical job or work, but under a different employer.

The directive grants the employees a right to continue their employment contracts with the new employer, the transferee. Transferor’s rights and obligations arising from an employment contract existing on the date of a transfer are transferred to the transferee as such. Decisive in the determination of the scope of rights and obligations is the content of the employment contract in force at the date of the transfer. The concept of the transfer’s date is identified as a particular point in the transfer process. It does not cover the process’s whole time length.

In the Case 305/94 Rotsart Mrs Rotsart de Hertaing was employed by Housing Service SA, carrying out reception duties. The company changed its name to J. Benoidt SA and went into liquidation. A newly formed company I.G.C. Housing Service began to carry out business activities, operating from the same premises. J. Benoidt SA terminated Mrs Rotsart de Hertaing’s employment contract and unilaterally changed her functions. Mrs Rotsart de Hertaing’s employment contract was terminated anew by the liquidator due to a serious fault. It was established that there had been a transfer of an undertaking between J. Benoidt SA and I.G.C. Housing Service. Mrs Rotsart de Hertaing’s employment contract had not however been transferred. Employment contracts and relationships existing at the date of the transfer and employees employed in the transferred

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1200 Directive 2001/23/EC see Title and Preamble point (1), with the word “approximation”.
1202 Case 324/86 Daddy’s Dance Hall paragraph 16; C-135/83 Abels paragraph 38; Nielsen page 314; Malmberg page 72.
1203 Barnard page 653.
1204 Malmberg page 74.
1205 Nyström page 272; Hietala – Kahri – Kairinen – Kaivanto 2006 pp. 100-102. See KKO 2005:50 on the validity of a non-competition agreement. Particularly weigthy reasons stated in ECA 2001 § 3:5.1-2 as a precondition for the validity of this kinds of an agreement have to be fulfilled also after the transfer.
1206 Case C-478/03 Celtec paragraphs 21 and 30.
1207 Case C-305/94 Rotsart paragraphs 8-11 and 13.
undertaking are automatically transferred from the transferor to the transferee by the mere fact of the transfer, despite the parties’ will, denoting to the date on which the employer responsibilities move from the transferor to the transferee. The consent of the parties is not needed, in order the transfer to take place. The rule is mandatory. It is not possible to derogate from this rule to the employees’ detriment. The implementation of the rights granted by the directive to the employees cannot be made subject to the consent of either the transferor or the transferee. This covers also the employee representatives as well as the employees themselves.

A transfer of an undertaking resulting from a merger or a legal transfer is not to affect the employees’ status in a negative way. The employment contracts’ and agreements’ conditions’ level with the transferee are settled with and by the previous employer, the transferor. The directive is to prevent that employees were placed in a less favourable position solely resulting from a transfer. The transfer of employment conditions takes place automatically, on the basis of the transfer itself. The scope of the transfer of rights and obligations is based on a strict interpretation. The transferee may not offer to the transferred entity’s employees less favourable terms compared with those offered by the transferor. The automatic transfer discharges the transferor from employer obligations towards employees, independently from their consent. Employment contracts and relationships with their rights and obligations form part of the transferred economic entity.

In the Case 19/83 Wendelboe Mrs Wendelboe had been employed by L.J Music Aps, a company making music cassette recordings. The company faced an impending insolvency. It ceased its activities and dismissed the majority of its staff, Mrs Wendelboe included. The staff was informed not to be required to work during the notice period. L.J. Music Aps was declared insolvent by a court order. At the same day another court authorised another company to use L.J. Music Aps’s premises and equipment from the next day. Although the final agreement on the continuation of business actions was made weeks later, the made agreement expressly stated that the company’s business had been carried out on behalf of the transferee from the date in which the transferor had

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1208 Case C-305/94 Rotsart paragraphs 21, 23 and 25-26; Case C-478/03 Celtec paragraph 36; Barnard page 655.
1209 Case C-362/89 D’ Urso and Others Summary 1; Case C-51/00 Temco paragraph 35; Case C-478/03 Celtec paragraph 37.
1210 Case 287/86 Ny Mølle Kro paragraph 25; Case C-478/03 Celtec paragraph 26.
1211 Case C-478/03 Celtec paragraph 38.
1212 Case 135/83 Abels paragraphs 37-38.
1213 Case C-4/01 Serene Martin paragraph 48.
1214 Joined Cases 144 and 145/87 Berg and Busschers Summary 1 and paragraphs 11 and 14; Barnard page 654.
1216 Case C-478/03 Celtec paragraph 27; Bylund – Elmér – Viklund – Öhman page 90.
been declared insolvent and the transferee had been authorised to use the insolvent undertaking’s premises and equipment. The other company had employed Mrs Wendelboe two days later from that date. Due to the dismissal by the transferor Mrs Wendelboe had not been employed by the other company on the date of the transfer.\footnote{Case 19/83 Wendelboe paragraphs 3-6.} The transferee is not liable to apply former conditions in relation to employees whose employment contract is not in force at the date of the transfer, being thus ceased to be employed by the transferor. This precludes the payment of holiday pay and compensation to employees who are not employed in the undertaking on the date of the transfer.\footnote{Case 19/83 Wendelboe Summary and paragraphs 13, 15 and 17; Nyström page 272.}

The Case C-478/03 Celtec concerned a determination of the length of the period of continuous employment by former civil servants, affected by vocational training programmes’ privatisation in the United Kingdom.\footnote{Case C-478/03 Celtec paragraphs 2, 6-8 and 17-19.} The transferred rights and obligations cover also rights contingent upon a dismissal or an early retirement based on an agreement with the employer.\footnote{Case C-4/01 Serene Martin paragraphs 30 and 35.} The transferee has to take into account the transferred employees’ entire service in the transferor’s and transferee’s business in calculating rights of financial nature. This denotes to a termination payment or salary increases, which are connected to employees’ length of service in the transferred business. The entire service has to be taken into account, if these obligations derive from an employment relationship between the transferor and these employees, and more precisely from terms agreed between these contracting parties.\footnote{Case C-343/98 Collino and Chiappero paragraphs 42 and 51; Barnard page 654; Hietala – Kahri – Kairinen – Kaivanto 2006 pp. 101-102.}

Also rights and obligations included in collective agreements are among the transferred rights.\footnote{Malmberg page 74.} The transferee is bound to continue to apply the employment terms and conditions based on a collective agreement binding the transferor, until the date of expiry of the collective agreement or the entry into force of another collective agreement. Member States may limit the period for observing such terms and conditions, provided that it shall not be less than one year. This obligation covers employees employed by the undertaking at the date of the transfer, but is not in force with regards to employees employed only after the transfer’s date.\footnote{Directive 2001/23/EC Chapter II Article 3 3; Case 287/86 Ny Mølle Kro paragraph 26; O’Leary page 283; Barnard pp. 658-659; Nyström page 273; Malmberg page 74; Hellsten 2007 pp. 18-20.}
The rule on the automatic transfer of rights and obligations included in a collective agreement does not cover the collective agreement itself. Only rights and obligations binding the transferor on the basis of a collective agreement are transferred. The collective agreement as such is not transferred. The rule is purported to the transfer of an employment contract with its different conditions as such.

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The Case 287/86 Ny Mølle Kro concerned a transfer of a lease on a restaurant. The restaurant operated regularly only during the summer. The transfer took place in winter, when the restaurant was closed. A waitress worked in the restaurant after the transferee had taken over the restaurant. The proceedings concerned the transferee’s obligations to pay her wages on the basis of a collective agreement binding the transferor. 1225 The automatic transfer of employment obligations and rights limits the transferee’s managerial autonomy. The transferee has this duty only with regards to workers and employees employed by the undertaking at the date of the transfer. The transferee is not bound to apply the former conditions in respect to workers and employees engaged after the date of the transfer. 1226

On the basis of the directive Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under the directive. This obligation is dependent on the knowledge of the transferor on these rights and obligations at the time of the transfer. A failure to notify is not to affect adversely the transfer of rights and obligations or the rights of the employees against the transferee and/or transferor in respect of these rights and obligations. A failure to notify is thus not to affect the rights and obligations or the employees negatively. 1227

The directive is purported to safeguard in a transfer of an undertaking employees’ rights resulting from an employment contract, being a matter of public policy. 1228 An employee cannot waive the rights having been conferred to him/her by the directive’s mandatory rules. The waiving of the rights cannot take place, although the derogations had been offset to him/her by such benefits that as a whole his/her position would not have worsened. 1229 Due to a proposal on changes on a payday

1224 Nyström page 273.
1225 Case 287/86 Ny Mølle Kro paragraphs 3-5.
1228 Case 324/86 Daddy’s Dance Hall paragraph 14.
1229 Case 324/86 Daddy’s Dance Hall paragraph 18; Barnard page 656.
and composition of wages the total amount of the wages would have remained the same. The payday and the composition of wages could not be altered exclusively because of a transfer. Member States may provide that after the transfer’s date the transferor and transferee are jointly and severally liable with regards to the obligations having arisen before the date of a transfer, based on an employment contract or relationship in force on a date the transfer actually takes place. The possibility to enact on joint-liability means in practise that the Member States are granted an option to choose between two different systems in organising economic responsibility with regards to employment relationships in transfers of undertakings. In one of the models alone the transferee is responsible of the employer obligations. In another model the responsibility is divided between the transferor and the transferee. This option can be interpreted as a cost-factor affecting employer decisions on establishment within the EU. From the employee perspective, the issue is a matter of employee economic protection.

The co-liability has been enacted in many Member States. The period of the transferor’s co-liability with the transferee in respect of pre-transfer debts varies from six months to years. In some Member States only the transferee is held liable. The co-liability is enacted in Finland and Sweden but not in the United Kingdom.

3.3.6. EXCEPTIONS TO RULE ON AUTOMATIC TRANSFER OF RIGHTS AND OBLIGATIONS

The rule on the rights and obligations automatic transfer to the transferee is not without exceptions. Instead, exceptions to the rule are allowed.

Employee rights to old age, invalidity or survivors’ benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States are under an exception. If the Member States do not provide the transfer of these rights, Member States have an obligation to adopt measures necessary to protect the interests of employees and of persons no longer employed in the transferor’s business at the time of the transfer in respect of rights.

1230 Case C-209/91 Rask and Christensen paragraph 31.
1231 Barnard page 654.
1233 Nyström page 272.
1234 Barnard page 655.
conferring on them immediate or prospective entitlements to old age benefits, including survivor’s benefits, under supplementary schemes. If the directive is not applicable to these kinds of benefits, it is the task of the Member States to guarantee these rights, not the transferee’s. Protected are the employees at the transferor’s business or those formerly employed.\(^{1236}\)

In the Case E-2/95 Eidesund, Eilert Eidesund had been formerly employed by Scandinavian Service Partner. It had paid certain pension insurance premiums into an insurance scheme, based on a local collective agreement. Scandinavian Service Partner provided catering and cleaning services, among the others to an operator of an oil drilling platform in the North Sea. Due to a tender procedure this service contract was transferred to Stavanger Catering. Stavanger Catering employed a majority of Scandinavian Service Partner’s employees, among them Eilert Eidesund. Stavanger Catering refused to pay pension insurance premiums. A central issue in the proceedings concerned in addition if there had been a transfer within the directive on Transfers of Undertaking’s meaning, whether the transferee had an obligation to pay the pension insurance premiums for a supplementary pension scheme provided by the previous employer outside the mandatory State social security system.\(^{1237}\) Transferee’s obligation to pay premiums for old-age, invalidity and survivor’s benefits are excluded from the general transfer of rights and obligations. The transferee has thus no obligation to continue to pay premiums relating to old-age, invalidity and survivor’s benefits. An employer’s obligation to pay premiums to supplementary pension schemes is consequently not transferred.\(^{1238}\) Exemptions are allowed only in the enacted cases, the exemption clauses reducing employee rights requiring narrow interpretation.\(^{1239}\)

The Case C-4/01 Serene Martin concerned in a transfer of an undertaking terms on early retirement and a transfer of the terms provided by the previous employer.\(^{1240}\) Rights contingent upon dismissal or a right to an early retirement based on an agreement with the employer are rights covered by the directive on Transfers of Undertakings.\(^{1241}\) Early retirement benefits and benefits intended to enhance such retirement’s conditions and paid in the context of an early retirement to an employee having reached a certain age due to an agreement between an employer and an employee, are not old-age, invalidity or survivors’ benefits under supplementary or inter-company pension schemes.


\(^{1237}\) Case E-2/95 Eidesund paragraphs 5-7.

\(^{1238}\) Case E-2/95 Eidesund paragraphs 60-62, 64-65 and 67-68.

\(^{1239}\) Case C-164/00 Beckmann paragraphs 29-30; Case E-2/95 Eidesund paragraph 63.

\(^{1240}\) Case C-4/01 Serene Martin paragraphs 2 and 9-12.

\(^{1241}\) Case C-4/01 Serene Martin paragraph 30.
although those obligations may derive from statutory instruments and irrespective of the practical arrangements concerning their implementation. Consequently, these kinds of obligations are transferred to the transferee.\textsuperscript{1242}

3.3.7. REFUSAL TO CONTINUE AT THE TRANSFEREE’S EMPLOY, DISMISSAL PROTECTION AND EMPLOYMENT CONTRACT ALTERATIONS

The directive’s purpose is not to ensure that employment contracts or relationships with the transferor are continued if the employees themselves do not want to continue in the transferee’s employ.\textsuperscript{1243} It is the task of Member States to determine the fate of employment contracts and relationships in a case employees resist the transfer to the transferee’s employ. The Member States may legislate that employment contracts have to be terminated by either of the parties. They may also legislate that an employment contract should be kept in force with the transferor.\textsuperscript{1244} In Finland, an employee does not have a right to stay at the transferor’s employ. The employee may terminate an employment contract by using a special notice period.\textsuperscript{1245} In Sweden, an employment contract is not transferred, if an employee objects the transfer.\textsuperscript{1246} In the United Kingdom, the legal state has been interpreted unclear in the case an employee refusing the transfer to the transferee’s employ.\textsuperscript{1247} An employment contract is interpreted to be terminated, with no protection under dismissal law.\textsuperscript{1248}

The directive is to prevent dismissals based solely on the transfer itself.\textsuperscript{1249} The directive grants however wide managerial powers to carry out dismissals.\textsuperscript{1250} The directive’s provision to forbid dismissals based on a transfer itself does not cover and hinder dismissals taking place for economic, technical or organisational reasons entailing changes in the workforce.\textsuperscript{1251}

\textsuperscript{1242} Case C-4/01 Serene Martin paragraph 35; See also Case C-164/00 Beckmann Summary 1 and paragraph 32; Barnard page 661.
\textsuperscript{1243} Case 105/84 Danmols Inventar paragraph 17; Joined Cases 144 and 145/87 Berg and Busschers paragraph 12; Joined Cases C-132/91, C-138/91 and C-139/91 Katsikas and Others paragraph 30; Case C-399/96 Europièces paragraph 38.
\textsuperscript{1244} Joined Cases C-132/91, C-138/91 and C-139/91 Katsikas and Others paragraphs 35-37; Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 35; Case C-399/96 Europièces paragraphs 39 and 44; Case C-51/00 Temco Summary 2 and paragraphs 36-37; Nyström page 272; Hietala – Kahri – Kairinen – Kaivanto 2006 page 101.
\textsuperscript{1245} See ECA 2001 §§ 1:10.2 and 7:5.2; Proposal for ECA 2001 page 61.
\textsuperscript{1246} AEP § 6b.4; SOU 1994:83 page 45; Bylund – Elmér – Viklund – Öhman page 90.
\textsuperscript{1247} Collins – Ewing – McColgan page 1049.
\textsuperscript{1248} Barnard page 622.
\textsuperscript{1249} Case 19/83 Wendelboe paragraph 15; Barnard pp. 653 and 663.
\textsuperscript{1250} Directive 2001/23/EC Chapter II Article 4.1.
\textsuperscript{1251} Directive 2001/23/EC Chapter II Article 4 1.; Case C-319/94 Dethier Summary 4 and paragraphs 36-37; Nyström page 274; Malmberg page 74.
employee protection against dismissals due to the transfer itself are mandatory, a matter of public policy. It is not possible to derogate from these rules in a manner unfavourable to the employees.1252

In the Case 101/87 P. Bork and Others P. Bork International had leased a factory from another company, taking over the staff. After P. Bork International had terminated the lease, the factory ceased its operation, resulting in employees being dismissed. Another company purchased the factory, beginning to operate it and taking over a majority of the staff. 1253 The main issue was, whether P. Bork International’s obligations as an employer were transferred to the new factory owner, especially with regards to employees whose employment contracts or relationships had come to an end with effect from prior a transfer’s date. These employees must still be regarded in the undertaking’s employ on the transfer’s date. The determination of the dismissal ground, whether it is solely due to a transfer, takes place by taking into consideration objective circumstances surrounding the dismissal, especially a fact that dismissals took effect close to the transfer’s date and the employees – a majority of them – were taken on by the transferee.1254 Employees dismissed unlawfully shortly before an undertaking’s transfer must still be regarded to be employed by the undertaking on the transfer’s date.1255

Principally the directive on Transfers of Undertakings can be relied upon solely by employees, whose employment contract is in existence at the transfer’s date.1256 The protection does not consequently in principle extend to those, whose employment relationships have ceased at the date of the transfer.1257 Irrespective of this rule it is necessary to comply with the directive’s mandatory provisions on employee protection with regards to dismissals resulting from the transfer.1258

In order to assess if dismissals are solely based on the transfer, being contrary to the directive, the national court has to take into account in an objective manner all the circumstances of the dismissal. Especially into consideration has to be taken if the dismissals take effect on a date close to the date of the transfer and that the employees were taken on by the transferee. 1259 The conclusion was affirmed also in a case in which the dismissals took place only shortly before the transfer, the

1252 Case 324/86 Daddy’s Dance Hall paragraph 14; Case C-319/94 Dethier paragraph 40.  
1253 Case 101/87 P. Bork and Others paragraphs 3-4.  
1254 Case 101/87 P. Bork and Others paragraphs 18 and 20.  
1255 Case C-319/94 Dethier paragraphs 39 and 41-42.  
1256 Directive 2001/23/EC Chapter II Article 3 1..  
1257 Case 19/83 Wendelboe paragraph 15.  
1258 Case 101/87 P. Bork and Others Summary I and paragraph 17.  
1259 Case 101/87 P. Bork and Others paragraph 18; Case C-51/00 Temco paragraph 28.
employees not being taken on by the transferee.\textsuperscript{1260} The employer’s conduct indicated that the reason for the dismissals was the transfer of a business itself.\textsuperscript{1261} If the dismissals have been carried out against the rule of the directive, the employees should still be considered to be employed by the undertaking on the date of the transfer, resulting in the transferors’ obligations being automatically transferred to the transferee.\textsuperscript{1262} 1263 The main ratio behind the rule is to hinder lowering of personnel costs by the use of dismissals, by employing the employees later with less advantageous employment conditions.\textsuperscript{1264}

The directive’s provision to forbid dismissals based on a transfer does not cover and hinder dismissals taking place for economic, technical or organisational reasons entailing changes in the workforce.\textsuperscript{1265} There has to be a genuine economic, technical or organisational reason resulting in dismissals, indicating the need to dismiss irrespective of the transfer.\textsuperscript{1266} The directive itself does not define an economic, technical or organisational reason entailing changes in the workforce.\textsuperscript{1267} Of the rule forbidding dismissals due to a transfer but allowing dismissals based on economic, technical or organisational reasons entailing changes in the workforce the latter part of the rule in italics has not been under evaluation by the ECJ. Due to the directive’s wide dismissal powers the level of dismissal protection is ultimately set at the Member State level.\textsuperscript{1268}

The Member States may provide that the rule forbidding dismissals based on a transfer but allowing dismissals based on economic, technical or organisational reasons shall not apply to certain specific categories of employees not covered by Member State laws or practice in respect of protection against dismissals.\textsuperscript{1269} This derogation is to be interpreted strictly. It covers only employees having no protection under the national law against dismissals.\textsuperscript{1270} The provision is applicable in all situations the employees have some kind of protection, although a limited one, against dismissals.

\textsuperscript{1260} Case C-319/94 Dethier paragraph 41.
\textsuperscript{1261} Case C-51/00 Temco paragraph 28.
\textsuperscript{1262} See Cases 101/87 Bork and Others paragraph 18, C-51/00 Temco paragraph 28 and C-319/94 Dethier Summary 4 and paragraphs 35 and 41-42.
\textsuperscript{1263} Nyström page 274.
\textsuperscript{1264} Barnard page 663.
\textsuperscript{1265} Directive 2001/23/EC Chapter II Article 4 1.; Case C-319/94 Dethier Summary 4 and paragraphs 36-37; Nyström page 274; Malmberg page 74.
\textsuperscript{1266} Barnard page 665. See on comparable argumentation on the basis of the EC Merger Regulation T-12/93 Vittel paragraphs 51-52 and 54-55.
\textsuperscript{1267} TUPE 2006 guide page 20.
\textsuperscript{1268} Kenner page 34.
\textsuperscript{1269} Directive 2001/23/EC Chapter II Article 4 1.
\textsuperscript{1270} Case 237/84 Commission v Belgium paragraph 10.
under national law. Under the directive this protection cannot be taken away from them or reduced only because of a transfer.\textsuperscript{1271}

In the case of a lawful dismissal there is not a right to a continued employment. Only compensation is possible, forming a secondary contractual obligation.\textsuperscript{1272}

The ban on dismissals solely due to a transfer is connected with employment contract’s alterations. On the basis of the directive an employee is protected in his relations with the transferee to the same extent as he is protected in his relations with the transferor under the legal rules of the Member State in question.\textsuperscript{1273} Changes connected with the transfer are permitted, but only, if they are not substantial in character.\textsuperscript{1274} If national law allows employment relationship to be altered from the employees’ point of view in an unfavourable manner outside a transfer of an undertaking, for example, with regards to remuneration conditions, these kinds of alterations are not precluded merely due to a transfer of an undertaking and consequently a transfer of an employment contract.\textsuperscript{1275} The rule is applicable with regards to both the transferee and the transferor. The transfer itself may never be the reason for an amendment.\textsuperscript{1276}

There is not a common EU-level interpretation of allowed alterations. As a general EU-level interpretation rule changes connected with the transfer are permitted, but only, if they are not substantial in character. The room and scope of alterations is to be settled ultimately in each of the Member States individually.

In the Case C-425/02 Delahaye Johanna Maria Boor was employed by Foprogest. The company’s activities were transferred to the Luxembourg State, to be carried out as administrative public service. Mrs Boor was transferred, resulting in a conclusion of a new employment agreement. Mrs Boor was allocated 37 per cent lower salary compared to the one previously paid by Foprogest. This was due to State classification, with no allowance for the length of service, resulting in the first

\textsuperscript{1271} Case 105/84 Danmols Inventar paragraph 27; Case 237/84 Commission v Belgium paragraph 13.
\textsuperscript{1272} Barnard page 664.
\textsuperscript{1273} Case 324/86 Daddy’s Dance Hall paragraph 16.
\textsuperscript{1274} See directive 2001/23/EC Chapter II Article 4 2. and Case C-425/02 Delahaye paragraph 35.
\textsuperscript{1275} Case 324/86 Daddy’s Dance Hall paragraphs 17-18, C-209/91 Rask and Christensen paragraph 31 and C-343/98 Collino and Chiappero paragraph 53.
\textsuperscript{1276} C-4/01 Serene Martin paragraph 44; Barnard pp. 656-658; See also Hietala – Kahri - Kairinen – Kaivanto 2006 page 103 on the Finnish law and practise, where changes in the scope of employer’s direction right are permitted as well as changes based on employer’s dismissal right, see KKO 1991:105 and 1991:187.
grade of the salary scale.\textsuperscript{1277} If the transfer involves a substantial change in working conditions to
the detriment of the employee, resulting in employment contract’s or relationship’s termination due
to this change, the employer shall be regarded as having been responsible for the termination of the
contract or relationship.\textsuperscript{1278, 1279} It is the task of a national court to determine whether there is
inherent in the proposal made by the transfeerate on the employment conditions a substantial change
to the detriment of the employee. If this kind of a change is assessed, it is the task of the Member
States to legislate the responsibility of the transfeerate for the termination of the employment
contract.\textsuperscript{1280, 1281}

Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys concerned a transfer of a motor vehicle
dealership as a Ford dealer for a particular territory. The new dealer Novarobel took over 14 of the
former dealer’s Anfo Motors’ 64 employees. The employees taken over by Novarobel retained their
duties, seniority and all other contractual rights.\textsuperscript{1282} A change in the level of remuneration awarded
to the employee is a substantial change in working conditions within the meaning of the directive,
although the remuneration depends particularly on the actual turnover. When the employment
contract is terminated due to this kind of a change, the employer is held responsible for the
employment contract’s termination.\textsuperscript{1283}

The transferred rights cover also rights and obligations included in collective agreements.\textsuperscript{1284} The
rule on the automatic transfer of rights and obligations included in a collective agreement does not
cover the collective agreement itself. The collective agreement itself is not transferred, but only
rights and obligations binding the transferor due to a collective agreement. The rule is targeted to
the transfer of an employment contract with its different conditions as such.\textsuperscript{1285}

The transfeerate is bound to continue to apply employment terms and conditions in a collective
agreement binding the transferor, until the date of expiry of the collective agreement or the entry
into force of another collective agreement. Member States may limit the period for observing such
terms and conditions, not being less than a year. This rule concerns employees employed by the

\textsuperscript{1277} C-425/02 Delahaye paragraph 12 and 14-17.
\textsuperscript{1278} Directive 2001/23/EC Chapter II article 4 2.; See C-425/02 Delahaye paragraph 35.
\textsuperscript{1279} Barnard page 663.
\textsuperscript{1280} See Kairinen pp. 270-271. Compare C-396/07 Juuri paragraph 30 and the Ruling.
\textsuperscript{1281} Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys paragraph 39, Case C-399/96 Europièces paragraph 44.
\textsuperscript{1282} Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys Summary and paragraphs 6-7.
\textsuperscript{1283} Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys Summary 2 and paragraphs 37-39; Barnard page 663.
\textsuperscript{1284} Malmberg page 74.
\textsuperscript{1285} Nyström page 273.
undertaking already at the date of the transfer, but not employees employed after the transfer date.\textsuperscript{1286}

In Finland the assignee has to apply the assigned employee’s collective agreement binding the assignor until to expiring of this collective agreement’s term.\textsuperscript{1287} When the term has expired, the assignee is entitled to apply a collective agreement normally applicable in the undertaking. An assignee may however agree with the employees on the application of better conditions provided by the former collective agreement.\textsuperscript{1288, 1289} In Sweden the transferee has to apply a collective agreement binding the transferor to a relevant extent, if s/he is not bound by any collective agreement regarding transferred employees. The transferred collective agreement is applicable at the maximum for a year.\textsuperscript{1290} In the United Kingdom, the transferee has to apply to the transferred employee the collective agreement binding the transferor and made with a trade union recognised by the transferor, until to expiring of this collective agreement’s term.\textsuperscript{1291}

The transfer has been held binding with regards to the continuation of the employment conditions that earlier the employee representatives were not allowed to agree even collectively alterations to the agreed employment terms and conditions. This rule was applicable in the relationships both with the transferor and the transferee.\textsuperscript{1292}

Social partners are now granted an opportunity to agree alterations to employment terms and conditions by a conclusion of an agreement, despite the former rulings of the ECJ in cases Daddy’s Dance Hall, Rask and d’Urso. In the cases Daddy’s Dance Hall and Rask the ECJ had held that the employment relationships could be altered with regard to the transferee only to the same extent they could have been altered in relation to the transferor, the alterations being permitted by the national law in other situations outside the transfer. The transfer itself could never be a ground for an


\textsuperscript{1287} CAA § 5; TT 1987 – 66; Case C-396/07 Juuri the Ruling and paragraphs 10-11, 33-34 and 36; Saarinen pp. 83-84 and 511-512.

\textsuperscript{1288} See KKO 2007:65.

\textsuperscript{1289} Rautiainen – Äimälä page 153; Valkonen 2006 pp. 630-631.


\textsuperscript{1291} TUPE Regulations 2006 (5); Explanatory memorandum 2006 No. 246.

\textsuperscript{1292} Case C-362/89 D’Urso Summary 1 compared with Directive 2001/23/EC Chapter II article 5.2. (b) on undertakings in serious difficulties.
alteration.\textsuperscript{1293} In the case d’Urso the ECJ had not allowed collectively agreed alterations to the employment terms and conditions by the employee representatives.\textsuperscript{1294}

Directive on Transfers of Undertakings in its present enacted form grants to the transferor, transferee and employee representatives an option to agree alterations to employment terms and conditions in order to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or the business.\textsuperscript{1295} Member States are granted an option to apply this rule to any transfers where the transferor is in a serious economic crisis, defined on the basis of the national law. The undertaking’s serious economic crisis is to be declared by a competent national authority and it is to be open to judicial supervision.\textsuperscript{1296}

\textbf{3.3.8. CONCLUSIONS ON REFUSAL TO CONTINUE AT THE TRANSFEREE’S EMPLOY, DISMISSAL PROTECTION AND ALTERATIONS}

Consequences of a refusal to continue at the transferee’s employ are settled at the Member State level. The employment relationship may be regarded terminated, or it may be allowed to continue. It is not possible to make conclusions at the EU-level on the refusal’s consequences, because the matter is decided individually at the Member State level. The solutions adopted in Finland, Sweden and the United Kingdom denote to opposite end-results with regards to employee status due to a refusal. Evaluated on the basis of the solutions adopted in Finland and the United Kingdom, a refusal to be transferred may well be equated with an actual dismissal and employment contract’s termination by an employer. Due to varying legislative solutions also the level of protection varies, being evaluated even as a lack of employee protection, consequences equating themselves with those in a company’s dissolution.\textsuperscript{1297}

According to the 3\textsuperscript{rd} directive on mergers the merging companies’ administrative or management bodies have an obligation to draw up a merger’s draft terms. The merging companies’ administrative or management bodies are to draft a report explaining the grounds for the merger.\textsuperscript{1298} Restructuring transactions, and especially mergers, are in many cases grounded with efficiency goals, being practical outcomes of economies of scale and scope. The used terminology in the draft terms and report may refer to goals of getting a more practical organisation due to a merger, leading

\textsuperscript{1293} Case 324/86 Daddy’s Dance Hall paragraphs 17-18; Case C-209/91 Rask and Christensen paragraphs 28 and 31.
\textsuperscript{1294} Case C-362/89 d’Urso Summary 1; O’Leary pp. 284-285.
\textsuperscript{1295} Directive 2001/23/EC Chapter II Article 5 2. (b).
\textsuperscript{1296} Directive 2001/23/EC Chapter II Article 5 3.; O’Leary page 284.
\textsuperscript{1297} CA Committee 1992:32 page 316.
\textsuperscript{1298} The 3\textsuperscript{rd} directive Chapter II articles 5 and 9.
to significant savings in costs.\textsuperscript{1299} In statements of this kind there is often inherent a need to dismiss.\textsuperscript{1300} If dismissals take place, in legal practise and literature they are not however traditionally interpreted “due to the transfer itself, but to economic, organisational or technical reasons entailing changes in the workforce”. This interpretation is valid, if the situation in an undertaking is evaluated \textit{solely before} a restructuring transaction. If under evaluation is taken the \textit{situation as a whole, the wholeness}, implying in a case of a merger to its end-result in the form of a formed company continuing participating companies’ business activities, keeping also in mind the grounds and targets, often implying efficiency, the labour law evaluation becomes more complicated. The need to dismiss would not necessarily have existed before the carrying out of a restructuring measure. There is a need to workforce dismissals after and \textit{due to the end-result}, because of efficiency reasons. Evaluated on the basis of the \textit{wholeness} of the situation and measures, especially taking into account the situation after the measures’ completion, the dismissal reason denotes inevitably to the transfer itself.

Dismissals even of the employees’ majority in a transfer’s context do not in themselves preclude the directive’s applicability. This is due to the directive’s rule expressly allowing dismissals based on economic, technical or organisational reasons.\textsuperscript{1301} The interpretation direction inherent in the judgment grants a very wide managerial scope of action, emphasising free enterprise. The protective goals of the directive are granted a secondary place, being narrow in character.

In the directive on Transfers of Undertakings the formulation of the rule on dismissal grounds does not form a barrier to dismissals in profit-making companies.\textsuperscript{1302} Under this rule dismissals in economically profitable undertakings are not forbidden, as far as the dismissals can be grounded with economic, technical or organisational reasons, entailing changes in the workforce. One can with good grounds argue the sense of dismissals in restructuring context in profit-making companies on the basis of employees’ importance in developing knowledge-based competitive advantage.\textsuperscript{1303}

\textsuperscript{1299} See Heinestam on a merger’s draft terms both in a subsidiary company and absorption and combination mergers pp. 111 and 122. The used terminology refers to goals to get a more practical organisation due to a merger, making the management of administration and the administration itself more practical, purported to significant costs savings.
\textsuperscript{1300} See Lehto pp. 9-10 and 31, company acquisitions generally decreasing the scale of business activities, especially when targeted to increase market power and economies of scale. An acquisition may lead to efficiency increases at the cost of personnel and the general scale of business activities as a whole.
\textsuperscript{1301} Joined Cases C-171/94 and C-172/94 Merckx and Neuhrs paragraphs 7, 26 and 31 on a transfer in which most of over 60 employees were dismissed, only 14 being further employed, their employment relationships continuing.
\textsuperscript{1302} See Toiviainen 2004 page 159.
\textsuperscript{1303} See Porter pp. 657 and 665 and Lehto page 48.
The directive’s grounds for dismissal and evaluation of their practical application creates from the employees’ perspective a need to improve the level of employee protection. This could take place by taking into use a method of assessment. In this assessment the restructuring situation would be evaluated as a wholeness. Into account are taken in an objective manner grounds and targets, the situation before the restructuring and after its completion, in order to assess if the dismissals are in practise due to a transfer, although they are grounded by economic, technical or organisational reasons denoting to changes in the workforce. In addition, redefining of dismissal grounds is needed, by narrowing their scope.

Employment contracts and relationships form a part of the transferred economic entity, implying to general succession. This forms also the starting point of the protection enacted in the directive on Transfers of Undertakings. The wide dismissal powers granted to the employers to organise the use of workforce leave employees, however, in many cases in practise without the protection stated and guaranteed to be the directive’s starting point. Employees are granted a right to be transferred to the transferee’s employ, only to be dismissed due to economic, organisational or technical reasons entailing changes in the workforce. This equals with the situation the transferee initially not at all employing the employees, denoting to legal effects equalling with those of a company dissolution. With regards to shareholders, a merger is targeted to guarantee a share ownership’s continuation in the acquiring company or a company being formed. The general succession model implied by the directive on Transfers of Undertakings can be said to be a modified one and different in character compared to the protection granted under the 3rd directive to the shareholders, labelled in the shareholders’ case with continuity and stability on the basis of an agreement and guaranteed with double reporting before the actual decision-making on a merger’s adoption.

The directive on Transfers of Undertakings’ enactment and implementation changed the legal state in some of the Member States by guaranteeing in principle “that as far as possible the employment
relationship should be maintained unchanged with the transferee,” referring to the employment relationships’ continuation with former rights and obligations at the transferee’s employ. The rule on the employment conditions’ former level’s continuation is not without exception. Alterations are allowed, as far as they are not based on the transfer itself. Alterations in situations and on preconditions outside a transfer of an undertaking are allowed according to national practises.

An alteration amounting to 37 per cent of a salary is regarded to be a substantial change and not acceptable. Less substantial changes are however acceptable. Changes connected with the transfer are permitted, but only if they are not substantial in character. If the employment contract or relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is regarded having been responsible for the termination of the contract or relationship. An employer is granted a wide scope of action to affect the employee protection with regards to the employment relationship’s continuation with its former conditions.

The borderline between forbidden and allowed alterations, in fact deteriorations, is unclear on the basis of the directive itself and the ECJ’s case-law. Due to a lack of more precise interpretation instructions, the ultimate scope of unlawful and accepted alterations is to be settled at the Member State level, taking place on the basis of national rules and legal practises, leading to varying end-results.

The level of alterations and also the way of carrying them out is connected with the employees’ right to continued employment. Thus, due to the unclear borderline between forbidden and allowed alterations at the EU-level, the borderline setting ultimately taking place at the Member State level according to national practises, also the employees’ right to continued employment is unclear. From the perspective of employee protection this cannot be considered a satisfactory legal state, when keeping in mind the directive’s starting point on the employment relationship’s continuation with its former rights and obligations. The interpretation instructions on alterations of employment conditions, also connected with employment relationship’ continuation, can hardly be said to be targeted to employment relationships’ continuance and stability. From the employee perspective

1313 Case 237/84 Commission v. Belgium paragraph 2.
1314 See C-425/02 Delahaye paragraphs 17 and 35.
1315 Compare C-172/99 Oy Liikenne Ab paragraph 9.
also in this field under evaluation the factual legal effects may denote to those of a company’s dissolution instead of a general succession.

The transferee is bound to continue to apply a collective agreement binding the transferor, referring to its rights and obligations. This obligation continues until the date of expiry of the agreement or of the entry into force of another agreement. Member States may limit the period for observing such terms and conditions, provided that the limitation is not less than one year. Grounds for restructuring in its different forms, mergers included, are often based on the idea of efficiency under the economies of scale, targeted towards creation of cost savings. Sources of these savings vary, depending on branches and companies in question. Savings may be formed by using more efficient production ways in the form of new technological innovations. Another source of cost savings are decreases in personnel costs. The directive on Transfers of Undertakings allows the latter, thus a long-term economic planning resulting in personnel costs savings. This takes place by limiting the former collective agreement’s application. Although the limitation is allowed on the basis of the directive itself, from the directive’s protective goals one may with good reasons argue the limitation, denoting to a contradiction between the directive’s goals and enacted measures. The directive does not allow changes in employment terms and conditions based on a transfer of an undertaking itself. In the collective agreements’ terms and conditions’ context the change in the applicable collective agreement may however be the very reason for the transfer of an undertaking. In female-dominated branches often with low-salary levels the change in the applicable collective agreement’s terms and conditions may further decrease employment terms’ and conditions’ former level, salary levels included, being in opposite to these employee groups’ general strives to change the established status quo in the labour markets with regards to salary levels.

The option granted to the social partners to try to save the undertaking by making alterations – in practise the option has to do with deteriorations – to the agreed employment conditions is a way of action with no guarantee of its success. By the use of this option an entrepreneur’s risk is at least to some extent transferred to the employees.

When evaluated from the directive’s employee protection goals, keeping in mind the starting point of the continuation of the former rights and obligations, the rules and interpretation instructions on

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1318 Compare Case C- 396/07 Juuri paragraphs 10-11 and 13.
1319 O’Leary page 285.
alterations in employment conditions can hardly be said to be targeted towards the continuance and stability of the employment relationship. Continuance, stability and well-being are, however, preconditions for creativity, which are the primary starting points in creating knowledge-based competitive advantage.

In the case of terminations a lack of a right to a continued employment can also be challenged. A right of a monetary compensation does not ever equal with an employment contract’s continuation. A monetary compensation lacks an element of continuation.

As regards the employment relationship’s continuance with its former rights and obligations the emphasis seems to be on facilitating restructuring and free enterprise, instead of employee protection. Compared with the shareholders’ rights under the 3rd directive, their rights being “suitably protected” and labelled with continuance and stability, and creditor protection, the merger not “adversely affecting their interests”, 1320 one is able to discern under the directive on Transfers of Undertakings the lack of these elements – suitably protected and not adversely affecting their interests – even to a considerable extent with regards to the continuance of employee employment relationships with the former rights and obligations. The 3rd directive on mergers and the directive on Transfers of Undertakings lack equivalent verbal safeguards – realising themselves in practical level company restructuring – with regards to employee rights, denoting to employee economic rights. Also these notions point out there is a need for common re-evaluation on the 3rd directive on mergers and the directive on Transfers of Undertakings, especially on the topic of claimed protective goals’ factual realisation in relation to the employees.

### 3.3.9. INFORMATION AND CONSULTATION

The directive on Transfers of Undertakings’ information and consultation procedures has two kinds of goals. The provisions are to protect employee rights on a comparable basis in the different Member States. The provisions are to harmonise costs which the directive’s rules entail for undertakings, including information and consultation procedures. 1321 The information and consultation procedures in the form enacted at the EU-level do not cover these procedures’ prevalent structure at the national level. 1322 The directive on Transfers of Undertakings does not

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1320 The 3rd directive Preamble.
1321 Compare in the context of the the directive on Collective Redundancies Case C-383/92 Commission v. United Kingdom paragraph 16; Barnard page 670.
1322 Liukkunen page 271.
cover national level concepts and structures on company management, which it has remained untouched.

The directive requires the transferor and the transferee to inform the representatives of the employees affected by the transfer of its date, reasons and legal, economic and social implications for the employees and any measures envisaged in relation to them. The transferor must give the information to the representatives of his/her employees in good time, before the transfer is carried out. There is not enacted any specific time limit. The transferee must give such information to the representatives of his/her employees also in good time. The information is to be given in any event before his/her employees are directly affected by the transfer with regards to their conditions of work and employment.

Where the transferor or transferee envisages measures in relation to his/her employees, he/she has an obligation to consult the representatives of the employees in good time on such measures with a view to reaching an agreement.

The employer obligations can be divided into two on the basis of their legal character. The information obligation is purely unilateral in character, the employee representatives being assignees of the employer information. In the consultation obligation there is inherent a reciprocal element, the employee representatives being granted an opportunity to make their opinions known, with a view to reach, in practise to seek, an agreement. The directive’s consultation obligation is characterised as “a limited scope for bargaining in an unequal relationship”, implying primarily to procedural obligations. In informing there is not involved from the employee representatives’ side an active part.

Legal literature has evaluated the decisions on measures affected by the negotiations be commercial in character. Employees are provided through their representatives an option to be consulted, thus an option to participate in the formation of commercial decisions. This participation right is, however, without a veto right. If the end-result is not an agreement, the consultation under the

1323 Barnard page 666; Malmberg pp. 74 and 85.
1326 Barnard page 666.
1327 Kenner pp. 40 and further 64.
1328 Compare Barnard page 704.
1329 Barnard page 666; See on the classification of different kinds of codetermination rights Toiviainen 2004 pp. 7-11.
directive on Transfers of Undertakings represents consultation in its weak form. An employer makes the final decision, the decision either reflecting, or not, the employee representatives´ views. In the case of an agreement the consultation represents consultation in a strong form, equalling itself with co-determination, the employer decision-making being covered and limited by the agreement.

The directive´s information and consultation procedures are applicable irrespective whether the decision resulting in the transfer is taken by the employer or by an undertaking controlling the employer. In a concern a subsidiary company cannot thus excuse its omission to inform and consult by referring to a parent having done the decision on a transfer. The directive´s obligations do not extend to the controlling undertaking itself.

Member States are granted an option to limit the information and consultation obligations to undertakings or businesses which, in terms of employee numbers, meet the conditions for the election or nomination of a collegiate body representing the employees. In Finland, there is enacted a threshold for the Act on Co-operation within Undertakings’ application, thus for the consultation obligations´ applicability, taking place in undertakings normally employing at least 20 persons. Some of the ACU 2007’s obligations are applicable only in undertakings employing normally at least 30 persons. In Sweden, there is not enacted a comparable numerical threshold.

Member States have an obligation to provide, where the employees concerned have no representative of their own in an undertaking or in a business through no fault of their own, the employees must anyway be informed in advance of the date or the proposed date of the transfer, its reasons and legal, economic and social implications for the employees and any measures envisaged in relation to them. The information has to be given in advance. The used formulation differs compared to the information obligations in relation to the employee representatives who have to be informed “in good time”. The used formulation makes possible in practise to water down

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1330 Barnard page 704.
1332 Barnard page 667.
1333 COM (94) 300 final page 14; Liukkunen page 257.
1336 See ACW § 1.
1338 Barnard page 667.
effectively the provision’s purpose on *advance* information. The information covers also envisaged measures, without an obligation to consult on them the employees themselves.

### 3.3.10. CONCLUSIONS ON INFORMATION AND CONSULTATION COMPARED TO THE 3rd DIRECTIVE’S PROCEDURES

The 3rd directive on mergers in the EU-company law and the directive on Transfers of Undertakings in the EU-labour law are built on similar protective starting points. This is natural, because both of the legal instruments regulate completely same phenomenon.

The 3rd directive’s main purpose is to guarantee the shareholders’ status as far as possible unchanged and, consequently, comparable with their status before the merger with regards to the economic values involved in the share ownership. The emphasis on stability is strengthened by the requirements on double reporting, a qualified majority voting in a general meeting adoption and other minority protection safeguards. Also the creditor protection is built on a similar protective principle, although it is enacted ultimately at the Member State level.

The 3rd directive’s protective goals’ achievement is secured in relation to the shareholders by using an agreement as a merger mechanism. Central in the 3rd directive on mergers is the character of the draft terms as a preliminary agreement between the participating companies, being later approved as a binding agreement by a general meeting or an administrative or management body. In the draft terms are set the share exchange ratio and the allotment of shares to the shareowners in a company being acquired. These form the central elements in the procedure, targeted to guarantee the status of shareholders and the continuation of their rights in an unaffected manner.

The directive on Transfers of Undertakings covers information and consultation procedures. Among the matters to be informed of are reasons and implications, referring to a merger’s or a legal transfer’s legal, economic and social consequences. Information consists of an employer’s unilateral action. Under the directive on Transfers of Undertakings delivered information is not a part of an agreement. This concerns both the reasons and implications, referring to consequences. The delivered information’s timely scope is unenacted. From the provision’s formulation it is not possible to draw conclusions on the time-period which the delivered information covers. Unenacted are also conditions resulting in changes to the delivered information. All these issues are of importance, when evaluated from the stability perspective.
The directive on Transfers of Undertakings’ consultation procedure covers measures on employees. From an individual employee’s perspective, the measures denote in most cases to deteriorations, either with regards to the continuation of the employment relationship or the continuation of the former terms and conditions.

When measures are envisaged, employee representatives are consulted with a view to reaching an agreement. If the employees do not have a representative, they are only informed of the measures. In both of these cases there is not inherent an obligation to reach an agreement. If an agreement is not reached in the consultations with the employee representatives, the employer is free to decide the matter on his/her own. The end-result equals with the case the employees having not at all being represented by a representative, being unilaterally informed by an employer. Consequently implemented measures are not based on an agreement.

As regards measures based on the delivered information, the employees have no right to object the envisaged measures. As regards measures under the consultation process there is not enacted a right to object the envisaged measures. The employees’ status is not in this respect comparable to that of the minority shareholders, who by voting in a general meeting may hinder the final acceptance of an agreement, thus the acceptance of a merger. In the acquiring company the minority shareholders have also a right to demand a merger’s acceptance in a general meeting, having thus available a two-tier procedure.

The 3rd directive on mergers can be described to be a guarantee of continuance and stability in relation to the shareholders, but to a large extent also to creditors, defined in a narrow meaning. This is guaranteed by the procedure based on an agreement, demanding the ultimate acceptance of the shareholders and complemented with minority protection devices. The element of stability is furthered by a double reporting preceding the decision-making. Creditors’ protection is based on safeguards the merger not adversely affecting their interests, these safeguards getting ultimately their form in different Member States’ laws. From the employee perspective, the directive on Transfers of Undertakings cannot be evaluated to be a guarantee of continuance and stability. This is due to used procedures and mechanism and their character. Information is in character unilateral, lacking a framework on its timely scope and conditions with regards to changes on the delivered information. The employees lack in the consultation procedure devices actively to direct the procedure and affect its end-results. The directive acknowledges an agreement as a device to
implement envisaged measures. Although an agreement is binding regarding its legal effects, its contents differ, however, often in character with the one made on the shareholders’ status. In a merger’s context, applying also generally in a transfer of an undertaking, an agreement on measures affecting employees most commonly denotes to and covers deteriorations to former employment contracts’ terms and conditions or has to do with these contracts’ terminations.

3.4. DIRECTIVE ON COLLECTIVE REDUNDANCIES

3.4.1. DIRECTIVE’S GOALS

The factors behind the adoption of the directive on Collective Redundancies are both social and economic. The directive was adopted on the basis of the Treaty Articles 100 (at the present 94) and 136, the latter provision stating the need of the Member States to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. The directive is intended to afford workers greater protection in collective redundancies. This is based on a consultation procedure with the workers’ representatives, to avoid the termination of employment contracts or the reduction of the number of terminations. The directive is to promote free movement of labour. In carrying out the goal of greater employee protection into account should be taken the need for a balanced economic and social development in the Community. The directive is targeted to facilitate the creation of the internal market. From employer perspective, the directive’s economic goals take place by costs levelling.

From the employee point of view, the directive has to do with managing of collective redundancies. It is applicable in collective redundancies due to restructuring, but also in any other forms of termination of employment contracts based on an employer’s initiative and due to reasons not related to an individual, covering at least five redundancies.

1339 Compare CA Committee 1992:32 page 316.
1340 See Lehto pp. 6, 31 and 46-47.
1342 Directive 98/59/EC Preamble points (2) and (6).
1343 Directive 98/59/EC Preamble page 504.
1344 Directive 98/59/EC Section II Article 2 1.; Case C-188/03 Junk paragraph 38.
1345 Kenner page 29.
1346 Directive 98/59/EC Preamble points (2)-(4); C-449/93 Rockfon paragraph 29; Case C-383/92 Commission v. United Kingdom paragraph 16; Barnard page 673; Hellsten 2007 pp. 11 and 13-14.
1347 Directive 98/59/EC Preamble (8) and Section I Article 1 1.
The directive is intended to promote “the approximation” of the Members State laws relating to collective redundancies. It is targeted to harmonise the Member State laws on collective redundancies. The differences in the Member State laws on provisions dealing with collective redundancies and practical arrangements, procedures and measures to alleviate their consequences were considered to have a direct effect on the functioning of the internal market.\textsuperscript{1348}

The directive is targeted to set minimum standards on collective redundancies procedure, based on a partial harmonisation.\textsuperscript{1349} The Member States have a right to apply or introduce laws, regulations or administrative provisions, which are more favourable to workers, or to promote or allow the application of collective agreements, which are more favourable to workers compared to the directive’s provisions.\textsuperscript{1350}

The directive is to ensure proper consultation with employee representatives in collective redundancies. Secondly, it is to ensure the notification of public authorities prior to collective redundancies.\textsuperscript{1351} Due to the directive’s temporary and limited protection it has been characterised only as “a sticking plaster”.\textsuperscript{1352} The directive is applicable, although the decision on collective redundancies was made in another Member State.\textsuperscript{1353}

The directive is not intended to affect undertakings’ freedom to organise their activities and arrange their personal departments in a way best suiting their needs.\textsuperscript{1354} Outside the directive’s scope is also the actual decision-making on collective redundancies in individual cases.\textsuperscript{1355} This is due to the Article defining the directive’s scope, not covering rules relating to undertakings’ internal organisation or to their personnel management.\textsuperscript{1356} If there are barriers to an employer decision-making in collective redundancies, the procedures are national in character.\textsuperscript{1357} The directive takes thus for granted the existing branches of law, legal concepts and company management structures.

\textsuperscript{1348} Directive 98/59/EC Title and Preamble (1) and (3)-(4); Case 215/83 Commission v. Belgium paragraph 2; Treu pp. 105-106; Hellsten 2007 pp. 12-14.
\textsuperscript{1349} C-449/93 Rockfon Summary 1 and paragraph 21; See C-383/92 Commission v. UK paragraph 25; Compare Case 215/83 Commission v Belgium Summary and paragraph 25.
\textsuperscript{1350} Directive 98/59/EC Section IV Article 5; Barnard page 684.
\textsuperscript{1351} Directive 98/59/EC Section II Article 2 1. and Section III Article 3 1.; Case 284/83 Nielsen paragraph 10; Barnard page 673; Malmberg pp. 70-71; Lauolm pp. 124-125.
\textsuperscript{1352} Kenner page 29.
\textsuperscript{1353} Case 284/83 Nielsen paragraph 10; Kenner page 339.
\textsuperscript{1354} C-449/93 Rockfon paragraph 21.
\textsuperscript{1355} C-Case 284/83 Nielsen paragraph 10; Nyström page 252.
\textsuperscript{1356} On the directive’s scope see Directive 98/59/EC Section I Article 1.
\textsuperscript{1357} Kenner page 29.
including corporate governance. The directive’s focus is on the collective redundancies’ consequences.\footnote{Barnard page 673.} The directive can be evaluated as a reactive measure to affect collective redundancies.

In the directive’s goals there is inherent an inner tension equivalent to the one mentioned in the context of the directive on Transfers of Undertakings. In addition to the protective goals in the form of avoiding or reducing collective redundancies, the directive does not affect the employer’s freedom to effect or refrain from effecting collective dismissals.\footnote{Case 284/83 Nielsen paragraph 10.}

Member States are to guarantee that judicial and/or administrative procedures are available for the directive’s obligations’ enforcement, both for the employees and their representatives.\footnote{Directive 98/59/EC Section IV Article 6; Nyström page 254.}

3.4.2. DIRECTIVE’S SCOPE

In the directive the concept of “collective redundancies” denotes to dismissals effected by an employer for reasons not related to individual workers.\footnote{Directive 98/59/EC Section I Article 1 1.(a); Nyström page 252; Malmberg page 71.} The concept of redundancy is a Community concept, having a Community meaning.\footnote{Opinion of Advocate General Tizzano in Case C-55/02 Commission v Portugal paragraph 49.} Redundancy in the directive’s meaning refers to any employment contract’s termination not related to an individual worker and therefore without his/her consent\footnote{Case C-55/02 Commission v. Portugal Summary 1, the term collective redundancies referring for example to structural, technological or cyclical reasons.}. The dismissal reasons in the directive’s context are as a whole interpreted to be in character economic, affecting a whole group of employees.\footnote{Barnard page 674.} The reasons for collective dismissals cover in addition to economic reasons also organisational or technical reasons, referred to in the directive on Transfers of Undertakings.\footnote{Directive 2001/23/EC Chapter II Article 4 1.} The scope of the two directives is in part overlapping. Consequently, the scope of the employee legal protection has to be cleared out from different sources. This can be criticised.

The Finnish definition on collective redundancies covers financial or production-related reasons and reasons arising from a reorganisation of the employer’s operations.\footnote{ECA 2001 § 7:3.1.} Finnish law does not hinder
dismissals in a transfer of an undertaking’s context due to economic, technical or organisational reasons entailing changes in the workforce.\footnote{1368 See Government Proposal 157/2000 pp. 101-102.}

The directive’s applicability requires in addition to the above-mentioned dismissals’ character, fulfilment of certain numerical thresholds on the number of redundancies. This takes place according to the Member States’ choice.

According to the first option granted to the Member States, the number of dismissals over a period of 30 days is:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,
- at least 10 per cent of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more.\footnote{1369 Directive 98/59/EC Section I article 1 1. (i).}

According to the second option granted to the Member States, the number of dismissals over a period of 90 days is at least 20, irrespective of the number of workers normally employed in the establishments in question\footnote{1370 Directive 98/59/EC Section I article 1 1. (ii); Nyström page 252.}.\footnote{1371 Barnard page 674; Malmbarg page 71.}

When calculating the number of redundancies, employment contracts’ terminations taking place due to an employer’s initiative for one or more reasons not related to an individual worker are assimilated to collective redundancies, provided that there are at least five redundancies.\footnote{1372 Directive 98/59/EC Preamble point (8) and Section I article 1 1.; Nyström page 252.} Other kinds of termination of employment contracts and relationships are thus equalled with collective redundancies on a precondition, that they take place on an employer’s initiative. They may be carried out in the form of voluntary early retirements. They may be based on a contract between the employer and the employees in question. An employee may have been encouraged to an agreement in exchange for financial advantages\footnote{1373 Opinion of Advocate General Tizzano in Case C-55/02 Commission v. Portugal paragraph 46.}.\footnote{1374 Barnard page 674; Kenner page 339.} Otherwise, the termination of employment contracts and relationships by the employees themselves are outside the scope of the directive. The dismissals under the directive have thus to be effected by the employer.\footnote{1375 Advocate General Tizzano in Case C-188/03 Junk paragraph 49; Case C-383/92 Commission v. UK paragraph 31; Barnard page 677.} Outside the directive’s scope are
dismissals taking place by the employees themselves, following an employer’s announcement on debt suspension. These are not collective dismissals in the directive’s meaning. Irrespective of economic grounds inherent in debt suspension, the dismissals are not effected by an employer. They are not based on an employer’s initiative but an assessment made by the employees themselves, consequently being excluded.

The criteria for the directive’s applicability contain two elements, an objective and a subjective one. The objective element relates to the redundancies’ scale, denoting to a number or percentage of employees. The subjective element has to do with the dismissals’ reasons, not being related to the individual employees themselves. The subjective element requires also that the dismissals in question have to be initiated by the employer.

Outside the scope of the directive is, among others things, collective redundancies due to terminations of employment contracts agreed upon for limited time periods or for specific tasks except in cases where such redundancies take place prior to the expiry date or the completion of such contracts. Exceptions are defined narrowly. Fixed-terms employment contracts are as a rule outside the directive’s scope. This rule is not without exception. When fixed-terms employment contracts are terminated prior to their date of expiry or completion, they are interpreted to be under the directive’s scope. In order to be covered by the directive, these kinds of contracts have to be terminated by the employer before their initially agreed date of termination.

The directive lacks substantive rules common in the Member State laws and collective agreements on notice periods, priority orders and severity pays. The directive does not either cover any measures targeted to solve the problems caused by the projected collective redundancies comparable, for example, to the Finnish and Swedish models on action plans in collective redundancies.

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1376 Case 284/83 Nielsen Summary 1 and paragraph 11; Nyström page 252.
1377 On the definition of the objective element see Case C-449/93 Rockfon paragraphs 12-13 and 32; See also Nyström pp. 252-253.
1378 Case C-55/02 Commission v Portugal Summary 1.
1379 Directive 98/59/EC Section I Article 1 1.(a).
1380 Barnard pp. 674-677.
1381 Directive 98/59/EC Section I Article 1 2. (a); Nyström page 252.
1382 Barnard page 677.
1383 Malmberg page 70; Hellsten 2007 page 12.
3.4.3. INFORMATION AND CONSULTATION

An employer contemplating collective redundancies has to begin consultations with the workers’ representatives\textsuperscript{1384} in good time with a view to reaching an agreement.\textsuperscript{1385} An employer has also a duty to notify the relevant public authority\textsuperscript{1386}.\textsuperscript{1387}

The consultation procedure is to be initiated only, when the employer contemplates collective redundancies, having drawn up a “project” to that end. No decisions on collective redundancies have not yet been taken.\textsuperscript{1388} An employer has no duty to foresee collective redundancies.\textsuperscript{1389} The obligations to consult workers’ representatives and notify the public authority arise prior to any employer’s decision to terminate employment contracts. At this stage actual decisions on dismissals have not yet been taken, dismissals being only at the projection stage.\textsuperscript{1390}

From a proactive perspective the framework for the consultation’s timing is problematic. An employer has no duty to foresee collective redundancies. The duty to consultations arises only after an employer has drawn up a project to that end. This interpretation instruction is not apt to act as a stimulating factor in lengthening in business planning time spans and proactivity. The timely framework essentially affects the consultations’ initiation, consequently affecting the interpretation of a concept “in good time” and also employees’ options to prepare themselves at the individual level for possible changes.\textsuperscript{1391}

Redundancy consists of an employer’s declaration of his intention to terminate the employment contract.\textsuperscript{1392} The consultation, and also the notification of the public authority, has to take place before the actual notices on dismissals are delivered to the employees.\textsuperscript{1393}

In the directive on Collective Redundancies the focus is on the obligation to consult. The directive’s requirements are not met solely by delivering information.\textsuperscript{1394} An employment contract can be

\textsuperscript{1384} Directive 98/59/EC Section I Article 11. (ii) referring to the national law or practises in defining workers’ representatives; See Nyström page 254.
\textsuperscript{1385} Directive 98/59/EC Section II Article 2 1.; Kenner page 339; Nielsen 2002 page 55; Malmberg page 71; van Peijpe page 85.
\textsuperscript{1386} Directive 98/59/EC Section III Article 3 1.; See Blanpain page 507.
\textsuperscript{1387} Barnard page 678; Malmberg pp. 70-71 and 124-125; Nyström pp. 251-252.
\textsuperscript{1388} Case C-188/03 Junk paragraphs 36-37.
\textsuperscript{1389} Case C-188/03 Junk paragraphs 36-37; Barnard page 679.
\textsuperscript{1390} Compare Poijula pp. 11 and 40.
\textsuperscript{1391} Case C-188/03 Junk paragraph 39.
\textsuperscript{1392} Case C-188/03 Junk paragraph 41; Nyström page 253.
terminated only after the consultation procedure has been concluded, an employer having an obligation to comply with the provision on consultation.\textsuperscript{1395}

The directive does not affect undertakings’ freedom to organise their activities in a way best suiting their needs.\textsuperscript{1396} Outside the consultation procedure’s scope are the reasons having led to the consultation. The basis of the measures under consultation cannot be questioned.\textsuperscript{1397} Consequently, the consultations do not cover an employer’s managerial decision-making and its grounds, but only this decision-making’s consequences. But the consultations are to cover ways and means of avoiding collective redundancies or reducing the number of workers affected. The exclusion of the grounds from the consultations’ scope essentially affects in a narrowing way the employee representatives’ options to negotiate on avoiding the collective redundancies or reducing the number of employees affected.

Consultations with the workers’ representatives have to cover at least ways and means of avoiding collective redundancies or reducing the number of workers affected.\textsuperscript{1398} The consultations have also to cover measures to mitigate consequences by recourse to accompanying social measures, aimed at aid for redeploying or retraining workers made redundant. The main purpose of the consultation stage is to avoid or reduce redundancies\textsuperscript{1399}.\textsuperscript{1400} Also this obligation is problematic when evaluated from the directive’s scope, not covering any concrete means to mitigate the consequences. The means are based either on national law or practises or an employer’s own decision-making.

In Finland, unemployment and other kinds of pensions are used as means to mitigate the consequences. Pensions are not however held real alternatives to dismissals.\textsuperscript{1401} Pensions may be a

\begin{flushleft}
\textsuperscript{1394} Advocate General Tizzano in Case C-188/03 Junk paragraph 59; Case C-188/03 Junk paragraph 44; Barnard page 682.
\textsuperscript{1395} Case C-188/03 Junk paragraph 45.
\textsuperscript{1396} C-449/93 Rockfon paragraph 21.
\textsuperscript{1397} Morin – Vicens page 51; Hellsten 2007 page 13. See Tiitinen page 85, Valkonen 2006 page 804 and Rautiainen – Äimälä page 260 on employers’ managerial rights in Finland. Compare with the character of consultation in Sweden, including two rounds of negotiations. In the first round the central issue has to do with the need of carrying out the contemplated redundancies, based on an employer’s decison-making proposal. In the second round the procedure covers among the others a dismissal order and contemplated dismissals’ timing, see Iseskog pp. 348-351, Bylund – Elmér – Viklund – Öhman page 225.
\textsuperscript{1398} Nyström page 253; Malmberg page 71.
\textsuperscript{1399} Advocate General Tizzano’s opinion in Case C-188/03 Junk, paragraph 67.
\textsuperscript{1400} Directive 98/59/EC Section II Article 2 2.; See also Advocate General Tizzano’s opinion in Case C-188/03 Junk, paragraph 67, stating the main purpose of the consultation stage being to avoid or reduce collective redundancies.
\textsuperscript{1401} Kairinen – Uhmavaara – Finne pp. 32-33, 39-41 and 69.
\end{flushleft}
form of externalising company costs\textsuperscript{1402}.\textsuperscript{1403} But the final assessment depends largely on the cost structures of the different measures.

In Finland collective redundancies may be substituted by the use of lay-offs, flexible working-time arrangements or part-time contracts. Fixed-term employment contracts may not be renewed. Re-training and re-placement services offered by public authorities and private companies may also be used, the use of the latter depending on an employer’s own choice. Salary decreases and decreases of other employment terms and conditions and the use of different kinds of leaves are in use. Decrease in the established service or production level may be used.\textsuperscript{1404} The latter solution contains a strong and negative value-based message on the value of the works, services and products, directed to employees and customers.

In good time during the course of the consultations the employee representatives have to be supplied with all relevant information.\textsuperscript{1405} This is to enable them to make constructive proposals in the consultation process, aimed to secure the consultation’s effectiveness.\textsuperscript{1406} The Member States may provide that the employee representatives may call on experts’ services due to the technical complexity of the matters under informing and consultation, taking place however in accordance with national legislation and/or practise.\textsuperscript{1407}

In addition that the employers have in good time during the consultations to supply employee representatives with all relevant information, the employers have also to notify the representatives in good time in writing of the collective redundancies’ framework. An employer has to notify the employee representatives of:

(i) the reasons of the projected – thus planned – redundancies,
(ii) the number of categories of workers to be made redundant,
(iii) the number and categories of workers normally employed,
(iv) the period over which the projected redundancies are to be effected, thus to be carried out,
(v) the criteria proposed for the selection of the workers made redundant as far as national legislation or practise confers this kind of a power to the employer, and

\textsuperscript{1402} See Stiglitz page 190.
\textsuperscript{1403} Compare Collins – Ewing – McColgan page 1023 on early retirement schemes in the United Kingdom.
\textsuperscript{1404} Kairinen – Uhmavaara – Finne pp. 32-33, 39-41 and 69.
\textsuperscript{1405} Directive 98/59/EC Section II Article 2 3. (a).
\textsuperscript{1406} Barnard page 681; Malmberg page 71; van Peijpe page 85.
\textsuperscript{1407} Directive 98/59/EC Preamble point (10) and Section II Article 2 2.; Nyström page 253; van Peijpe page 85.
(vi) the method for calculating any redundancy payments other than those based on national legislation and/or practise.\(^{1408}\)\(^{1409}\)

The obligations on information, consultation and notification are applicable irrespective of whether the decision on collective redundancies is taken by the employer or an undertaking controlling the employer.\(^{1410}\) The obligation to acquire information is set on the undertaking under the control of another.\(^{1411}\) The directive on Collective Redundancies lacks a procedure inherent in the directive on Works Councils. If the group’s controlling undertaking is situated in a third state, the central management not being situated in a Member State, a central management’s representative agent is to be designated.\(^{1412}\)

The obligation to consult with the workers representatives is to be done “with a view to reaching an agreement”. If an agreement is reached, the end-result is binding, affecting an employer’s decision-making in carrying out measures in the agreement’s framework. If an agreement is not reached, the end-result equals with the effects of unilateral information. An employer has powers to act according to his/her own priorities.\(^{1413}\) The success of the enacted consultation procedure depends also on the actual powers granted at the Member State level to the workers’ representatives.\(^{1414}\) The ways of electing the representatives is of significance, too.\(^{1415}\)

According to a Finnish survey, 40 per cent of employee representatives held their possibilities to affect in practise company decision-making in consultations on workforce reductions very low, and 44 per cent held their possibilities low. Even 70 per cent of employee representatives were of the opinion that matters under consultations are, in fact, decided before the consultations by an

\(^{1408}\) Directive 98/59/EC Section II Article 2 3. (i)-(v); Kenner page 339; Malmberg page 71; See Hellsten 2007 page 12.

\(^{1409}\) Barnard page 681; Nyström page 253.

\(^{1410}\) Directive 98/59/EC Preamble point (11) and Section II Article 2 4.; See also C-449/93 Rockfon Summary 1 and paragraph 22; Nyström pp. 252-253.

\(^{1411}\) Barnard pp. 681-682; Kenner page 339.

\(^{1412}\) Directive on Works Councils articles 3 - 4 (1)-(2); Liukkunen page 246.

\(^{1413}\) van Peijpe page page 85.

\(^{1414}\) Laulom 2003 page 293.

\(^{1415}\) See ACU 2007 § 2:8 and the British system on the election of employee representatives TUL(C)RA, Schedule A1. In the first place employees are represented via a recognised trade union. This lacking, other kind of representation may be arranged. If specially elected employee representatives are to be elected, an employer is responsible to arrange the election, making sure that arrangements are reasonable practical to ensure that the election is fair. The employer is to determine the number of representatives so that there are sufficient representatives to represent the interest of all the effected employees, having regard to the number and classes of the employees. The employer is to decide, whether the effected employees should be represented by the representatives of all the affected employees or by representatives of particular classes of those employees. See further TUPE 2006 guide pp. 27-28 and Redundancy consultation and notification – Guidance page 2.
employer, irrespective of the carrying out the consultation procedure. Of employers’ representatives, 46 per cent were of the opinion that matters under consultations were decided before the consultations were carried out.\textsuperscript{1416}

3.4.4. NOTIFICATION OF PUBLIC AUTHORITIES

The directive on Collective Redundancies is the only European level enactment requiring public authority involvement in employer activities.\textsuperscript{1417} The employers have to notify in writing the competent public authority of any projected collective redundancies. The notification has to contain all the relevant information on the projected collective redundancies and consultations with the worker representatives.\textsuperscript{1418} Particularly the notification is to contain reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be affected.\textsuperscript{1419} The worker representatives have a right to send any comments they have to the competent public authorities.\textsuperscript{1420}

The directive on Collective Redundancies creates a framework for carrying out the notification procedure. Its practical carrying out and also practical effectiveness depends on the national law and practises and national authorities’ powers in collective redundancies.

The notification is targeted to manage the effects of collective redundancies.\textsuperscript{1421} Its purpose is to allow authorities to seek solutions to problems caused by collective redundancies.\textsuperscript{1422} The public authority involvement’s scope and nature, taking place under the directive in the form of a notification, may be light and even superficial, depending ultimately on the national level scope of action. The directive itself does not set on the authority an obligation to control the actual carrying out of consultations between the employer and worker representatives. The consultation procedure is to cover among the others “measures to mitigate the consequences by recourse to accompanying social measures aimed at aid for redeploying or retraining workers made redundant”. The public authority has no obligation to check the nature of measures. The directive does not either set any material obligations on the public authority to seek solutions to the redundancies, for example, by

\textsuperscript{1416} Kairinen – Uhmavaara – Finne pp. 19 and 67-68.
\textsuperscript{1417} Laulum pp. 124-125.
\textsuperscript{1418} Malmberg page 71; Blanpain page 507.
\textsuperscript{1419} Directive 98/59/EC Section III Article 3 1.; Nyström page 254.
\textsuperscript{1420} Directive 98/59/EC Section III Article 3 2.; Barnard page 683.
\textsuperscript{1421} Advocate General Tizzano’s opinion in Case C-188/03 Junk paragraph 67.
\textsuperscript{1422} Directive 98/59/EC Section III Article 4 2.; Case 284/83 Nielsen paragraph 10; Case C-188/03 Junk paragraph 47; Barnard pp. 683-684.
decreasing the number of them. Due to its soft administrative intervention the directive has been evaluated to leave a lot of freedom to the Member States.1423

Projected collective redundancies notified to the competent public authority may not take effect earlier than 30 days after the notification, without prejudice to any provisions governing individual rights with regard to notice of dismissal.1424 The enacted time period is, in fact, a minimum negotiation period.1425 If the period is shorter than 60 days, Member States may grant the public authority powers to extend the initial period to 60 days, if the problems raised by the collective redundancies are not likely to be solved within the initial period. Member States may grant public authorities also wider powers of extension.1426

The terminations may occur after the redundancies have been notified to the public authority. An employer is entitled to carry out collective redundancies after having concluded the consultation procedure and having notified competent public authority.1427 The directive’s procedure has been characterised procedural in nature.1428 When the set formalities are fulfilled, the employer has powers to make the decisions.

In principle the employers have an obligation to notify the competent public authority in writing of any projected collective redundancies. Member States need not apply the directive on Collective Redundancies arising from a termination of an establishment’s activities resulting from a judicial decision.1429 Member States may however provide in the case of planned collective redundancies arising from an establishment’s activities’ termination resulting from a judicial decision that the employer is obliged to notify the competent public authority in writing only if the latter so requests1430.1431

1423 Laulom page 125; Laulom 2003 page 293; In the Netherlands authorities have powers to authorise or prohibit redundancies, but due to the United Kingdom’s resistance this kind of a procedure was not adopted in the directive, Barnard page 683.
1424 Directive 98/59/EC Section III Article 4 1.; Case C-188/03 Junk paragraph 50; Nyström page 254.
1427 Case C-188/03 Junk paragraphs 53-54; Barnard page 684.
1428 Kenner page 64, referring especially to the consultation’s nature; Hellsten 2007 page 13.
1429 Directive 98/59/EC Section III Article 4 4..
1430 Directive 98/59/EC Section III Article 3 1..
1431 Barnard page 678; Case 284/83 Nielsen paragraph 16.
3.4.5. CONCLUSIONS ON THE DIRECTIVE ON COLLECTIVE REDUNDANCIES

The directives on Collective Redundancies and Transfers of Undertakings are closely linked. Employees contemplated to be dismissed under the directive on Transfers of Undertakings are under measures enacted in the directive on Collective Redundancies, if the numerical thresholds set in the directive are fulfilled. Mergers, and transfers of undertakings, generally result in collective redundancies.\textsuperscript{1432} The 3rd directive on mergers and the directives on Transfers of Undertakings and Collective Redundancies regulate, consequently, a common area.

In a nutshell the directive on Collective Redundancies can be summarised as follows: the employers are required to consult the employee representatives, in order to reach an agreement on preventing dismissals or decreasing the number of affected employees and on measures to be carried out in order to mitigate the redundancies’ consequences. The employers have also an obligation to inform the competent authority. The authorities are to seek solutions to problems raised by the collective redundancies, the directive not defining the solutions. The directive emphasises the obligations of employers and employees to find alternative solutions to dismissals, these being the last resort.\textsuperscript{1433}

The link between the managerial decisions on collective redundancies at the company level, the concrete means to increase employee employability by the companies themselves and public power, and the measures of public power to help to solve the problems of companies and employees by hindering the redundancies and mitigating their consequences seems to be a weak one. The directive’s framework of action may be evaluated to be worrying, if employment is held to be a public good, also guaranteeing employee economic security.\textsuperscript{1434} Dismissals affect in addition to those having been dismissed, also the employees still continuing at the employer’s employ and the surrounding community at large.\textsuperscript{1435} This could be defined as a stakeholder perspective on collective redundancies. The directive in its enacted form lacks this kind of a perspective.

Collective redundancies should be viewed as a crisis measure. Their use should be limited to the minimum. The directive does not support this goal, due to its lack of substantive safeguards. The 3\textsuperscript{rd} directive on mergers is marked by its verbal safeguards with regards to shareholders and creditors. In a merger, shareholder rights are suitably projected, and creditors must be protected so

\textsuperscript{1432} Lehto pp. 6, 31 and 46-47; Government Proposal 103/2007 page 23.
\textsuperscript{1433} Treu pp. 105-106.
\textsuperscript{1434} Morin – Vicens page 66.
\textsuperscript{1435} Morin – Vicens page 54.
that the merger does not adversely affect their interests. The directive on Collective Redundancies lacks equal verbal safeguards with regards to employees, although it is claimed to have protective goals.

The directive’s procedural safeguards are targeted to secure the effectiveness of consultations. Effectiveness is impacted by the timing of consultations. The consultations are to be initiated in good time. However, an employer has no duty to foresee collective redundancies. The consultations are to be initiated after the employer contemplates collective redundancies, having drawn up a “project” to that end. This affects essentially the consultations’ initiation and the timely framework in their practical carrying out, resulting at the employee level in the timely framework at use to adjust to changes at the personal level.

Information and consultation procedures have been considered to be psychologically important to the employees. An advance notice of forth-coming changes has been thought to help employees to adjust to them more easily. Negotiating periods have been thought to grant time to adaptation by training or job-seeking. Effects may be evaluated on the basis of the length of the negotiating periods and crisis psychology. In Finland, the negotiating periods vary from 14 days to six weeks. A loss of a job is one of the most traumatic experiences in human life. It causes a crisis, which in its acutest form lasts about six weeks. As a whole the crisis may last from one to three months. The length of the crisis may extend even up to one year or even longer. From this perspective the directive’s consultation procedures’ psychologically evaluated effects may be, even highly, overestimated.

Consultation’s effectiveness depends on issues outside the pure procedural provisions. Consultation in its traditional form does not denote to the parties’ equality. Outside the consultation procedure’s scope are the contemplated collective redundancies’ reasons. The measures’ rationale cannot be questioned under the directive’s procedures. This narrows also employee representatives’ scope of action in actual consultations. The matter is linked with

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1436 The 3rd directive Preamble.
1437 Directive 98/59/EC Section II Article 2 1.
1438 Case C-188/03 Junk paragraphs 36-37.
1442 On the consultations’ character see Robbins pp. 390 and 396-397.
corporate governance.\textsuperscript{1444} It is also linked with corporate citizenship. Corporate citizenship is based on enterprises’ social and – outside this research’s immediate scope – environmental responsibilities.\textsuperscript{1445} Corporate citizenship may be based on companies’ own voluntary actions or be imposed on them. The focus is on a corporation’s social, political and civil rights and obligations relating to its business activities. Corporations’ social environment covers also employees. An enterprise has a role of an active player in the social field. This role is based on a wide stakeholders’ definition, including the society in general, being motivated by economic and political grounds.\textsuperscript{1446}

The focus of the consultations between the employer and the employee representatives is on the prevention of redundancies and their social implications, \textit{without defining} the accompanying social measures or aid for redeployment or retraining. At the moment these are matters to be defined at the Member State level. In the directive the lack of real substantive measures is a grave lack. The directive does not cover measures in the form of support, training and compensations to dismissed employees.\textsuperscript{1447}

The directive’s measures cannot be evaluated as a wholeness by taking into account solely the EU-level provisions. The directive’s practical consequences and thus its effectiveness depend on the national law and practises on collective redundancies, being variable. For example, in the Netherlands the authorities have powers to authorise or prohibit collective redundancies.\textsuperscript{1448} This is not in use in Finland.\textsuperscript{1449} Variations in national practises are not in line with the directive’s protective goals. From the employee perspective, these kinds of differences make achievement of the directive’s protective goals uneven.

Originally, the directive was targeted towards cost levelling at the company and undertaking level on information and consultation procedures in the different Member States. The issues on cost levelling at the company and undertaking level cannot be limited only to information and consultation procedures themselves. Cost levelling has to be evaluated by taking into account the wholeness of collective dismissals procedures and measures prevalent in the Member States affecting at the company and undertaking level. Due to the differences in procedures and

\begin{footnotes}
\item[1444] See Elkington pp. 300, 311, 317, 324 and 345.
\item[1445] See Stiglitz pp. 190 and 203, Ellsworth pp. 29 and 145 and Toiviainen page 166.
\item[1446] On the corporate citizenship see Crane – Matten pp. 61-71, especially page 64 and Crane – Matten 2007 pp. 70-79, especially page 73. See Elkington pp. 73, 155-156, 216, 272, 300, 311, 315 and 331.
\item[1447] Morin – Vicens page 49.
\item[1448] Barnard page 683.
\end{footnotes}
measures, the achievement of the goal of cost levelling is highly questionable. From company perspective this is apt to increase competition on establishment between different Member States. This is not apt to increase coherence and sustainable social development within the EU. Differences in costs at the company and undertaking level do not either denote to equality between companies and undertakings on rights and obligations.

If the directive’s aim is to level risks caused by collective redundancies between the employers, employees and the society and to minimise collective redundancies’ negative effects, by avoiding them, reducing the number of affected or mitigating the effects, the enacted ways of action hardly give support in achieving these goals.

When the directive on Collective Redundancies is evaluated on the basis of the principles of protecting the weaker party or employees’ economic interests or even from the point of view of the principle on the contracting parties’ equality, very little of practical legal significance is left in hands. From company perspective the directive is hardly to increase companies’ options to compete with each other on an equal legislative basis. The chosen model of action is not apt to lead to equal social costs in different Member States, due to the different character of the national procedures and measures, affecting negatively at the EU-level on the internal market’s functioning.

There are also other reasons to argue the directive’s legal significance. The enacted consultation process is largely procedural in character, with no substantive elements and guarantees targeted to achieving an agreement. The consultation is to be carried out with a view to reaching an agreement on avoiding or reducing the redundancies or mitigating the consequences. If an agreement is not reached, the end-result denotes to a mere delivering of information, the employee representatives having no available means to question the employer’s plans. If these kinds of means are to exist, they are in character national and thus different, leading to different solutions.

According to the Finnish survey consultations on collective redundancies or, according to the Finnish terminology, negotiations on reducing the use of workforce are felt to be carried out only to fulfil the legal obligations. This being the core of case consultation is, in fact, informing and

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1450 See Hellsten 2007 page 12 on differences in severance payments and page 15 on the lack of setting social plans and further Hellsten 2007a page 58 on severance payments.
1451 See Elkington pp. 73, 331 and 345 and on the significance of time in sustainability pp. 272 and 315.
1452 See Sigeman page 258 on the definition of collective redundancies.
1453 Compare Directive 98/59/EC Preamble point (4).
1454 ACU 2007 Chapter 8.
making visible the grounds for employer’s decisions,\textsuperscript{1455} being far from the original purpose of consultation to affect employer decision-making. The consultations’ purpose and their carrying out in practise should, however, always be evaluated by taking into account collective redundancies’ long-term effects on competitive advantage. This perspective is apt to affect the practical significance of the consultations.\textsuperscript{1456} Collective redundancies are closely linked with productivity. Workforce reductions generally decrease trust. Mistrust generally affects negatively on productivity.\textsuperscript{1457} From the perspective of companies and undertakings, this is not an advantage in the long run. Collective redundancies are an issue covered by corporate citizenship\textsuperscript{1458} and corporate governance.

The emphasis within the EU, companies and undertakings included, should be on long-time employment relationships targeted developing knowledge-based competitive advantage.\textsuperscript{1459} The employees or their representatives\textsuperscript{1460} or public authority or both of these parties should be granted a right to question collective redundancies\textsuperscript{1461} contemplated by an employer, due to the measures’ social effects and employment implications. The matter is also connected to a need to re-evaluate at the EU-level the character of the consultations themselves, being a matter of corporate governance. Handling at the EU-level can be grounded by the need to guarantee the uniformity of the procedures and measures. This can be grounded also by the EU’s status in the world trade, having powers to affect other large world trade powers in employee issues. Due to the globalised economy, collective redundancies resulting from restructuring have effects reaching outside the national borderlines, affecting outside the EU’s own and its Member States’ national borderlines. The issue is also connected with defining collective redundancies, referring to their grounds. The definition of dismissal grounds in the directive on Collective Redundancies is linked with the same issue under the directive on Transfers of Undertakings. The definition of the grounds in the directive on Collective Redundancies is procedural in character, requiring in principle only the fulfilment of an employer initiative and certain numerical thresholds. The definitions on dismissal grounds regarding their substance are matters to be done at the EU-level, to guarantee the uniformity.

\textsuperscript{1455} Kairinen – Uhmavaara - Finne page 70.
\textsuperscript{1456} See Robbins – Judge page 445.
\textsuperscript{1457} See Robbins – Judge page 445. See Elkington pp. 85 and 242 on trust.
\textsuperscript{1458} See Crane – Matten pp. 61-71, especially page 64 and Crane – Matten 2007 pp. 70-79, especially page 73. See Elkington pp. 73, 155-156, 216, 272, 300, 311, 315 and 331.
\textsuperscript{1459} Compare Porter pp. 657 and 665 and Directive 2002/14/EC Preamble point (9).
\textsuperscript{1460} See Toiviainen 2004 on employees’ veto-rights.
\textsuperscript{1461} See Hellsten 2007 pp. 16-17.
The directive does not cover employee representatives’ election procedures or their powers to carry out the tasks imposed by the directive. At the moment election and powers depend on varying national solutions, depending in their turn on national traditions, not necessarily reflecting the representativeness in relation to all employee groups. These aspects of the consultation procedure need evaluation, too.

The re-evaluation and unification of the 3rd directive on mergers and the directive on Transfers of Undertakings should also cover the directive on Collective Redundancies. All these directives regulate common, overlapping areas.

3.5. DIRECTIVE ON INFORMING AND CONSULTING EMPLOYEES

3.5.1. GOALS, BACKGROUND AND REMEDIES

The directive on Informing and consulting employees has been evaluated to emphasise proactive action instead of the former emphasis on reactive action in alleviating restructuring measures’ consequences. In brief, the directive is targeted to ensure European level framework on informing and consulting employees in a globalised business environment. Matters affecting employment are emphasised. The directive is targeted to help companies to adapt to an increased competition and to help employees to be better equipped in it. It is to increase social dialogue between the labour market parties. Information and consultation procedures’ carrying out is important before decisions affecting employees are made.

A background factor in adopting the directive on Informing and consulting employees is the felt inadequacy both at the national and EU-level on the previous legislative measures on information and consultation. The previous legislative measures cover the directives on Transfers of Undertakings, Collective Redundancies and Works Councils. These directives, although intended to ensure that employees are involved in their employer company’s and undertaking’s affairs and decisions affecting them, have not always prevented serious decisions from being taken and made public without implementing beforehand adequate procedures to inform and consult the employees.

1463 Barnard pp. 26-27, 105 and 140-143; Kenner pp. 496-497.
The Preamble in the directive on Informing and consulting employees acknowledges a need to strengthen dialogue and promote mutual trust within undertakings. This is important because of improving risk anticipation on employment and making the organisation more flexible. Among the reasons emphasising the need to strengthen dialogue and promote mutual trust within the undertakings are needs to improve risk anticipation, facilitate employees’ access to training while maintaining security, make employees aware of adaptation needs, increase employees’ availability to undertake measures and activities to increase their employability, promote employees’ involvement in an undertaking’s operation and future and increase its competitiveness.

The directive has been enacted with the purpose to support the employees’ ability to adapt themselves to changes, especially, when according to an employer’s evaluation there is a threat to employment. There is stated to be a need to promote and enhance information and consultation on the undertaking’s situation and likely employment development. This is the case especially, where the employer’s evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular on employee training and skills development. This is done with a view to counterbalance the negative developments or their consequences and increase those employees’ employability and adaptability likely to be affected.

Timely information and consultation are held prerequisites for restructurings’ success and undertakings’ adaptation to the new conditions created by the economy’s globalisation, taking place particularly by developing new forms of organisation of work. Timely information and consultation are essential prerequisites in employees’ adapting themselves to change. The directive is targeted to further restructuring measures’ carrying out in a socially acceptable manner, taking place by creating a framework for employee influence. The directive does not contain provisions of material nature in the form of severity pays or redundancy payments.

The Community level employment strategy is based on anticipation, prevention and employability. It is targeted to be incorporated to all public policies likely to benefit employment. It covers also

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1467 Directive 2002/14/EC Preamble point (7); SOU 2004:85 pp. 11, 17 and 61.
1469 Directive 2002/14/EC Preamble point (7).
1471 Directive 2002/14/EC Preamble point (8).
1472 Directive 2002/14/EC Preamble point (9); See SOU 2004:85 pp. 28 and 61.
1473 Liukkunen page 282.
individual undertakings’ policies. The incorporation takes place by strengthening social dialogue with a view to promoting change, compatible with preserving employment as the priority objective.\textsuperscript{1474}

The directive covers an evaluation on the former legal framework of employees’ information and consultation, both at the Community and national level. It “tends to adopt an excessively a posteriori approach to the process of change”. It neglects taken decisions’ economic aspects. It does not contribute to employment developments’ genuine anticipation within the undertakings or risk prevention.\textsuperscript{1475}

The directive on Informing and consulting employees is in character a minimum directive. It does not prevent the Member States to lay down provisions more favourable to the employees.\textsuperscript{1476}

The Member States have an obligation to provide for appropriate measures in the directive’s non-compliance by the employer or the employee representatives. In particular it is to be ensured that adequate administrative or judicial procedures are available to enable the directive’s obligations to be enforced.\textsuperscript{1477} The Member States are also under an obligation to provide for adequate sanctions in the event of the directive’s infringement by the employer or the employee representatives. The sanctions have to be effective, proportionate and dissuasive.\textsuperscript{1478}

\textbf{3.5.2. CONCLUSIONS ON GOALS AND BACKGROUND}

The Directive on Informing and consulting employees differs in character from all the other EU-level enactments under research in one aspect. It states the need of strengthening dialogue and promoting mutual trust within undertakings. The basis of all commercial activity is dialogue and mutual trust, on a continuous basis. These are also the basics of successful restructuring.\textsuperscript{1479}

Evaluated on the basis of the Preamble, the directive on Informing and consulting employees lacks as a goal employee protection. The directive has to do with setting a framework for informing and consulting employees. The directive can be evaluated clearly procedural in character. On the basis

\textsuperscript{1474} Directive 2002/14/EC Preamble point (10); See SOU 2004:85 page 63.
\textsuperscript{1475} Directive 2002/14/EC Preamble (13).
\textsuperscript{1476} Directive 2002/14/EC Preamble (18).
\textsuperscript{1477} Directive 2002/14/EC article 1 .1; Nyström page 171; SOU 2004:85 page 59.
\textsuperscript{1478} Directive 2002/14/EC article 8 1..
\textsuperscript{1479} Directive 2002/14/EC article 8 2.; Hietala – Kaivanto page 141.
\textsuperscript{1479} See Vuorenmaa page 93.
of the Preamble the directive’s focus is on promotion of change and adaptability, employability and involvement in it at the individual employee level. Compared to the former EU-level directives in the research context regulating employee protection and status in restructuring, the change in the starting points is a remarkable one. The starting point clearly denotes to proactivity, means being however crucial to its achievement.

The directive emphasises information and consultation as prerequisites in restructuring measures’ success, particularly through the development of new forms of organisation of work.\textsuperscript{1480} The new forms of organising work reflect to a large extent the production ways prevalent especially in transnational corporations,\textsuperscript{1481} stated and evaluated in sociological research. Consequently, the new forms of organising work reflect to a large extent also the demands these production ways set on employees at the individual level to be able to cope in the continuous change.\textsuperscript{1482} The directive’s Preamble can be evaluated to be to some extent contradictory with the former research results on successful restructuring. The directive’s Preamble places emphasis in addition to timely information and consultation,\textsuperscript{1483} adaptation to new forms of work as prerequisites to the success of restructuring measures. Former research place emphasis on trust, long-term employment relationships and long-term company development.\textsuperscript{1484}

The directive’s Preamble\textsuperscript{1485} emphasises employment as a priority objective. This part of the directive is closely linked with restructuring, commonly resulting in workforce reductions.\textsuperscript{1486}

The Preamble states as a fact the development of new forms of organisation of work requiring flexibility and adaptation.\textsuperscript{1487} This is worth of noting because of its implications. The directive’s purpose is to support employees’ ability to adapt themselves to changes. Another point of view has to do with steering of change, being largely a matter within employers’ decision-making. The Preamble lacks this point of view. The Preamble lacks also the point of view of developing mutual trust. Mutual trust needs, in order to develop, commitment from all the parties in a relationship. The developing of mutual trust is, however, concentrated in the directive’s Article 1. When defining or implementing practical arrangements for information and consultation, the employer and employee

\begin{itemize}
\item \textsuperscript{1480} Directive 2002/14/EC Preamble point (9).
\item \textsuperscript{1481} See also Industrial Relations 2006 page 17.
\item \textsuperscript{1482} Directive 2002/14/EC Preamble point (7).
\item \textsuperscript{1483} See Vuorenmaa pp. 82-84.
\item \textsuperscript{1484} See Vuorenmaa pp. 89 and 92-93, Robbins – Judge page 445, Lehto page 48 and Porter pp. 657 and 665.
\item \textsuperscript{1485} Directive 2002/14/EC Preamble point (10).
\item \textsuperscript{1486} See Lehto pp. 6, 31 and 46-47.
\item \textsuperscript{1487} See also Industrial Relations 2006 page 157.
\end{itemize}
representatives are to work in a spirit of cooperation with due regard for their reciprocal rights and obligations. In this are to be taken into account the interests of the undertaking, the establishment and employees.

The Preamble does not concretise employers’ inputs in human development.\textsuperscript{1488} The Preamble lacks the perspective of developing competitive advantage in a long-term manner. In addition to the employee commitment, this has to do with employers’ support and measures, based on stability, continuance and commitment, not only from the employees’ part to unilateral adaptation on a continuous basis.

The former legal framework on employee information and consultation, both at the Community and national level, it evaluated to “tending to adopt an excessively a posteriori approach to the process of change”. The former legal framework is evaluated to neglect taken decisions’ economic aspects. It is said not to contribute to employment developments’ genuine anticipation within the undertakings or to risk prevention.\textsuperscript{1489} Based on the present research’s previous conclusions it is easy to agree with these estimates on the lack of proactive approach and genuine anticipation. The evaluation on the former legal framework’s claimed lacks cannot anyway wholly be agreed upon with regards to the economic aspects. The former EU-law on restructuring under research takes into account the taken decisions’ economic aspects from the shareholder and creditor point of view; the creditor concept, on the other hand, is based on a narrow interpretation. The decisions’ economic aspects on companies and undertakings are taken into account in the former legal framework by the lack of enacted substantive safeguards for employees. This form of action does not, however, take into account social development’s coherence and sustainability within the EU. The employee measures are to a large extent procedural in character, making room for flexible use of workforce on the basis of companies’ changing needs, creating room for cost savings. The EU-law under research may well be evaluated to be company friendly from the economic point of view at the cost of employees and national and local economies. The EU-law under research may, however, well be evaluated to be company unfriendly at the cost of the companies themselves in the long-run, due to national level legislative differences. From the employee perspective, the core values in restructuring are economic in character. With regards to nation states and local communities, the economic aspect has to do with the costs of unemployment, re-training and re-education. The unifying factor between the companies, employees, nation states and local communities is the need

\textsuperscript{1488} See Industrial Relations 2006 page 158 referred to as employers’ investments in human capital.
\textsuperscript{1489} Directive 2002/14/EC Preamble point (13); Compare SOU 2004:85 pp. 62-63.
of anticipation or risk-prevention stated in the directive as a fact from the undertakings’ point of view. It is equally important to the other actors, too.

3.5.3. INFORMATION AND CONSULTATION IN PRACTICE

“Information” means transmission by the employer to the employee representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it.\textsuperscript{1490} “Consultation” means exchange of views and establishment of dialogue between the employee representatives and the employer\textsuperscript{1491,1492}

The directive is targeted to establish a general framework in setting out minimum requirements for the employees’ right to information and consultation in undertakings or establishments within the Community.\textsuperscript{1493} Within the enacted framework the Member States are free to enact and adopt information and consultation procedures best suiting to their prevalent labour market systems, traditions and industrial relations systems.\textsuperscript{1494} This is to be done in a way ensuring the arrangements’ effectiveness\textsuperscript{1495,1496} The enacted requirements do not hinder applying more advantageous provisions at the Member State level\textsuperscript{1497,1498}

Information and consultation imply rights and obligations for management and labour at undertaking and establishment level.\textsuperscript{1499} The directive is not targeted to harmonise information and consultation procedures themselves. Establishing a standing body for employee representation is, however, implicitly intended.\textsuperscript{1500}

Information and consultation are enacted as employee rights. An employer does not have an obligation to implement them at his/her own initiative. The employees have to request the implementation of the enacted procedures.\textsuperscript{1501}

\textsuperscript{1490} Directive 2002/14/EC article 2 (f); Barnard page 735.
\textsuperscript{1491} Directive 2002/14/EC article 2 (g); Barnard page 736.
\textsuperscript{1492} SOU 2004:85 pp. 30 and 72-73; Nyström page 172; Liukkunen page 283.
\textsuperscript{1493} Directive 2002/14/EC article 1 1.; On the definition of the concepts of undertaking, establishment, employer, employee and employees’ representatives see Directive 2001/14/EC article 2 (a)-(e), referring in the case of the last three concepts to the national law or practises; See Barnard pp. 735-736; SOU 2004:85 pp. 11, 17, 30 and  63-70.
\textsuperscript{1494} Barnard page 736; Liukkunen page 283; SOU 2004:85 pp. 11, 17 and 28.
\textsuperscript{1495} Nyström page 172.
\textsuperscript{1496} Directive 2002/14/EC article 1 2..
\textsuperscript{1497} Directive 2002/14/EC Preamble point (18) and article 1 1.; SOU 2004:85 pp. 12, 18 and 78.
\textsuperscript{1498} SOU 2004:85 pp. 29 and  59-61.
\textsuperscript{1499} Directive 2002/14/EC Preamble point (27); Liukkunen page  283.
\textsuperscript{1500} Industrial Relations 2006 pp. 59-60.
\textsuperscript{1501} Barnard page 735.
When practical arrangements for information and consultation are defined or implemented, the employer and the employee representatives are to work in a spirit of cooperation, taking into account their reciprocal rights and obligations. All the affected parties’ interests have to be taken into account, implying to the undertaking, establishment and the employees. Both an employer and employee representatives are to work in the spirit of co-operation in agreeing on different forms of information and consultation and in carrying out the procedures.\textsuperscript{1502} The directive is applicable at the national level. It lacks a cross-border character.\textsuperscript{1503}

Member States are granted an option to restrict the directive’s scope. They may apply the directive to undertakings with at least 50 employees in any one Member State or establishments employing at least 20 employees in any one Member State.\textsuperscript{1504} Member States shall determine the method for calculating the thresholds.\textsuperscript{1505}

Member States have to ensure that employee representatives in carrying out their functions enjoy adequate protection and guarantee to enable them to perform properly their duties.\textsuperscript{1506} Member States have an obligation to ensure that adequate administrative or judicial procedures are available to ensure the directive’s obligations to be enforced, in the case of the directive’s non-compliance\textsuperscript{1507} .\textsuperscript{1508}

Member States have to determine the practical arrangements for exercising the right to information and consultation at the appropriate level.\textsuperscript{1509}

Information and consultation is to cover:

(a) information on the recent and probable development of the undertaking’s or establishment’s activities and economic situation. This refers to matters with

\textsuperscript{1502} Directive 2002/14/EC article 1 3.; Nyström pp. 171-172; SOU 2004:85 pp. 29 and 62. Compare with the Swedish system, there being a goal of an end-result based on negotiations, Iseskog page 632.

\textsuperscript{1503} Liukkunen page 282.

\textsuperscript{1504} Nyström page 172; Industrial Relations 2006 page 59.

\textsuperscript{1505} Directive 2002/14/EC article 3 1.; Barnard page 736; Liukkunen page 284; SOU 2004:85 pp. 11, 17-18, 30 and 75.

\textsuperscript{1506} Directive 2002/14/EC Article 7; Barnard page 738; Nyström page 173; SOU 2004:85 pp. 15, 21 and 32; Liukkunen page 285.

\textsuperscript{1507} Directive 2002/14/EC article 8; Barnard page 739; Nyström page 173; van Peijpe page 87; SOU 2004:85 pp. 32-33. SOU 2004:85 page 13.

\textsuperscript{1508} Directive 2002/14/EC article 4 1..
economic or strategic character. In legal literature these matters are evaluated to be “generally outside the control of employer”.  

(b) information and consultation on the situation, structure, and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment, referring to employment trends, and 

(c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions among the others on Collective Redundancies and Transfers of Undertakings. The directive on Informing and consulting employees is not to hinder the application of more specific provisions in the other directives. 

Information is to be given at such a time, in such a fashion and with such content that are appropriate to enable particularly the employee representatives to conduct an adequate study and, where necessary, prepare for consultation. 

Consultation’s timing, method and content have to be appropriate. It is based on information supplied by the employer. Consultation is to take place at the relevant level of management and representation, depending on the subject. This may refer to a local or central level. Consultation has to be carried out in a way enabling employee representatives to meet the employer and obtain a grounded response with its reasons. Consultation is to be carried out with a view to reaching to an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations. 

1510 Barnard pp. 737-738. 
1511 Directive 2002/14/EC Preamble point (29) and articles 4 2. and 9; Among the referred-to-directives is also the directive on Works Councils. Industrial Relations 2006 page 59; Barnard pp. 738-739; Nyström page 172; van Peijpe page 87; Liukkunen page 284; SOU 2004:85 pp. 12, 18 and 31. 
1513 SOU 2004:85 page 80. 
1514 Directive 2002/14/EC article 4 4.; Industrial Relations 2006 page 59; Barnard page 738; Nyström page 172; Liukkunen page 285; SOU 2004:85 pp. 12, 18, 31 and 80-81.
Information and consultation obligations’ scope is largely overlapping, with one derogation. Information is to cover the recent and probable development of undertaking’s or establishment’s activities and economic situation. Consultation does not cover these issues.\(^{1515}\)

Matters under information and consultation have been evaluated to be in character matters under employer’s management and direction rights. These concepts refer as starting-points to employer’s primary and sole decision-making rights within enacted legal framework, complemented however with information or consultation obligations.\(^{1516}\) Information and consultation may affect employer decision-making, the effects depending on the character of the end-results.

One evaluation made on the character of the EU’s former directives on information and consultation can be repeated also in the context of the directive on Informing and consulting employees. There is stated to be enacted the nature of information and consultation. Issues on corporate structure and actual means of information, consultation and also participation to affect the strategic level have been left outside the enacted measures.\(^{1517}\) According to another evaluation, due to the directive on Informing and consulting employees’ wide scope, it has been evaluated to make possible information on mergers, acquisitions, business reorganisation and changes in employment terms and conditions.\(^{1518}\) The latter evaluation excludes consultation in these matters.

Member States may entrust social partners at the appropriate level to define freely and at any time in a negotiated agreement the practical arrangements for informing and consulting. The concept of social partners refers to labour market parties. Both the undertaking and establishment levels are included. The agreements may differ from the directive’s procedures, but not in a way denoting to changes with regards to the directive’s basic principles, as defined in its first article covering object and principles.\(^{1519}\)

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\(^{1515}\) SOU 2004:85 pp. 78-79.
\(^{1516}\) SOU 2004:85 page 79. See and compare ACU 2007 Chapters 4 and 6-8 denoting to a consensus or an agreement. See ACW.
\(^{1517}\) Kenner page 65.
\(^{1518}\) Industrial Relations 2006 page 59.
3.5.4. CONCLUSIONS ON INFORMATION AND CONSULTATION IN PRACTICE

The directive’s enactment and implementation has generalised and institutionalised workplace representation at the EU and Member State level. It has also made employee representation mandatory. Irrespective of the mandatory character, the directive leaves to individual Member States a wide scope of action to carry out its obligations. The representation itself is not harmonised. In evaluating the directive, information of the national level procedures and their practical application is also needed. In the evaluation both the EU-level measures and those at the Member State level are to be taken into account, to form a whole picture of the workability of the directive’s obligations. The experience at the Member State level on the application of the directive on Informing and consulting employees is, however, still fairly short. There is neither available any court cases, including the ECJ, on the directive’s interpretation.

The directive’s enactment and implementation can be evaluated as a positive development in restructuring context. This is due to the employee representation’s mandatory character. The directive has created a legal framework for election of employee representatives and functioning at the company and undertaking level, business units included. Irrespective of the information and consultation procedures’ weaknesses, the legal framework on elections for employee representatives makes possible to carry out information and consultation procedures under the directives on Transfers of Undertakings and Collective Redundancies in a more extensive scale compared with the former legal state. Implementation of the directive on Informing and consulting employees decreases the option to become unilaterally informed in matters under the directive on Transfers of Undertakings. Implementation of the directive on Informing and consulting employees does not however wholly remove this, due to the directive’s numerical application thresholds, depending on the choice of individual Member States.

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1520 Industrial Relations 2006 page 59.
1521 Industrial Relations 2006 page 11.
1523 See Directive on Transfers of Undertakings Chapter III Article 7 and Directive on Collective Redundancies Section II article 2.
1524 Directive on Transfers of Undertakings Chapter III Article 7 6..
1525 Compare in the context of directive on Collective Redundancies Case C-383/92 Commission v UK Summary 1 and paragraphs 27 and 44; Selwyn pp. 467-468.
1526 Directive 2002/14/EC Article 3 1. stating the directive being applicable, according to the Member States’ choices, to undertakings employing at least 50 employees in any one Member State, or establishments employing at least 20 employees in any one Member States. Member States have powers to determine the method for calculating thresholds for employees employed.
The enacted measures cover information and consultation. In its weakest form consultation may well be equated with delivering of unilateral information. In its strongest form in the form of an agreement or consensus consultation can be equated with direct participation, limiting employer decision-making in its framework.

A precondition to the effective application of the enacted provisions, especially in restructuring, is access to information. In the directive on Informing and consulting employees the concept of information has been defined denoting to transmission by the employer to the employee representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it. Information shall be given at such a time, in a fashion and content appropriate to enable employee representatives to conduct an adequate study and prepare for consultation.

The provision on delivering information should be interpreted widely. The provision in its enacted form does not however denote to a principle of information transparency. The provision does not in its enacted form either denote to employee representatives the right to information. The wording of the provision on information can even be interpreted in a narrow way, denoting to an employer’s assessment on the character of the issue at hand, resulting in delivered information’s scope and quality. According to a narrow interpretation, the delivered informations’s scope and quality could even be decided on a case-by-case basis by the employer, by denoting to the differences in the scope of matters under information and consultation procedures.

In company and also in securities markets law company’s relations with shareholders are grounded on the principle of information transparency, being an aspect of corporate governance. As a company law example can be mentioned a planned merger’s draft terms. The terms are not unilateral information delivered by the company, but a company-law-based draft agreement to be later accepted as a binding agreement, guaranteed by a double reporting and publication before the

1527 See ACU 2007 §§ 6:34:1 and 8:50.
1528 van Peijpe page 87.
1530 Directive 2002/14/EC Article 4 3..
1531 See Morin page 367.
1533 Compare Anna-Maija Lehto’s interview page 59 denoting to a scarce delivering of information especially by listed companies.
1534 In securities market law see ASM Chapter 2, especially §§ 5-7 compared with ACU 2007 §§ 1:1, 3:10 and 3:14 and Government Proposal for ACU 2007 pp. 26 and 31-32. On listed companies’ information obligations see further Sonninen.
actual decision-making. The principle of information transparency or a lack of it reflects power relations at the corporate level.

In EU-labour law, the employees’ right to information and consultation should be based on the principle of information transparency. This refers to a right to be furnished with information, forming also a basis for consultation in an adequate scope, comparable to information delivered to shareholders, also in a group context. Consultation in a genuine form cannot be achieved without this kind of a basis, if targeted to exchange of views in a balanced way, in order to get a grounded answer and even an agreement.\textsuperscript{1535} The principle of information transparency should result in national level solutions.

The principle of information transparency in shareholder relationships is grounded within the economic values of shareownership. The principle of information transparency in relation to employees can also be grounded with economic reasons, due to the economic character of employment relationships. It can also be grounded by social grounds, by referring to corporate citizenship.\textsuperscript{1536}

In legal literature an evaluation has been expressed according to which “development of the undertaking’s or establishment’s activities and economic situation” contain matters with economic or strategic character, being largely outside the employer control.\textsuperscript{1537} According to another evaluation, the directive has made possible information on mergers, acquisitions and business reorganisation, in addition to changes affecting employment conditions.\textsuperscript{1538} According to still an evaluation based on the EU’s information and consultation procedures’ character generally, there is enacted the \textit{nature} of information and consultation, issues on corporate \textit{structure} and actual \textit{means} of information, consultation and also participation to affect the \textit{strategic level} having been left outside the enacted measures.\textsuperscript{1539}

Economic matters, when depending on customer conduct, are to some extent outside a company’s or an employer’s control. Matters of strategic character are however never outside the company or employer control. They are core issues in a company’s or an employer’s decision-making. Matters

\textsuperscript{1535} Morin page 367.
\textsuperscript{1536} See Crane – Matten pp. 61-71, especially page 64 and Crane – Matten 2007 pp. 70-79, especially page 73. See Elkington pp. 73, 155-156, 216, 272, 300, 311, 315 and 331.
\textsuperscript{1537} Barnard pp. 737-738.
\textsuperscript{1538} Industrial Relations 2006 page 59.
\textsuperscript{1539} Kenner page 65.
of economic and strategic character are under the directive’s information obligation. In these areas employees are consequently only unilaterally informed by the employer, without a right to influence the employer decision-making.

In company matters the strategic level is the most important level of action. Restructuring, mergers and transfers of undertakings included, are strategic in character. They are planned and under preparation long before coming public, for example, under the 3rd directive. In this context it is worth of denoting to the directive on Informing and consulting employees’ Preamble. According to the Preamble there is “a need to promote the employee involvement in the operation and future of the undertaking and increase its competitiveness”.\textsuperscript{1540} Involvement denotes further compared to mere information. It denotes to participation, extending further than information and consultation. Under the directive matters of economic and strategic character, restructuring included, are under only an information procedure, referring to a unilateral action by the employer. The Preamble’s statement is in contradiction with the directive’s actual obligations. In addition to consultation’s limited scope, outside information and consultation more profound forms of employee involvement have not been included under the directive’s obligations.

Informing and consulting are to take place before decision-making or carrying out of measures affecting employees.\textsuperscript{1541} In consultation is to be ensured among the others that the timing is appropriate\textsuperscript{1542,1543} According to legal literature, this denotes that consultation needs not be carried out before the decision-making,\textsuperscript{1544} implying that it can be carried out also after the decision-making. Consultation, if taking place after the employer decision-making, is vain from the employees’ point of view. With regards to the timing of consultation, especially where there is a threat to employment, according to still another interpretation, the consultation should take place when the first indicators of the threat on employment are to be seen, even before any decisions on different options on handling the situation have been made by the employer.\textsuperscript{1545} In this case, the consultation is to cover especially what should and could be done in order to increase employee employability both outside and inside the undertaking by using training and education.\textsuperscript{1546} These different wording of the interpretations compared with the directive’s wording imply a contradiction.

\begin{thebibliography}{99}
\bibitem{1540} Directive 2002/14/EC Preamble (7).
\bibitem{1541} SOU 2004:85 pp. 25-26 and 28.
\bibitem{1542} Directive 2002/14/EC Article 4 4. (a).
\bibitem{1543} See SOU 2004:85 pp. 62-63.
\bibitem{1544} See Directive 2002/14/EC article 6 on Confidential information.
\bibitem{1545} Nyström page 172. See Directive 2002/14/EC article 6 on Confidential information.
\bibitem{1546} Compare in the context of the Directive on Collective Redundancies Case C-188/03 Junk paragraphs 36-37.
\end{thebibliography}
in the timing of the directive’s obligations. This is highlighted when into account is taken that consultation is to take place with “a view to reaching an agreement on decisions within the scope if the employer’s powers”,\textsuperscript{1547} denoting to decisions likely to lead to substantial changes in work organisation or in contractual relations,\textsuperscript{1548} extending its effects also to the area of employee employability.

According to the Preamble, there is a need to “facilitate employee access to training”.\textsuperscript{1549} This is important especially in restructuring context, to facilitate further employment. With regards to employment threat there is contradiction between the wording of the Preamble on measures to be taken,\textsuperscript{1550} the directive’s articles being to a large extent silent on the matter except a short mention on “any anticipatory measures envisaged”\textsuperscript{1551} and legal theory’s interpretations, being more far-reaching compared to the directive’s actual obligations. Employee access to training is not included in the directive’s obligations. In the EU-context there is, however, a strong emphasis on importance of training and acquisition of skills.\textsuperscript{1552} No access to training is a labour market risk.\textsuperscript{1553} Within the EU, a legislative framework should be created, targeted to guarantee access to training from a lifelong perspective.

The employee representatives’ level of protection and competence is defined at the Member State level. Based on the directive on Collective Redundancies, this obligation cannot be frustrated by making limitations for the protection or on the competence.\textsuperscript{1554} Defining of employee representatives’ representativeness is of practical importance.\textsuperscript{1555} It may largely affect the practical carrying out of the enacted procedures and, consequently, also the end-results, evaluated from the perspective of different employee groups.

\textsuperscript{1547} Directive 2002/14/EC Article 4 4. (e).
\textsuperscript{1548} Directive 2002/14/EC Article 4 2. (c).
\textsuperscript{1549} Directive 2002/14/EC Preamble point (7); See also Industrial Relations 2006 page 157.
\textsuperscript{1550} Directive 2002/14/EC Preamble point (8).
\textsuperscript{1551} Directive 2002/14/EC Preamble point (7).
\textsuperscript{1552} Directive 2002/14/EC Article 4 2. (b).
\textsuperscript{1553} See Industrial Relations 2006 page 17.
\textsuperscript{1554} See Industrial Relations 2006 page 147.
\textsuperscript{1555} See C-383/92 Commission v. UK Summary 1 and paragraph 8.
\textsuperscript{1555} See ACU 2007 § 2:8, especially 2:8.2 and Government Proposal for ACU 2007 pp. 29-30, especially page 29. See British model on employee representation TUL(C)RA, Schedule A1. In the first place employees are represented via a recognised trade union. This lacking, other kind of representation may be arranged. If specially elected employee representatives are to be elected, an employer is responsible to arrange the election, making sure that arrangements are reasonable practical to ensure that the election is fair. The employer is to determine the number of representatives so that there are sufficient representatives to represent the interest of all the affected employees, having regard to the number and classes of the employees. The employer is to decide whether the effected employees should be represented by the representatives of all the affected employees or by representatives of particular classes of those employees. See further TUPE 2006 guide pp. 27-28 and Redundancy consultation and notification – Guidance page 2.
The employee representatives’ right to information and consultation has been evaluated to have established itself now at the EU-level as a matter of general principle, but not yet as a general right.1556 This conclusion can be agreed upon, based on the evaluation of the enacted measures.

3.5.5. CONFIDENTIAL INFORMATION VERSUS EMPLOYEE IMPLICATIONS

The directive’s starting point is that the undertakings’ interests on disclosure of sensitive information are protected in the national law. The Member States have to provide in their national legislation that the employee representatives and any experts assisting them – having got the information – are not authorised to reveal to employees or to third parties any information which, in the legitimate interest of the undertaking or the establishment, has expressly been provided to them in confidence. This obligation applies after the expiry of the terms of office. The Member States may authorise the employee representatives or those assisting them to pass on confidential information to employees and to third parties.1557

The Member States shall provide, in specific cases and within conditions and limits laid down by national legislation, the employer is not obliged to communicate information or undertake consultation when the nature of information or consultation is such that according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it.1558 Member States have to provide for administrative or judicial review procedures in cases employer requiring confidentiality or not providing the information, including procedures intended to safeguard the information’s confidentiality1559.1560

In the case C-384/02 Grøngaard and Bang the ECJ interpreted employee representatives’ disclosure’s scope in publicly traded companies. The disclosure related to a plan on merger negotiations between two Danish financial institutions. The publication of the merger plans was supposed to increase the market price of securities, having also taken place. It was also anticipated that the merger would affect consequences on the staff.1561

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1556 Rodière in Morin page 367.
1558 Directive 2002/14/EC Preamble points (25)-(26) and article 6 2., see also 6 3.; Nyström page 173; Rautiainen – Äimälä – Hollmén pp. 218 and 227; Liukkunen page 285.
1561 C-384/02 Grøngaard and Bang paragraphs 15, 17 and 19.
Regarding employee representatives’ disclosure’s scope in publicly traded companies, according to the ECJ, there has to be a link between the disclosure and the exercise of an employee representative’s employment, profession or duties. It is further required that the disclosure is *strictly necessary* for the exercise of that employment, profession or duties. In the assessment into account is taken that the prohibition of disclosure of inside information must be interpreted strictly. Each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary to confidential nature of inside information. Also the sensitivity of the inside information is to be taken into account.¹⁵６²

The judgment in the Case C-384/02 Grøngaard and Bang did not cover the planned merger’s consequences on the staff. The employee implications were totally left without attention.

**3.5.6. CONCLUSIONS ON INFORMATION’S CONFIDENTIALITY VERSUS EMPLOYEE IMPLICATIONS**

The provisions on information’s confidentiality can be evaluated to cover any matter of strategic character in company context. Restructuring in its different forms is a core issue in this area. The provisions on information’s confidentiality are exceptions to information and consultation procedures, narrowing their scope.

In the directive’s Preamble there are expressly stated a need to promote and enhance information and consultation “where the employment situation within the undertaking may be under threat”,¹⁵６³ denoting to the practical consequences of restructuring measures,¹⁵６⁴ and that “timely information and consultation is a prerequisite for the success of the restructuring”.¹⁵６⁵

The provisions on confidentiality are exception to information and consultation, requiring narrow interpretation.¹⁵６⁶ In restructuring issues are strategic in character, having a business secret nature referring to the information’s confidentiality. Irrespective of the confidentiality provision’s narrow construction, the set restrictions are in individual cases apt to make void the directive’s in the Preamble enacted purposes and the enacted measures for information and consultation. The restrictions create serious limitations on information and consultation procedures’ practical carrying out, taking into account also that in a listed company a need merely to inform employees is not a

¹⁵６² Case C-384/02 Grøngaard and Bang Summary; Rautiainen – Äimälä – Hollmén pp. 223-226.
¹⁵６³ Directive 2002/14/EC Preamble point (8).
¹⁵６⁴ See Lehto pp. 6, 31 and 46-47.
¹⁵６⁵ Directive 2002/14/EC Preamble point (9). See Vuorenmaa pp. 82-84.
¹⁵６⁶ Compare E-2/95 Eidesund paragraph 63.
valid reason for disclosing inside information, the disclosure having to be strictly necessary for the exercise of employee representative’s tasks.1567

There is a close relationship between the directives on Informing and consulting employees with the directives on Transfers of Undertakings and Collective Redundancies. The directives on Transfers of Undertakings and Collective Redundancies are largely focused on restructuring transactions’ consequences. They cover measures having already been under company or undertaking decision-making, having thus largely lost business secret and confidential character.

The judgment of the Case C-384/02 Grøngaard and Bang did not at all handle the planned merger’s consequences from the staff’s perspective. The employee implications were completely left without attention. The judgment may be interpreted to reinforce the narrow scope of company stakeholders in the EU-company law, the employees and their interests being granted a secondary role.

3.6. CONCLUSIVE EVALUATION OF THE 3RD DIRECTIVE ON MERGERS AND RELATED EU-LABOUR LAW

At the nation state level1568 and from an individual employee point of view flexibility can be interpreted in opposition to continuance and stability. The flexibility inherent especially in the directive on Transfers of Undertakings has to do with labour market exit and decreasing established employment conditions’ level. These are factors characterising the risk-society described by Beck. It is not exaggeration to claim that the directive on Transfers of Undertaking as one of the first tools of the European labour law policy can also be interpreted as one of the tools resulting in the present production ways emphasising flexibility in its different forms.

Business economics shows that over half of restructuring transactions fail.1569 The failure percentage is estimated to be even over 70 per cent.1570 The above-mentioned has to do with legislation’s coherence, in fact with the legislation’s predictability. It concerns legislation’s defined goals in relation to the actual results. At the EU-level merger law’s coherence can be evaluated defective in many ways, covering also transfers of undertakings.

1567 Rautiainen – Äimälä – Hollmén page 225.
1568 See Industrial Relations 2006 page 15, stating the motivation for greater flexibility coming from both employers and national governments, the latter trying to facilitate entry and exit to the labour market.
1569 Vuorenmaa page 9.
1570 Peng page 381.
The division of law into branches makes possible to define stakeholder groups differently, depending on the context. In the present research the division of law into different branches has been claimed to conceal the company and labour law procedures’ differences, resulting in differences in protection in relation to different groups claimed to be protected.

The 3rd directive on mergers is based on an idea of a limited company as a bundle of narrowly defined financial relationships. The shareholders and creditors are the protected stakeholders. In company law a merger is based on a binding agreement between the participating companies on a merger’s conditions, targeted to the continuance of shareholder relationships, denoting to a general succession. The conditions are first stated in a draft agreement, to be later accepted as the merger’s final conditions. The protection of shareholder and creditor rights is further guaranteed in the procedure by a double reporting on the draft terms, a written report by the participating companies’ administrative or management bodies and the experts’ reports and a publication of the draft terms.

Acceptance of the draft terms takes place in a general meeting of the shareholders. The shareholders thus accept themselves the agreement. Shareholders forming at least one-third of share capital and votes have a right to resist a merger. This forms a central part of minority rights. In an acquiring company the adoption takes place in an administrative or management body, but in a general meeting, if shareholders representing at the maximum five per cent of share capital so demand. Also this procedure is a part of minority rights. At the Member State level special protective measures have to be enacted to protect creditor interests in a merger, the merger not adversely affecting their interests.1571

In the company law procedure employees have no role, they are not held stakeholders. In a merger their status is enacted principally in the directive on Transfers of Undertakings. Also directives on Collective Redundancies and Informing and consulting employees are applicable. The first two of the directives are targeted towards employee protection. The directive on Informing and consulting employees emphasises according to its Preamble especially the employees’ adaptability as the main tool to cope with the constant change, being affected also by an increase in the M&A.

The directive on Transfers of Undertakings is targeted to employment relationships’ continuance with former rights and obligations. The character of the employee measures is, however, different.

1571 See CA 2006 § 16:6.1, granting to creditors a right to object.
compared to the ones affecting shareholders, and also creditors, under company law, when evaluated from the perspective of economic value protection. The general succession concept in the directive on Transfers of Undertakings is modified in character. The enacted model makes business reorganisation resulting from restructuring easy. From the employee point of view, the present research’s results largely question general succession in transfers of undertakings. In spite of the employment relationships’ transfer, essential derogations are allowed, also taking place in practise, after the transfer in fact nullifying the general succession, affecting the level of employee protection.

The claim is due to three factors.

Outside purely company-law-based mergers, the application of the directive on Transfers of Undertakings is generally dependent on the fulfilment of the concept of “a stable economic entity” being transferred. In core, a stable economic entity has to do with organising an economic entity. This is a matter of an employer’s decision-making.

ECJ case law has accepted even dismissals of employee majority in a transfer of an undertaking’s context, not precluding the directive’s application. This kind of case law gives good reasons to argue the validity of the concept of a transfer of an economic entity, employees forming a part of it. When the transfer of the workforce is mitigated by large-scale dismissals, also one of the factors characterising an economic entity is vanished. In defining an economic entity, employees have consequently only a secondary role. In relation to the employees, the end-results are dualistic. In the case of the employees not dismissed the end-result is the continuance of employment relationships, equalling with the goal of employee protection. From the dismissed employees’ point of view, the end-result is just the opposite, the legal effects equalling themselves with those in a company’s dissolution, with no means at use to limit dismissal grounds or have a right to continued employment.

Irrespective of the starting point of employment relationships’ continuance with the former rights and obligations as such, this is not without exceptions. The directive grants employers different options to change the level of employment conditions. Weakening is possible of employment contracts and relationship conditions if not based on a transfer of an undertaking, as such, and not substantial in character. Changes connected with the transfer are allowed. Changes based on national practises outside a transfer’s context are allowed. A change in the applicable collective
agreement is allowed. The application of the transferor’s collective agreement can be limited, either until that agreement’s date of termination, or the Member States themselves limiting the terms’ application, not less than one year.

Dismissals based solely on a transfer are forbidden. But there are enacted wide powers to dismissals on economic, technical and organisational reasons entailing changes in the workforce, irrespective of the company’s or undertaking’s actual economic state. In the case of termination of employment contracts and relationships, the legal effects of a merger and legal transfer equal themselves with the legal effects taking place in company dissolution. The consequences of a dismissal are determined at the Member State level, with varying procedures, practises and consequences, denoting thus to a varying level of protection.

The allowed alterations of employment terms and conditions combined with wide dismissal powers and varying consequences are apt to increase personnel costs-related competition between the Member States. It is simultaneously also apt to weaken the EU’s social policy’s legitimacy, the harmonisation process having to a large extent only a surface-value.1572

Into account has also to be taken the ECJ’s case law with its changing emphasises. There is to be seen a discernible shift from emphasising protective goals to economic ones, emphasising free enterprise instead of employee protection.1573

Due to all the above-mentioned factors, employee protection in a merger and legal transfer, generally in a transfer of an undertaking, lack in practise to a large extent the protective elements of continuance and stability. They have, however, traditionally been inherent in the concept of general succession.

The directive on Transfers of Undertakings contains an information obligation. The employees have to be informed of the transfer and its consequences. This provision is affected by national practises, resulting in its practical significance from the employees’ perspective. In Sweden, employee representatives are consulted on a transfer of undertaking, covering also a merger,1574 before an

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1572 Compare Hellsten 2007/a pp. 30-33 on a premise labour not being a commodity.
1573 Barnard pp. 670-671.
employer makes a decision on the transaction’s carrying out.\textsuperscript{1575} In Finland, in the case of the acquiring company or the company being formed decisive for the information obligations’ initiation is a merger’s registration for enforcement,\textsuperscript{1576} denoting to a fully completed legal transaction in the company law sense. In the case of measures envisaged, the employer has to begin a consultation procedure, with a view to seek an agreement. If the agreement is not reached, the employer has a right to make unilaterally decisions on the employment conditions’ level and relationships’ continuance, with the exception these not being solely based on a transfer and in the framework of national provisions. This makes a significant difference between the safeguards in the 3\textsuperscript{rd} directive and the directive on Transfers of Undertakings. The 3\textsuperscript{rd} directive on mergers with its procedures is targeted towards the continuance of shareholder rights unaffected and, depending on the scope of the national provisions, covering also creditors. As regards shareholders, the procedure is based on an agreement, being ultimately dependable on the stakeholders’ themselves active participation, taking place by the accepting or rejecting of the agreement by shareholders. The shareholders have at their use means of active involvement, ultimately in the form of accepting or rejecting the offered conditions. With regards to employees, there is an obligation to seek an agreement on measures, referring in practise even to alteration in employment contract conditions in the form of deteriorations or terminations. The agreement’s contents differ in character compared to the one on the shareholders, purported to shareholdings’ continuation unaffected. If an agreement on measures affecting employees is not reached, decisions are made unilaterally by the employer. The mechanisms for the protection of shareholder and employee economic rights differ, affecting also the end-results and thus the stability of the economic protection.

At the moment the procedures under the 3\textsuperscript{rd} directive on mergers and the directive on Transfers of Undertakings are separate and in character different. The directives, thus the procedures should be unified. In the unification process also the enacted measures’ character in relation to the employees should be taken under evaluation. Employment relationships’ character as economic relationships should be acknowledged, being equal with the relationships made by the shareholders and creditors with the company. This equalisation can be done irrespective of the underlining company formation principles, be these based on concessive or contractual theories.

\textsuperscript{1576} Rautiainen – Āimālā – Hollmén page 174.
The merger procedure needs re-evaluation. The draft terms’ scope has to be extended. The draft terms should cover a national level merger’s employee implications, employment included.\textsuperscript{1577} The managements’ and experts’ reports need to be extended consequently. All the documents should cover a framework on a merger procedure’s actual carrying out, targeted to its goals’ achievement.\textsuperscript{1578} Also a merger’s effects on a company’s status at the product-markets need to be included.\textsuperscript{1579} This is important in securing a company’s activities’ long-term success, affecting employment.

At the EU- and Member State level is needed the evaluation of basic company law principles. It is connected also with the concepts and practical implementation of employee involvement, participation included, denoting to corporate governance.

Resulting from the evaluation of the basic company law principles, employees’ role in the merger procedure may be further evaluated. They could be granted a status comparable to that of the minority shareholders. This denotes to granting employees rights equalling with those of the minority shareholders, covering a right to object a merger’s acceptance in a general meeting.\textsuperscript{1580} In an acquiring company the employees could be granted a right to demand decision-making in a general meeting, followed by a right to object a merger’s acceptance. In order to secure employee acceptance, the procedures as a whole have to be planned and implemented with care. These rights could be extended to cover all restructuring matters, closures included. As regards shareholders, minority rights in a merger have not been evaluated forbidden restriction on competition or a right of establishment.\textsuperscript{1581} There is neither to be found legal theory evaluating shareholders’ minority rights as a hindrance to the free movement of goods or services. These interpretations and evaluations do not consequently give heed to re-evaluation regarding equivalent rights’ extension to employees, too.

From the employee point of view, the proposals are grounded with economic grounds. Employment relationships are economic in character, comparable to the contracts made by the shareholders and creditors with the company.

\textsuperscript{1578} See Vuorenmaa pp. 9, 96 and 118.
\textsuperscript{1579} See Ellsworth page 1 and Elkington pp. 272 and 315.
\textsuperscript{1580} See Toiviainen 2004 page 159 proposing employees’ veto-rights.
\textsuperscript{1581} Compare Kuoppamäki 2007 pp. 200-201, especially page 201.
From the company and shareholder perspective, the 3rd directive’s and the directive on Transfers of Undertakings’s revision to the outlined direction can be grounded with competitive reasons. The development of competitive advantage in a stable manner in a knowledge-based production needs as its prerequisites continuance, stability and commitment.\textsuperscript{1582} The revisions can also be grounded by corporate citizenship.\textsuperscript{1583} Also pressures on the social security models at the Member State level, under constant changes due to financial pressures,\textsuperscript{1584} have a role.

It is not exaggeration to say that the employees seem to be affected by two kinds of risks. The employees meet the commercial risks in the form of weakening employment conditions or even in the form of totally losing employment due to restructuring. The taking care of consequences takes place in the individual Member States’ varying systems, now under pressure.

Under the directive on Transfers of Undertakings in the case of an unlawful dismissal only monetary compensation is possible. A right to continued employment is generally precluded. This may be evaluated contradictory to the directive’s protective starting points. Consequences of unlawful dismissals due to restructuring should be taken under consideration at the EU-level, to be equalled. A method of assessment\textsuperscript{1585} in evaluating dismissals in restructuring context could be taken into use, in addition to limiting their grounds. In the assessment the restructuring situation is evaluated as a wholeness. Into account are taken in an objective manner grounds and targets, the situation before the restructuring procedure and after its completion, in order to assess if the dismissals are in practise due to a merger or a legal transfer, although they are grounded by economic, technical or organisational reasons denoting changes in the workforce.\textsuperscript{1586} The evaluation of dismissal grounds\textsuperscript{1587} at the EU-level cannot be evaluated as a restriction to free enterprise, but vice versa. The re-evaluation of dismissal grounds can be based and justified on the need to enhance stability and continuance, important in developing competitive advantage in a long-term manner. It is based on commitment to long-term employment relationships.\textsuperscript{1588} The evaluation is also apt to lead to decrease in labour-law competition between the Member States, increasing the legitimacy of EU social policy.

\begin{itemize}
  \item\textsuperscript{1582} Compare Elkington pp. 84-86, 155-156, 300, 311, 319, 324, 327, 331 and 345, Porter pp. 657 and 665 and Ellsworth page 221.
  \item\textsuperscript{1583} See Crane – Matten pp. 61-71, especially page 64 and Crane – Matten 2007 pp. 70-79, especially page 73. See Elkington pp. 73, 155-156, 216, 272, 300, 311, 315 and 331.
  \item\textsuperscript{1584} Industrial Relations 2006 pp. 157-158.
  \item Heikki Toiviainen 24.1.2008.
  \item\textsuperscript{1586} Compare Case 101/87 P. Bork International paragraph 18.
  \item\textsuperscript{1587} See also Toiviainen 2004 page 159, proposing the definition of dismissal grounds. See Hellsten 2007 pp. 16-17.
  \item\textsuperscript{1588} Compare Porter pp. 657 and 665, Elkington pp. 73, 272, 311, 315 and 327 and Stiglitz page 190.
\end{itemize}
The re-evaluation of dismissal grounds in the directive on Transfers of Undertakings is linked with the measures and procedures in the directive on Collective Redundancies. Collective redundancies should be viewed as a crisis measure, their use being limited to the minimum. The directive in its present form does not support this goal. The directive on Collective Redundancies is labelled by procedural safeguards. It does not contain substantive safeguards. These, if there are any, are defined at the Member State level. In order to in practise level companies’ costs in restructuring, substantive safeguards under the directive on Collective Redundancies should be taken under consideration. Included should also be the right of employees, or their representatives, or public authorities or all of these parties, to question dismissals contemplated by an employer. This could cover objection or setting of conditions on the actual carrying out of collective redundancies, especially due to social factors in the form of employment considerations.

The re-consideration should also cover restructuring’s consequences. In alleviating restructuring’s consequences an implementation of a European change security model has been proposed. The model is based on employers’ collective financing. It covers all employee groups. The model is targeted to re-employment, using as its means also re-training, re-education and self-employment. Individual action plans’ carrying out is supported by constant individual-level consultation.\textsuperscript{1589}

In developing further the model, special attention needs to be put on the share of responsibilities between employers and public power.

The re-evaluation of the directive on Collective Redundancies should be combined with the evaluation of the 3\textsuperscript{rd} directive on mergers and the directive on Transfers of Undertakings. The re-evaluation of the directives cannot be considered as a restraint to free enterprise. Instead emphasised is a profound long-term planning in company matters.\textsuperscript{1590} The reconsideration’s taking place at the EU level is important to decrease competition on employee-related costs between the Member States.

In the directive on Informing and consulting employees, its Preamble is of interest. It states almost word by word changes having taken place in production ways, shown and stated by sociological research. The changes are expressed in the Preamble in a way stating them to be inevitable in character, something comparable to the laws of natural sciences, without options to affect them and

\textsuperscript{1589} Bruun 2005 pp. 196-197. See Hellsten  2007a page 58.
\textsuperscript{1590} Compare Elkington pp. 73, 272, 311, 315 and 327 and Stiglitz page 190.
change the course of action. In the directive, its Preamble included, steering of change is not taken into account. In steering of change employers have a remarkable role. The role granted to the employees in the change process is another matter worth of noting. The directive’s mainly procedural guarantees’ purpose is to enhance among the others work organisation flexibility, make employees aware of adaptation needs and increase employee availability to undertake measures and activities to increase their employability. The emphasis is clearly on demands on continuing flexibility and adaptation on the employees’ side, without substantive inputs on the employer’s side to increase the stated goals’ achievement on the basis of commitment, continuance and stability, in order to increase trust and create competitive advantage in a stable manner. In spite of the emphasis on training and skills development, measures in this field are outside the directive’s enacted provisions. At the EU-level a legislative framework should be created on proactive skills development, training and education in a life-long perspective. Special attention should be put on training’s and education’s length and quality.

In the directive on Informing and consulting employees there is a contradiction between the Preamble’s text and actual enacted procedures. In the Preamble there is a statement on the need to promote employee involvement in the operation and the future of the undertaking and increase its competitiveness. Involvement denotes also to participation, not only to information and consultation in their traditional forms, being in character either unilateral procedures or procedures in which the employer with his/her decision-making power makes the final decisions, either taking into account or not the employees’ opinion, in the case of an agreement or consensus not having been reached. From the perspective of developing mutual trust and long-term competitive advantage the substance of measures should be taken under evaluation. At the last stage the matter has to do with the employees’ participation rights in the employer decision-making, denoting to corporate governance, being at the moment an unsettled matter at the EU-level.

In addition to shareholders’ monetary investments, employees’ inputs are necessary preconditions in knowledge-based production. Both of these inputs are essential elements in carrying out business, restructuring included. Restructuring matters are end-results of strategic planning and decision-making at the company level. General meeting and administrative or management bodies are platforms for strategic decision-making in company matters. Within the EU-law employees are not

1591 See Ellsworth page 221.
1593 See Porter page 164 and compare Drucker pp. 132-133.
granted at the national level\textsuperscript{1594} options to influence matters of strategic level, leaving their know-how unused at this level. There is to be perceived a double-loophole with regards to companies’ long-term development. Investors with short investments spans do not represent a long-term company development, and employees are left without options to influence it.

\textsuperscript{1594} Compare Bruun page 285.
PART III NATIONAL RESTRUCTURING LAW IN THE RESEARCH CONTEXT

1 RESTRUCTURING LAW IN FINLAND IN THE RESEARCH CONTEXT

1.1. ON FINNISH LIMITED COMPANIES LAW

1.1.1. EMPLOYEES IN A LIMITED COMPANY’S DECISION-MAKING

Traditionally there have been available two, or with regards to Finland, three options to influence employment agreements’ contents. They are influenced in collective agreements, based on parties’ negotiations. They may be influenced by labour law. Thirdly, they may be influenced directly in a company´s decision-making. Investments are granted an equal status by equalling share-ownership and employees’ inputs at work.\(^{1595} \text{ } 1596\)

In Finland, there is an established view on employees’ status in a limited company’s decision-making. It is not in the Companies Act’s scope to regulate employee participation in company decision-making.\(^{1597}\)

Shareholders use their share-ownership based decision-making rights in a general meeting, making the most important decisions in company matters.\(^{1598}\) Employees, if also shareholders, can use equal rights on the basis of the Employee Fund Act.\(^{1599}\) Employees as fund owners and managers in investing assets in the company being employed of, are also company shareholders, being a means of direct influence in company matters.\(^{1600}\) Funds formed on the EFA basis are not popular in Finland.\(^{1601}\) This implies also narrow scope in employees’ decision-making in a general meeting.

According to one interpretation, articles of association are interpreted as shareholders’ mutual agreement on their mutual relationships and the way of carrying out a company’s business activities, to be changed only on a general meeting decision.\(^{1602}\) In the articles of association can be

\(^{1595}\) Lavén pp. 29 and 84.
\(^{1596}\) See on Sweden’s part Lavén page 28.
\(^{1598}\) CA 2006 §§ 5:1.1 and 5:6.1; Immonen – Nuolimaa pp. 76-78.
\(^{1599}\) Toiviainen 2004 page 10.
\(^{1601}\) Toiviainen 2004 page 136.
\(^{1602}\) CA 2006 §§ 1:3 and 5:3.1 ; Airaksinen – Pulkkinen – Rasimaho I pp. 59 and 65.
stipulated that in a limited company a minority of the members of the board of directors\textsuperscript{1603} are elected by other than a competent company organ, outside a general meeting or supervisory board.\textsuperscript{1604} Employee representation takes place by a company’s own voluntary act, in the form of direct influence.\textsuperscript{1605} Elected members act as regular members of the body in question.\textsuperscript{1606}

In Finland, it is not a common practise to organise employee representation in the board, even as a minority one, based on the articles of association. This diminishes the arrangement’s practical relevance.\textsuperscript{1607}

Employee representation in company decision-making is primarily based on the labour law, the Employee Representation Act, being a form of direct influence.\textsuperscript{1608} The ERA’s purpose is to develop an enterprise’s activities, make cooperation between an employer and employees more efficient and improve employees’ possibilities to have influence over the employer’s business activities.\textsuperscript{1609} It is applicable in Finnish companies, the average number of employees working regularly in Finland being at least 150\textsuperscript{1610}.\textsuperscript{1611}

Under the ERA, employee representation is in the first place based on a contract between the employer and at least two employees’ groups, representing the majority of employees.\textsuperscript{1612} If an agreement is not reached, the representation has to be arranged according to the enacted provisions, on the request of at least two employee groups. Company has to arrange employee representation according its own choice on its actual form. A board membership need not be arranged.\textsuperscript{1613} Representation may take place in a board, supervisory board or executive bodies responsible for company’s result. Final decision on representation’s form is a company’s own choice.\textsuperscript{1614} In a

\textsuperscript{1603} CA 2006 § 6:8.1 on the number of board members, minimum being three if not stipulated otherwise in the articles of association. If the number of members is less than three, there has to be at least one deputy. See also Immonen – Nuolimaa page 86.
\textsuperscript{1604} Immonen – Nuolimaa page 87.
\textsuperscript{1605} CA 2006 § 6:9; Toiviainen 2004 pp. 2, 8-10 and 40; Immonen - Nuolimaa page 48.
\textsuperscript{1606} Toiviainen 2004 pp. 26 and 40.
\textsuperscript{1607} Toiviainen 2004 page 119.
\textsuperscript{1608} Toiviainen 2004 pp. 3-4, 8 and 10; Immonen - Nuolimaa page 87.
\textsuperscript{1609} ERA § 1; Toiviainen 2004 page 20; Liukkunen page 228.
\textsuperscript{1610} ERA § 2; Toiviainen 2004 pp. 20-21; Airaksinen – Pulkkinen – Rasinaho I page 347; Liukkunen pp. 228-229.
\textsuperscript{1611} See Toiviainen 2008 pp. 451-452.
\textsuperscript{1612} ERA § 3; Toiviainen 2004 pp. 22-23.
\textsuperscript{1613} Airaksinen – Pulkkinen – Rasinaho I page 347; Liukkunen page 229.
\textsuperscript{1614} ERA § 5.1; Toiviainen 2004 pp. 24, 27 and 41; Liukkunen pp. 229 and 232.
company structure change due to an a transfer of a business, merger or division, employee representation has to be changed consequently, at least within a year upon the request.1615

Employee representatives, being also employees of a company in question,1616 may include one-fourth of the total number of members in a body in question, at least one, at the most four.1617 Employee representatives elected on the ERA basis are counted in addition to members otherwise elected.1618 Employee representatives do not have powers to decide among the others on the conditions of employment contract.1619

The scope of action of employee representatives is limited due to a duty of secrecy.1620 The company, in fact the company organ in which the employee representation is carried out, may denote a specific issue a business secret or in some other way confidential, prejudicing the company or its contract party, if made public. This kind of a matter can be handled only with the employees whom it concerns. Information is not allowed to be delivered to a wider sphere of employees.1621

One aspect linked with the board membership has to do with the right to be present in general meetings, not public in character. Participation right in general meetings is principally granted to board members.1622 Employees may have a right to be present in a general meeting due to share ownership, a board membership or if specially decided.

Employee participation in limited company’s decision-making can be summarised to be at a low level. If the representation is arranged, it is always in character minority decision-making, taking seldom place in a board. This has practical consequences: employees as a group are also principally outside of actual substantive decision-making in a limited company.1623 The duty of secrecy is also important from practical point of view. It effectively hinders a wider delivering of information, affecting in a limiting way employee rights to information, consequently limiting employee involvement.

1615 ERA § 5.3; Liukkunen page 229.
1616 ERA § 6; Toiviainen 2004 pp. 38 and 40.
1617 ERA § 5.2; Toiviainen 2004 page 25; Liukkunen page 229.
1618 Toiviainen 2004 pp. 28-29 and 41.
1619 Airaksinen – Pulkkinen – Rasinaho I page 347; Liukkunen page 229.
1620 ERA § 12.
1621 ERA § 12.1; Toiviainen 2004 pp. 112 and 116-117. See also also with regards to listed companies on limitations to disclosure C-384/02 Grøngaard, Bang Summary and Rautiainen – Äimälä - Hollmén pp. 223-226, and generally on confidentiality within ACU 2007 § 9:57.
1622 CA 2006 § 5:10; Airaksinen – Pulkkinen – Rasinaho I pp. 243-244.
1623 Toiviainen 2004 pp. 136-137.
Restructuring issues, mergers included, are strategic in character and based on a long-term company planning. They have far-reaching practical consequences on employee protection and status.1624 The consequences concern both those not anymore employed and those still employed due to changes in business operations affected by restructuring.1625 Issues of strategic character are commonly under the duty of secrecy. In addition to limited participation rights in strategic matters, the duty of secrecy essentially limits their handling between employee representatives and employees.

Employees’ role in restructuring has hardly been evaluated in Finland, by taking into account the procedures’ scope, practical carrying out including results and employee involvement in the procedure. This kind of evaluation is, however, important, due to the large scale of these transactions in Finland and the high failure percentage of restructuring transactions. Increasing employee perspective in restructuring – decision-making included – cannot straightforward be interpreted as “tightening of legislation”,1626 if evaluated from a goal of increasing the success of these transactions. Central is to strengthen the quality of long-term company development, being connected with the best possible use of the inputs provided by employees. Both of these issues have ultimately to do with a company’s own long-term success.

1.1.2. BASIS OF A LIMITED COMPANY’S BUSINESS

Limited liability companies although individual actors as such are together a remarkable force in the Finnish society. Over one-third of enterprises registered in the commercial register carry out their business activities in the form of a limited liability company. They offer also most of employment opportunities in the private sector. They act as parties in different kinds of contractual arrangements. Due to their wide scale of business activities limited companies are important actors in the national economy as a whole.1627

According to statistics, there were in Finland on 31 December 2007 nearly 190,000 companies limited by shares.1628 They are small in size. In Finland 99.8 per cent of companies generally employ fewer than 250 employees.1629 In 2002, there were in Finland only 570 limited companies

1624 See Lehto pp. 6, 31 and 46.
1626 Compare Bruun page 284, denoting in the context of developing the EU–law on cross-border employee involvement to multinational companies’ opposition, having since vanished.
1627 Mähönen – Süläläki – Villa page 17.
employing more than 250 employees. The majority of limited companies are private ones. In 2006, there were in Finland only 212 public companies limited by shares.

The former Finnish Companies Act of 1978 was drafted in co-operation with the other Nordic countries. This legislative coordination is now lost. The development is due to company law renewals in the Nordic countries since 1990s, having taken place uncoordinated and independently.

The Companies Act 2006 is based on flexibility. It is targeted towards the carrying out of business activities in a competitive way. It is purported especially to meet the needs of small companies. The strive for flexibility is reflected especially in merger provisions, targeted to a procedure’s shortening. The Finnish Companies Act is also targeted to act as an incentive for companies considering remaining established in Finland, or considering establishment in Finland. The Finnish Companies Act 2006 can be evaluated to reflect at least to some extent the general move towards flexibility now prevalent in the renewal of company law at the European level and in the individual Member States.

The Companies Act 2006 is targeted to clarify legislation’s contents. It is targeted to be the primary source when organising activities in limited liability company form. All having an interest in carrying out business in this company form get the needed information from the Companies Act itself. This concerns the legal form of a limited liability company, concept of shares, carrying out of business activities and different kinds of procedures in relation to different interest groups and parties. In this context the concept of interest groups and parties has been interpreted to include shareholders, governing bodies’ members, employees, creditors, contracting parties and all those having an interest in company matters. Enactments’ clarifying has been evaluated important especially from those interest groups’ perspective having the weakest possibilities to find out law’s contents and who at the same time have the highest contributions at stake, reference being made especially to minority shareholders and creditors. In this context, employees are not included in the circle of stakeholders.

1631 Immonen - Nuolimaa pp. 15-16.
1633 See Toiviainen 2008 page 417.
1635 Proposal 109/2005 for CA page 34.
The Companies Act is not the only legislative source on a limited liability company’s activities. Securities Markets Act plays an important role, forming the basis for listed company financing,1637 these kinds of corporations being also large-scale employers. Labour law is thought to be of importance, by forming the framework in organising the use of labour. Also public opinion is considered relevant. The reference to public opinion, although a statement of a profound truth and practical relevance contains still only a moral obligation, with no legally binding force. A limited company, when carrying out its responsibilities, has to take into account both of these factors, the legal one and the other one, being ethical and moral in character. A limited liability company’s responsibilities carrying out is linked with and based on a company purpose, generating profits for the shareholders,1638 otherwise resources are used in a manner against the company purpose, being even unlawful.1639

1.1.3. EVALUATIONS ON A LIMITED COMPANY’S CHARACTER

A limited liability company is not defined in the Finnish Companies Act. The legislator has thus taken for granted this kind of a juristic personality’s definition.1640 A habitual thinking of this kind involves dangers. Habitual thinking may prevent critical evaluation. It may leave unnoticed central features of issues under evaluation. Habitual thinking may stand as a barrier to find ways to solve problems to issues under evaluation. In restructuring this is an important point of view, especially form the employees’ perspective.

From the contract law perspective, a limited company has been evaluated as a nexus of contracts. Focus is on the mutual relations of the shareholders, management and the third parties; for example, employees and creditors, the parties’ mutual relations being governed by the Companies Act.1641 The theory denotes in its plainest form to a contractual concept in which a limited company is a contractual arrangement between the parties. The contracting parties are free to decide themselves on a voluntary basis the choice of a company form and other details regarding their mutual relationships, and sanctions not limiting the freedom of action of parties. Parties’ freedom is

1637 ASM § 1:1.1.
1638 CA 2006 § 1:5.
1640 Svensson page 11 on the Swedish CA 2005, valid also in Finland, in relation to the CA 2006. The same question has been posed also by Villiers page 194 in evaluating the European company law harmonisation programme.
1641 Reinkainen – Pelkonen – Lydman page 17.
predominant irrespective of enacting company matters, at least to some extent, in the Companies Act.\(^\text{1642}\)

In the nexus of contracts model a company is formed out of different contracts between different interest groups and actors, without a state’s constituent elements. A company as a web of contracts makes a limited liability company’s owner or owners, as well as the actual ownership itself, invisible.\(^\text{1643}\) In this model different stakeholder status depends largely – even primarily – on the delivered information, being connected with the management’s duty to inform different stakeholders. Essential is information’s scope, timing and target group.\(^\text{1644}\) The status of different parties in the web of contracts has practical consequences, linked with the parties’ rights to be informed. In its plainest form the nexus of contracts theory equals perfectly with changes having taken place in production, this in its turn having changed a limited liability company’s role as a productive organisation to an organisation with centrally economic character, inevitably affecting employee status.

A limited company’s profit-making purpose in a long term perspective and the focus on shareholders as central stakeholders can be linked together still from another point of view, by carrying out the profit-making purpose “by sufficiently taking into account the other interest groups”.\(^\text{1645}\) In addition to profit-maximisation, a limited company can thus have a wider spectre of purposes. They may concern market value, an increase in the number of employed, total amount of paid salaries, investment increases and their total scale, the amount of taxes and distributed profits. This mode of thought emphasises public policy aspects. An enterprise is a means of co-operation between different constituents. This starting point is highlighted in the actions of co-operative societies\(^\text{1646}\) and mutual companies\(^\text{1647, 1648}\).

The model emphasising public policy aspects is near or even equals with the model of the concession theory or communitaire theory, emphasising a state’s concession as the basis for a

\(^{1642}\) Timonen pp. 34-35.
\(^{1643}\) Villa page 4.
\(^{1644}\) Villa pp. 4-5. Compare with ASM Chapter 2, especially §§ 2:5-7 ACU 2007 § 3:10. See Villa page 5 on the need to modify the nexus of contracts theory due to cultural reasons. See also Immonen – Nuolimaa page 75 on the need for information as a part of corporate governance.
\(^{1645}\) Mähönen – Säilikivi – Villa page 33.
\(^{1646}\) ACS § 2.1.
\(^{1647}\) AIC § 3. On the differences between definitions and character of different economic corporate forms see Immonen – Nuolimaa pp. 14-15.
limited company’s actions. A company derives its justification both socially and legally from the society, nowadays on the basis of law. In this model, a limited company’s basic function is product-making, leading to profit-making.\footnote{See Berle – Means pp. 355-356, Ellsworth pp. 29 and 145, Stiglitz page 190, Toiviainen 2004 page 222 and Toiviainen pp. 167-175, 249-259 and 545-547.}

\subsection*{1.1. 4. COMPANIES ACT’S GENERAL PRINCIPLES AND THEIR SOCIAL IMPLICATIONS FROM EMPLOYEES’ PERSPECTIVE}

The Finnish Companies Act emphasises general principles. They have relevance if an issue cannot be solved on the Companies Act’s provisions, or the solution is inadequate, for example, due to changes in business environment. General principles define a company’s activities’ legal basis and the Companies Act’s objects and its scope of protection. Detailed rules have, however, primacy over the general principles.\footnote{Proposal 109/2005 for CA pp. 36-37; Airaksinen – Pulkkinen – Rasinaho I page 4.} General principles are linked with defining a company’s central stakeholders and their mutual relations, covering shareholders, management and creditors. The management consists of managing director, board of directors and supervisory board.\footnote{CA 2006 Chapter 6, especially §§ 6:1, 6:17.1 and 6:21.1; Proposal 109/2005 for CA pp. 78-80 and 86 – 88; On a limited company’s management and a division on management’s tasks and responsibilities see Mähönen – Säiläkivi – Villa pp. 151-185, Reinikainen – Pelkonen – Lydman pp. 105-125.} The general principles form basis for protecting minority shareholders and creditors.\footnote{Mähönen – Säiläkivi – Villa pp. 18-19 and 22-23.}

The general principles define a limited liability company’s legal personality and its limited liability, share-capital and its maintenance,\footnote{CA 2006 § 1:3 on capital, Airaksinen – Pulkkinen – Rasinaho I pp. 15-18.} transferability of shares\footnote{CA 2006 § 1:4 on transferability of shares, Airaksinen – Pulkkinen – Rasinaho I pp. 18-20.} and its purpose. The general principles include also majority rule, equality principle, management’s duties and shareholder decision-making in company matters.\footnote{CA 2006 § 1:2 on legal personality and limited liability, 1:5 on company purpose, 1:6 on majority rule, 1:7 on equality principle, 1:8 on management’s duty to act diligently and loyally and 1:9 on shareholder discretion in company matters; Mähönen – Säiläkivi – Lydman pp. 18 and 24-26. The general principles defined and summarised see Immonen – Nuolimaa pp. 19-28.}

A limited liability company has an independent juristic personality, based on registration. This denotes to a company’s independent rights and obligations and their determination outside shareholders’ circle.\footnote{CA 2006 §§ 1:2.1 and 2:9.1, Airaksinen – Pulkkinen – Rasinaho I pp. 12-13; Reinikainen – Pelkonen – Lydman page 21.}
Shareholders’ liability in company matters is limited. Limitation is based on monetary investments, limiting individual shareholders’ risk. Company’s separateness from its shareholders is further highlighted by company’s organs’ separateness from shareholders. Shareholders’ limited liability facilitates a division between ownership, financing and management. From shareholder perspective this division is claimed to make management’s monitoring in company matters less important. Limited liability is also a means of transferring risk in company matters from shareholders partially to creditors, although in payment order creditors are ranked better compared to shareholders.

The Finnish Companies Act is based on a concept of a limited liability company as a bundle of narrowly defined financial relations, based on monetary investments in the form of shares and securities. This conclusion can be grounded by referring to the established definition on stakeholders and general principles, their focus being on shareholders.

Limited liability has large advantages. It makes possible large-scale capital-raising. At the same time, it may affect large costs to society in the form of externalities that allowing for the externalisation of company action costs.

In the Companies Act there is a presumptive rule on the purpose of a limited liability company: it generates profits for shareholders as a result of its business activities. The rule on company purpose has to be taken into account in evaluating business and management’s activities, including management’s duty to act loyally and diligently.

In recent company law literature an interpretation has been expressed, based on the mutual relations of shareholders and management as a principal and agent, on management’s fundamental task of maximising share ownership’s value. The focus is on management’s tasks to further shareholders’ economic interests, emphasised by a rule on company purpose. Company purpose on generating profits has been interpreted not to denote to utmost profit-maximising, to “a quarterly capitalism”.

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1657 CA 2006 § 1:2.2; Proposal for CA 109/2005 page 38; Reinikainen - Pelkonen - Lydman pp. 21-22; Airaksinen – Pulkkinen – Rasinaho I page 13.
1659 Stiglitz pp. 190 on the definition of an externality, referring to a company’s actions’ consequences, for which it itself does not pay or get the benefit, and pp. 193-194.
1660 CA 2006 § 1:5; Airaksinen – Pulkkinen – Rasinaho I page 20.
1662 Mähönen – Säiläkivi – Villa page 33.
The profit-generating purpose can be carried out in a long time-perspective, targeted to business activities long-time continuance and company value’s long-time increasing, guaranteeing best also creditors’ rights.\footnote{CA 2006 § 1:5; Proposal 109/2005 for CA pp. 18 and 38-39; Reinikainen – Pelkonen – Lydman pp. 23-24 and 26; Mähönen – Säiläkivi – Villa page 34; Airaksinen – Pulkkinen – Rasinaho I pp. 21-22. See Elkington pp. 272 and 300 and 315 on time in relation to sustainability in company activities.} This applies also to the employees.\footnote{See Porter pp. 657 and 665.} 

Profit-generation as a company purpose is natural as such, even evident.\footnote{See Toiviainen 2004 page 156 in the context of the need to develop employees’ representation.} Company purpose cannot be evaluated and cannot in practise be carried out without taking into account company’s stakeholders at large and the effects of company actions on society.\footnote{Compare Stiglitz pp. 190 and 203 and Elkington pp. 73-94.} The present Companies Act’s stakeholder definition and consequently its interpretation in company law literature are primarily narrow, shareholders being the primary stakeholders. In the Companies Act’s preparatory works a limited company’s activities’ wider social implications and implicitly a larger sphere of stakeholders, both being connected with company purpose, have been taken into account. This has taken place in a form which can be evaluated to be moderate, or even a poor one, compared to the formulation in the Proposal for the 1978 Companies Act. The profit-generating purpose in the long run and increase in share values may often demand the carrying out of company activities in ways considered to be socially acceptable, although not mandatory according to law.\footnote{Proposal 27/1977 page 5 compared with Proposal 109/2005 for CA page 39; See Airaksinen – Pulkkinen – Rasinaho I pp. 22-23.}

By furthering the purpose of generating profits, in fact shareholder value maximisation, companies subordinate customer and employee interests to shareholder interests. A company’s focus is on capital markets. Strategies may, however, be focused on product markets. Shareholder value maximisation puts often employees at the secondary place. Division between company purpose of maximising shareholder value and a strategy targeted to provide customers added value, based on a long-term competitive advantage, is apt to lead to an internal conflict in a company, due to emphasis on financial results instead of product-markets. This causes an interest conflict between different stakeholders.\footnote{Ellsworth pp. Preface x, 94 and 136 and pp. 42-51, especially pp. 46-47, emphasising customer-based viewpoint as the fundamental starting point for the existence of a limited liability company. On this see also Toiviainen 2004 page 157. On corporate social responsibility see Immonen – Nuolimaa pp. 124-125.}

The established definition on limited liability company’s central stakeholders and the general principles both reflect a division of social rights and obligations established during the time of the
industrialisation, Golden Years and Welfare State. They also reflect the established division of law into branches. As examples can be mentioned company and labour law, being largely separate action fields, acting independently from each other, both with regards to used concepts, objects, enacted transactions and scope of legal protection.

Taking into account company purpose’s actual contents and the preparatory works’ statement on a limited liability company’s activities’ wider social implications, containing an obligation of merely of a moral character, there seems to be a growing gap between the company purpose of generating solely profits and its actual social effects, also, if compared with activities in some other corporate forms. This gap is highlighted due to changes affected by globalisation and changes in the ways of organising production.\textsuperscript{1669}

The principles on a company’s separate legal personality, its limited liability, profits-generating purpose and the scope of freedom of contracts are matters based on a state’s concession. There is a need of reconsideration with regards to these principles, due to limited companies’ activities’ scope, having a strong social connotation. A limited liability company’s purpose is a fundamental issue in restructuring context. There is no need to give up profit-making purpose. In its defining and actual carrying out there is, however, a need of balancing different company interests and different stakeholder groups’ interests.\textsuperscript{1670} This kind of balancing is important especially in relation to public limited liability companies, due to their role as large-scale employers. The balancing is apt to increase a company’s success in a long-term perspective.

In this reconsideration the principles on a company’s separate legal personality and its limited liability should be re-thought by taking into account a more balanced share of responsibilities between public power and private company actors.\textsuperscript{1671} Reformation of these principles is closely linked with restructuring. The present state of affairs may often make restructuring activities’ carrying out at the company level a matter of traditional strategic decision-making, often narrowly defined, without a need to take into account these operations’ actual long-term costs from a social point of view.\textsuperscript{1672} If a company in a good economic condition and due to reasons linked with

\textsuperscript{1670} Compare Ellsworth Preface x, 1, 19, 42-51, 94, 136 and 225, see also Toiviainen 2004 page 157, Stiglitz pp. 190 and 203 and Elkington pp. 73-94.
\textsuperscript{1671} See Berle – Means pp. 355-356, Toiviainen page 166, Elkington pp. 73, 156, 300, 311 and 331, Stiglitz page 190, Ellsworth pp. 29 and 145.
\textsuperscript{1672} See Stiglitz page 190 on externalities.
There are good reasons to argue to employees also public power having a stakeholder status, too. This can be justified by unemployment costs, carried out in the Finnish framework largely by the public power, denoting to externalising by the company.

According to the principle of equal treatment all shares carry same rights, arising out of share-ownership. The equality principle protects rights attached to shares. Management and majority shareholders are forbidden to misuse their powers in company matters especially to the minority’s detriment. The principle is applicable in all the Companies Act decision-making and in carrying out business actions. It is forbidden to disregard company and shareholder collective interests by favouring the majority shareholder interests. Shareholders’ economic status should stay as such or develop as smoothly as possible. The principle forbids an unjustified advantage at the cost of other shareholders. A violating purpose is not presumed. Decisive are consequences in their actual or presumed form. Also the motive is of significance, having to do with the purported advantages. The principle on equal treatment is based on the principle of validity of contracts. On the basis of both of these principles investors are able to rely on the actual realisation of rights attached to shares in their ownership. The equality principle has importance in a merger with regards to shareholders in the company being acquired.

The principle on equal treatment should be widened from share-owning to cover also employees. This is due to the inputs of employees in production and the character if employment agreements. Both are in character economic, comparable to the shareholders’ monetary investments. In the core of the principle on equal treatment in its reformulated form is employees’ equal status with limited liability company’s traditional primary stakeholders, forming the basis of corporate governance and employee involvement. This kind of reconsideration can be grounded by employees’ fundamental significance in the productive wellbeing of companies, thus economic

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1673 Lehto pp. 6, 31 and 46.
1674 Airaksinen – Pulkkinen – Rasinaho I page 36.
1677 See Supiot page 518 emphasising the protection of employees’ physical and economic security as a value being fundamental in all forms of work; See also Villiers 1998 page 202 emphasising economic values inherent in an employment relationship.
wellbeing. It can be justified by referring to limited companies’ widened social influence, forming also a basis for the economic expectations of employees in relation to a company and its activities. It can be grounded also by referring to the provision in its present forms: the rule on equal treatment emphasises disregarding a company’s and shareholders’ collective interests by favoring majority shareholders’ interests. Any company’s collective interests inevitably cover also employees.

A factor enhancing the importance of reconsideration regarding the principle on equal treatment is of a purely legal nature. It has to do with the principle on validity of contracts. In the Companies Act context contracts made by the shareholders with the company are emphasised, implying these to have more validity compared with the contracts made by the employees with the company. The above-mentioned is one of the core issues in restructuring. Employee agreements and contract-based economic rights are equal with other stakeholders. Employees should thus be considered equal as a stakeholder group. There are still further grounds for reconsideration from the contract law perspective. Changes in production ways and ever larger scale of restructuring transactions create discontinuity, instability and insecurity. The workability of the contract should be emphasised, considered from both of the parties’ perspective, denoting to a company and the employees.

The reconsideration of the principle on equal treatment and the principle on protecting employees are not contradictory. Due to reconsideration there is neither a need to label the principle of employee protection outdated and worth of taking out of use. The principle on employee protection is characterised by the vulnerability of human beings, resulting in needs of protection in safety and health and economically. Economic protection is one of the fundamental features of commercial law, also in restructuring. A part of the Companies Act’s reconsideration of general principles is their reconciliation in the reconsidered form with the other established principles of law, for example, employee protection.

1680 Meinander pp. 240-241; The World Commission page 46; Beck pp. 2-4; 7, 50 and 96-97; Beck 2005 page 150; Mozaffari page 37; Mousseau pp. 107-108.
1681 Compare Lehto pp. 6, 31 and 46-47 and see directive on Transfers of Undertakings Chapter II article 4 and Directive on Collective Redundancies Section I article 1. (a).
1682 Ämmälä page 97, Supiot 2007 page 620.
1683 See Supiot page 518 emphasising the protection of employees’ physical and economic security as a value being fundamental in all forms of work.
Decisions violating the equality principle and made in the general meeting are to be annulled\textsuperscript{1684} by the shareholder or are void,\textsuperscript{1685} as such.\textsuperscript{1686} The equality principle’s reconsideration is apt to lead to re-evaluation on company decision’s validity, too.

The decisions in a general meeting of shareholders\textsuperscript{1687} are done by majority rule.\textsuperscript{1688} In the Companies Act’s preparatory works this principle has been evaluated to be only informatory.\textsuperscript{1689} The majority principle is based on share-ownership’s size. The larger is the number of owned shares, the greater is an individual shareholder’s scope of influence in the general meeting.\textsuperscript{1690} The principle is important because of its practical significance in company matters. The majority rule makes largely void a strive to equality in company decision-making. As an example can be mentioned decisions on electing the members of the board of directors.\textsuperscript{1691} Also decision-making in restructuring can be mentioned. Majority rule grants for shareholders’ majority a primary role in business decisions.\textsuperscript{1692}

Also the majority principle needs reconsideration and balancing, resulting from the equality principle’s reconsideration. First and foremost this reconsideration has to do with balancing different constituent interests in company decision-making.\textsuperscript{1693} The majority principle’s reconsideration denotes to employee economic interests stronger protection, widely interpreted. This is important especially in restructuring, in guaranteeing the level of employment conditions and further employment.\textsuperscript{1694}

A limited company’s management, referring to managing director, board of directors and supervisory board, has a duty to act with due care. The management has also to take into account company interests, including a duty of loyalty towards the company and its all shareholders.\textsuperscript{1695} In the Companies Act there is not enacted an equivalent principle on shareholders’ mutual

\begin{itemize}
  \item CA 2006 § 21:1; Proposal 109/2005 for CA page 191.
  \item CA 2006 § 21:2; Proposal 109/2005 for CA pp. 192-193.
  \item Airaksinen – Pulkkinen – Rasinoaho I pp. 34-35; Immonen – Nuolimaa page 102.
  \item CA 2006 § 5:1; Immonen - Nuolimaa pp. 76-77.
  \item CA 2006 § 1:6.
  \item Proposal 109/2005 for CA page 39.
  \item Mähönen – Säiläkivi – Villa page 36.
  \item CA 2006 § 5:3 point 4, Mähönen – Säiläkivi – Villa pp. 92-93 and 94-95.
  \item Airaksinen – Pulkkinen – Rasinoaho I pp. 24-25.
  \item See Elkington pp. 300, 311 and 345.
  \item Compare directive 2005/56/EC article 5 (d).
  \item CA 2006 § 1:8; Mähönen – Säiläkivi – Villa page 42; Reinikainen – Pelkonen – Lydman pp. 25-26.
\end{itemize}
relationships with the company. Principally shareholders are under no obligation to further company interest or its other stakeholders’ interests.

The duties to act with due care, thus diligently and by taking into account a company’s interests, thus loyally, reflect the management’s status as the agent of the owners, referring to the shareholders. The Companies Act’s model reflects the traditional Anglo-American model on management’s duties towards the company and its shareholders, based on a narrow stakeholder model. In the traditional Anglo-American doctrine the management’s duties are described by using a concept of fiduciary duties, being a relationship of a principal and an agent, having its basis either in legal rules or acts. In Finnish company law literature the adoption of the traditional Anglo-American model has been grounded by its higher level of development.

Management’s duty to act with due care, thus diligently, concerns actions as a member of management. The duty is based on the management’s enacted tasks and the company purpose. Actions are evaluated as objectively as possible, taking into account risks inherent in business and informational asymmetry. The demand to act with due care is satisfied when the management has acted in its enacted capacity on the basis of the company purpose, decisions having been done in line with the available information on a precondition that a decision or action in question is not affected by an interest conflict between the management and the company.

The management’s duty to act loyally, furthering the company interest, covers management’s duty to act loyally towards company’s all shareholders. The shareholder interest implies to shareholders as a collective group. The duty to act loyally, furthering a company’s interest, refers to profit

1696 See af Sandeberg page 140, Skog page 226.
1698 See Berle – Means page 221 and Bourne pp. 154 and 167, a director having an obligation to avoid actual or possible conflict of interest or duties, is not allowed to accept benefits from a third party due to directorship likely to lead to a conflict, a nominee director have to exercise independent judgement and directors have to exercise their powers for the conferred purposes, acting in accordance with the company constitution. See further on fiduciary duties Mayson – French – Ryan pp. 447-449, especially page 449 stating that fiduciaries are not to exercise their powers or discretions in a detrimental way with regards to parties for whom they act, avoiding to abuse trust and confidence being disposed of. See also Lowry – Dignam pp. 320-349.
1699 Mähönen – Säiläkivi – Villa page 43.
1700 See Villiers – Boyle pp. 224-225 and 233 and CA 2006 BR point 171 on the directors’ duty to promote the success of the company, taking into account enacted factors, among the others the interests of the company’s employees. According to Explanatory notes page 50 this enshrines enlightened shareholder value. See Bourne pp. 146-148 and 166 and a critical view on enlightened shareholder value Talbot pp. 149-152, 182-183 and 191.
1701 Mähönen – Säiläkivi – Villa page 44.
maximisation, maximising the value of shareholder investments.\textsuperscript{1703} The goal of profit-maximisation, if denoting to a short-time profit-maximisation, may, however, weaken a company’s long-time success, being against the management’s very purpose of furthering the company interest.

One aspect of the management’s duty to act loyally has to do with the maintenance of secrecy. It is not considered possible to maintain secrecy in relation to the shareholders in company matters.\textsuperscript{1704} Employee rights to get information in the Companies Act context has generally not been under evaluation.

In a merger or a takeover the management has an obligation to try to achieve the best possible results, evaluated from the shareholders’ perspective. In takeovers there is a duty to try to achieve the best possible bid. In a merger the best possible consideration should be targeted.\textsuperscript{1705} The above-mentioned principles protect especially minority shareholders and creditors.\textsuperscript{1706} The Companies Act’s preparatory works emphasise in this context shareholders as the primary stakeholders, omitting totally employees as a stakeholder group.

In addition to company/shareholder relationships, the present Finnish company law theory has recognised two other relationships fiduciary in character. They are the relationships between the majority and minority shareholders and the company and its creditors.\textsuperscript{1707} According to the Companies Act, the management has no general duty to further the interests of other interest groups, employees included.\textsuperscript{1708} The creditor concept is based on a narrow definition. Creditor denotes to a party having a monetary debt with a company. The concept does not cover employees, neither employment expectations. It does not cover either society at large.\textsuperscript{1709} Irrespective of the scope of fiduciary relationships, the obligation to apply law, labour law included, is self-evident. In legal theory, employee interests have often been acknowledged equalling with the company’s

\begin{itemize}
  \item \textsuperscript{1703} Mähönen – Säiläkivi – Villa pp. 42, 46 and 48-49; Airaksinen – Pulkkinen – Rasinaho I page 24.
  \item \textsuperscript{1704} Mähönen – Säiläkivi – Villa page 53; Compare with informing of employees’ representatives ACU 2007 §§ 3:10 and 9:57 and Morin page 367 on information transparency.
  \item \textsuperscript{1705} Proposal 109/2005 for CA pp. 40-41; Mähönen – Säiläkivi – Villa pp. 42, 49 and 51; Reinikainen - Pelkonen – Lydman page 26.
  \item \textsuperscript{1706} Proposal 109/2005 for CA page 18.
  \item \textsuperscript{1707} Mähönen – Säiläkivi – Villa page 44.
  \item \textsuperscript{1708} See CA 2006 BR point 171 on the directors’ duty to promote the success of the company, taking into account enacted factors, among the others, the interests of the company’s employees. According to Explanatory notes page 50 this enshrines “enlightened shareholder value”. See Bourne pp. 146-148 and 166 and a critical view on enlightened shareholder value Talbot pp. 149-152, 182-183 and 191.
  \item \textsuperscript{1709} See Dine page 228 on a company’s members, which can be used in defining creditor-concept. See Ellsworth page 4 and Immonen – Nuolimaa page 124.
\end{itemize}
interest, the employees forming the most important production inputs.\footnote{Mähönen – Säiläkivi – Villa page 52. See Tiitinen - Kröger 2003 page 12 on employees’ unindependent status in employment relationships compared with Bylund – Elmér – Viklund - Öhman page 19 on the Swedish view on employment relationship’s parties’ equal status economically and socially.} In evaluating company fiduciary relationships, the contractual basis for employee relationships is essential to take into account, in addition to employees’ inputs significance in companies’ productive well-being, consequently economic success.

In a limited company’s context employees are not considered equal with shareholders, creditors and management. This can be grounded with the preparatory works’ reference to labour law as an important business framework\footnote{Proposal 109/2005 for CA page 36.} as well as management’s general duty to further no other group interests except those included in the narrow stakeholder definition.

The management’s duties to act diligently and loyally reflect the established stakeholder definition in a limited company context and the Companies Act’s general principles in their present enacted form. The management’s enacted duties leave wholly without attention changes affected by knowledge-based production, its core assets being employees. Any company’s long-time success is based on employee know-how.\footnote{Ellsworth pp. 51, 183, 221 and 253-254. See also Immonen – Nuolimaa page 124.}

The established principle on public powers’ primary responsibility as a caretaker of social damages in unemployment and re-training needs is not fully valid in the present era, due to pressures on individual national and local economies. The wider social implications of carrying out business in a limited company form implied by the concession theory and made evident in the present Era of Transformation, in individual nation states’ shrinking playing field, are largely left outside the Companies Act, its scope, definitions and considerations. The changes taking place at the moment due to the globalisation are in practice reflected in the Companies Act only in the references to the Anglo-American model, the need to increase flexibility and “creating business environment favorable to establishment”,\footnote{Proposal 109/2005 for CA page 34.} reflecting the emphasis on the primacy of narrowly defined economic starting points.

Other kinds of changes at the nation state level connected with the globalisation are not reflected in the Companies Act. From these changes can be mentioned individual enterprises’ impacts on
employment and local and national level economies\textsuperscript{1714} and the re-evaluation need of the Companies Act’s stakeholder-concept, due to employees’ significance in knowledge-based production.\textsuperscript{1715} These issues are left without attention, as well as employees’ inputs at the personal level on flexibility demands,\textsuperscript{1716} having created a need of steering change. The systemic connections, referring to individual enterprises’ responsibility at the social sphere and the employees’ changed status in this systemic whole are not reflected. The model leaves also without attention the significance of customers in the long-term company success. Their contracts with the company take place in the product-markets, not with the company itself.\textsuperscript{1717}

Due to social and systemic changes a limited company’s stakeholder-concept should be taken under reconsideration. Central is to emphasise different stakeholders’ equal role, by taking into account different stakeholders’ inputs’ significance in a company context. Essential in this reconsideration is to emphasise employment agreements’ economic character,\textsuperscript{1718} now largely left unnoticed. Employment relationships are basically economic in character, being thus equal with those made by shareholders and creditors with the company. The economic character of employee inputs make these matters equal with shareholders also under the concession theory. There is thus no difference with regards to the end-result, evaluated from the point of view of the concession theory or the contractual one in the form of nexus of contracts. The reconsideration should lead to equalling in employees’ status with the other stakeholders, affecting practical level changes in limited company matters.

Company law’s general principles and shareholders’ status affecting also company purpose and its realisation are generally grounded by ownership rights.\textsuperscript{1719} Ownership grounds have been valid reasons in the early 19\textsuperscript{th} century and may still be in the case of family- and related share-

\textsuperscript{1715} See Stiglitz pp. 190 and 203, economics having shown that social welfare is not maximised in companies maximising only profits. Economic efficiency prerequires companies to take into account their activities their actions’ effects on employees, community and environment.
\textsuperscript{1716} Compare directive on Informing and consulting employees Preamble point (7).
\textsuperscript{1717} See Toiviainen 2004 pp. 149-150 and 157 on the creation of wealth in production. According to Toiviainen, there is an interdependence between employees’ work and the profits, the latter in their turn being dependant on the customers’ demand. The existence and investments of customers are in the long run necessary for the existence of a limited liability company. The existence of a limited liability company is actually and in practice based on the investments of the customers, the level of these investments having to exceed the production costs.
\textsuperscript{1718} See Supiot page 518 emphasising the protection of employees’ physical and economic security as a value being fundamental in all forms of work; See also Villiers 1998 page 202 emphasising economic values inherent in an employment relationship.
\textsuperscript{1719} Ellsworth page 113; See Dine pp. 257 and 263.
ownership. Present share-ownership is generally dispersed in nature. Primarily it takes place by pension funds and other institutional investors with short investment-spans. These forms of share ownership are labelled by a lack of personal responsibility.

The definition of the word “share” is worth of pondering. It has two different meanings. First the word refers to a sum of certain defined rights and even of obligations. In its most neutral form the word refers to a bond. In reconsidering the Companies Act’s general principles also the interpretation of the word “share” needs reconsideration. The emphasis should be put on shareholders’ obligations in a limited company and also in a wider social context.

At the EU-level there are not defined, neither enacted general company law principles. In general company law principles and a limited liability company’s structure the EU has relied upon the established company law principles and company structure at the Member State level. Neither the EU’s recent company law development projects have included any proposals in these fields, being, however, fundamental in character.

There is inevitably also at the EU-level a need to take under consideration defining of general company law principles, into addition to established policies of formulating individual transactions. This is due to a high failure percentage in restructuring transactions. This has created a need to reconsider different stakeholders’ status in a merger, and in restructuring generally. Central in reconsideration is to increase the success of these transactions, thus the success of business activities. The reconsideration cannot however be based on the prevalent models and definitions, but should take place by taking into account factors mentioned and evaluated in this section. This is further grounded by the demands of the Lisbon strategy. The EU’s goal is to become the most competitive and dynamic knowledge-based economy in the world (by 2010), capable of sustainable economic growth with more and better jobs and greater social cohesion. The Lisbon strategy is labelled both with the economic and social dimension. The goal is to invest in people, by building

1721 Clarke – dela Rama page xxix.
1722 See Sennett 2007 pp. 42-43 on the American pension funds’ investment spans, having been in the 1960s about 46 months and in 2000 only 3,8 months. Compare Druckner pp. 132-133 on employees’ role in pension funds, not having affected work and company practises.
1724 Immonen – Nuolimaa pp. 55-56 and on the rights arising out of share-owning ibid. page 57. See Dine page 228 on a company’s members. Compare with the Swedish company law theory Skog page 127 and Sandström page 19.
1726 Jääskinen page 186; Liukkunen page 27.
an active welfare state.\textsuperscript{1727} Anticipation of change is emphasised, targeted to managing structural changes and lessening economic and social costs.\textsuperscript{1728} The Lisbon strategy’s leading principles, being largely based on human capital development, should inevitably be taken into account in the consideration.

1.2. MERGER IN THE COMPANIES ACT

1.2.1. CENTRAL FEATURES

The 3\textsuperscript{rd} directive’s implementation required essential changes in the Finnish company law on mergers. The greatest changes took place in the mid-1990s, in relation to and after Finland’s accession to the EU, concerning both private and public limited liability companies. The provisions on a merger plan were made more detailed. A provision on the independent experts’ statement on the consideration was adopted. Changes were also targeted to increase the shareholder information’ rightness.\textsuperscript{1729}

The Finnish company law provisions on a merger concern national level and cross-border mergers.\textsuperscript{1730} The present merger procedure is more flexible and less time-consuming compared with the former legislation of the 1990s, due to the options based on the 3\textsuperscript{rd} directive.\textsuperscript{1731}

National level merger’s definition in the Finnish Companies Act corresponds with the 3\textsuperscript{rd} directive’s definition. A merger includes a transfer of all the assets and liabilities of a company being acquired to an acquiring company, unknown assets and obligations included. An essential precondition for a merger is the transfer of share ownership and its continuance in an acquiring company. A merging company dissolves, denoting to its existence’s ceasing.\textsuperscript{1732}

\textsuperscript{1727} Nielsen page 41; Industrial Relations 2006 page 157.
\textsuperscript{1728} Liukkunen pp. 27-28.
\textsuperscript{1729} CA Committee 1992:32 pp. 315-316.
\textsuperscript{1731} Proposal 109/2005 for CA page 145; Reinikainen – Pelkonen – Lydman page 248. See the central differences between the enactments of the 1990s and 2006 Reinikainen – Pelkonen – Lydman page 257.
\textsuperscript{1732} CA 2006 § 16:16.1; Proposal 109/2005 for CA page 146; The 3\textsuperscript{rd} directive Chapter I article 3.1; Immonen – Nuolimaa page 212; Mähönen – Säätäjä – Villa page 481; Airaksinen – Pulkinnen – Rasinaho II page 144; Reinikainen – Pelkonen – Lydman pp. 255 and 279. Only a registered limited liability company can be a party in a merger, see Airaksinen – Pulkinnen – Rasinaho II page 147.
From the acquired company’s point of view a merger denotes to a general succession.\textsuperscript{1733} It denotes, however, to company’s dissolution, if the shareholders in the company being acquired cannot continue as shareholders in the acquiring company with conditions in relevant aspects similar with the former ones.\textsuperscript{1734}

Finnish merger law enacts an absorption merger, being an agreement-based takeover, and a combination merger, denoting to a creation of a new company.\textsuperscript{1735} Also enacted is a merger between a subsidiary and its parent company, the latter owning wholly the subsidiary’s shares, option rights and all the other rights attached to shares\textsuperscript{1736}.\textsuperscript{1737}

The shareholders get as a consideration the acquiring company’s shares, formerly or newly issued. Also money can be used, as well as other kind of assets and obligations.\textsuperscript{1738} The amount of monetary consideration is not limited. Its provision has to be based on the equality principle.\textsuperscript{1739}

\textsuperscript{1733} Airaksinen – Pulkkinen – Rasinao II page 144; Reinikainen – Pelkonen – Lydman page 255.

\textsuperscript{1734} CA Committee 1992:32 page 316.

\textsuperscript{1735} Werlauff 2003 page 567; Airaksinen – Pulkkinen – Rasinao II pp. 156-157; On absorption and combination mergers see further Reinikainen – Pelkonen – Lydman pp. 249-252.

\textsuperscript{1736} Airaksinen – Pulkkinen – Rasinao II pp. 158-159.


In addition to a subsidiary-parent merger, another form of an absorption merger is a triangular merger. The consideration is paid by a third party who is an outsider of the merger party, see CA 2006 § 16:2.3, Proposal 109/2005 for CA pp. 145 and 147 and Airaksinen – Pulkkinen – Rasinao II pp. 159-161; Reinikainen – Pelkonen – Lydman page 249.

A sister company merger is not enacted in the Companies Act. It is a form of an absorption merger, the name denoting to the transaction’s parties, Heikki Toiviainen 24.1.2008. All the “outside” shares of the participating companies are held by the same company or by subsidiary companies owned by it, see Reinikainen – Pelkonen – Lydman pp. 249 and 253-255; Airaksinen – Pulkkinen – Rasinao II pp. 162.

A downstream merger is not enacted. It takes place in a concern between a subsidiary and a parent, the latter merging to the subsidiary, taking in practise place according to the procedure enacted for the absorption merger, see Reinikainen – Pelkonen – Lydman pp. 249 and 254-255, Airaksinen – Pulkkinen – Rasinao II pp. 162-163.


\textsuperscript{1739} Proposal 109/2005 for CA page 146; Mähönen – Säiläkivi – Villa page 481.
1.2.2. DRAFT TERMS AND APPROVED AUDITOR´S STATEMENT

The provision on written draft terms drafted and signed by boards in companies participating in a merger corresponds to the 3rd directive[^1740] and contains the minimum and simultaneously also mandatory conditions of a national level merger[^1741].

The draft terms can be evaluated from the contract law point of view, denoting as a whole to an agreement, or at the first stage, to a preliminary agreement, between the participating companies. The draft terms serve different functions. It is board’s proposal for general meeting decision-making. If a merger is adopted by the board itself, the draft terms will actually be confirmed twice. From the shareholder and creditor point of view, the draft terms have an informative function. They deliver information needed for decision-making and on safeguards.[^1742]

The draft terms have to include an account of a merger’s reasons.[^1743] The requirement to state the reasons “may be meaningful from the shareholders’ and creditors’ perspective, as well as from the other constituents’ perspective, in considering a merger’s consequence on their own status”[^1744].[^1745]

The general company law principles have relevance in evaluating a merger’s reasons. Of importance are especially the equality principle and the management’s duty to act loyally.[^1746]

According to the equality principle, all shares carry same rights.[^1747] The equality principle protects rights attached to shares, especially in relation to minority shareholders. Management and majority shareholders are forbidden in all the Companies Act decision-making to misuse their powers in company matters to the minority’s detriment. It is forbidden to disregard company and shareholder collective interests by favouring majority shareholder interests. The principle requires shareholders’ economic status to stay as such or develop as smoothly as possible.[^1748] The equality principle in its enacted form does not cover employees’ relationships with the company. A limited liability

[^1740]: The 3rd directive Chapter II article 5.
[^1742]: Airaksinen – Pulkkinen – Rasinaho II pp. 173-174. In the implementation law a merger plan’s contents were strengthened with regards to its terms’ publication, targeted to secure shareholder information on a merger’s central conditions for general meeting decision-making, see CA Committee 1992:32 pp. 315, 504 and 506-507.
[^1743]: CA 2006 § 16:3 point 2; The 3rd directive Chapter II article 9. The demand on stating a merger’s reasons is applicable also in a subsidiary-parent company merger, see Airaksinen – Pulkkinen – Rasinaho II page 177.
[^1746]: Airaksinen – Pulkkinen – Rasinaho II page 177.
[^1747]: CA 2006 § 1:7; Immonen - Nuolimaa page 101.
company’s management, referring among the others to the board, has a duty of loyalty towards the company and its all shareholders. Under the Companies Act the management has no general duty to further other interest groups’ interests, employees included.

A merger’s reasons are often expressed by using standard definitions. This takes place especially in concerns, in in-house transactions. Irrespective of using standard definitions the requirement to deliver right and clear information has to be fulfilled. In practise the use of standard definitions is apt to weaken the actual significance of stating the reasons, evaluated from delivered information’s scope and quality.

In a national level merger the draft terms have to do with the status of shareholders, option rights and holders of rights to which special rights are attached. Other groups are creditors and the management. In the Companies Act there is not enacted an obligation to take in the national level merger’s draft terms any conditions or evaluations on the employees’ status. Restructuring generally leads to workforce reductions. Evaluation of employees’ status is important also from the public power’s perspective, due to pressures caused by unemployment to public economies, affecting re-training needs. The draft terms do no either cover a merger’s actual carrying out, its goals becoming realised only after the procedure’s successful carrying, or a company’s further status at the product-markets. All these are crucial factors in evaluating a merger’s effects on employees, especially its general succession character, in addition to evaluating further employment development.

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1750 Mähönen  – Säiläkivi – Villa pp. 42 and 52; See CA 2006 BR point 171 on the directors’ duty to promote the success of the company for the benefit of its members, by taking into account enacted factors, among the others the interests of the company’s employees. According to Explanatory notes page 50 this enshrines enlightened shareholder value. See Bourne pp. 146-148 and 166 and a critical view on enlightened shareholder value Talbot pp. 149-152, 182-183 and 191.

1751 Compare CA 2006 § 1:7.


1755 See Lehto pp. 6, 31 and 46-47.


1758 Compare CA Committee 1992:32 page 316 expressly stating that from a shareholder perspective a merger can be equated with a company’s dissolution, if a shareholder does not have a an option to continue in an acquiring company with conditions being in central aspects similar with the previous ones.
The Companies Act allows the draft terms to cover proposals for other conditions, where appropriate. They, when a part of the draft terms, are ultimately to be interpreted as a binding agreement between a merger’s parties, on a precondition not being contrary with the Companies Act’s mandatory provisions. The conditions may concern employee status, for example. A common statement in the draft terms concerns employee status, being transferred to the acquiring company on the basis of their employment at the company being acquired. Company law theory interprets conditions on the employees’ status to be only informative in nature. Conditions on the employees’ status with further going legal validity are of course possible. By including in the draft terms conditions on the employees’ former employment conditions’ continuation or employment relationships’ themselves continuation, the participating companies limit their freedom of action in the use of managerial rights in a way which they may consider detrimental from narrowly defined business interests. These kinds of policies may not, however, be advantageous in long-term company development perspective.

The participating companies’ boards have to designate one or more approved auditors to issue a statement on the draft terms for each of the participating companies. The auditors have to issue in their statement an opinion on grounds on setting the consideration and its distribution. In a statement to an acquiring company it is expressly to be issued if a merger is apt to endanger a company’s debts’ payment. Commonly one auditor issues a report for all the merging companies, but more than one auditor may also be denoted for the task.

The approved auditor’s statement serves for many purposes. It is to secure information’s rightness and adequacy on consideration, targeted to guarantee shareholders’ status. The draft terms have to contain information making possible for shareholders to evaluate merger’s fairness, especially the share exchange ratio or other ways of determining consideration, based on the equality principle.

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1759 CA 2006 § 16:3 point 16.
1762 Airaksinen – Pulkkinen – Rasinaho II page 211.
1763 Compare Lehto pp. 6, 31 and 46-47 stating company acquisitions generally leading to workforce reductions.
1764 On employer’s managerial rights see Titinen page 85, Valkonen 2006 page 804 and Rautiainen – Aimälä page 260.
1766 CA 2006 § 16:4; The 3rd directive Chapter II article 10. It is a common practise that one auditor issues a report for all the merging companies, but more than one auditor may also be denoted for the task, see Reinikainen – Pelkonen – Lydman page 268. Every approved auditor delivers her/his opinion from the point of view of a company having denoted her/him, Proposal 109/2005 for CA page 153, Mähönen – Sääläkivi – Villa page 499, Airaksinen – Pulkkinen – Rasinaho II pp. 216-218.
1768 Reinikainen - Pelkonen – Lydman page 268.
The merger’s fairness is to be evaluated from all the shareholders’ perspective. The participating companies’ values are emphasised, consideration usually being based on these values.\textsuperscript{1769} The auditors’ statement acts also as a safeguard for the acquiring company’s creditors. If the planned merger is apt to endanger these creditors’ debts’ payments, creditor protection procedure has to be extended to cover these creditors\textsuperscript{1770}\textsuperscript{1771}. Many factors may cause an endangerment. The company being acquired may be unprofitable or it may have obligations outside the balance sheet. Also the monetary consideration or price used for shares’ redemption may be too high in the prevailing circumstances.\textsuperscript{1772} In a subsidiary company merger as well as in any other merger the auditor’s statement may cover, on all the shareholders’ consent, only the creditors’ status.\textsuperscript{1773}

The auditor’s statement does not cover merger’s effects on employees. It does not either cover a merger’s actual carrying out, its goals actually becoming realised only after a merger procedure’s successful carrying out, or a company’s further status at the product-markets.\textsuperscript{1774} All these factors are crucial in evaluating a merger’s effects on employees and from their perspective especially the merger’s general succession character, into addition to evaluating further employment development.

The members of the boards in the participating companies are liable for damages caused by a breach of rules on the draft terms’ enacted contents.\textsuperscript{1775} The liability for the damages concerns the members in the breach of the duty to act diligently and loyally in relation to the company, when the damages are caused on purpose or due to negligent action. When actions are based on relevant background information held to be adequate in the prevailing circumstances, and before the actual decision-making different ways of action have been with care under consideration, there is hardly a breach of the duty, irrespective of measures having caused monetary loss for the company.\textsuperscript{1776} The members of the boards are also liable for damages caused on purpose or when having acted negligently in the breach of the Companies Act or the articles of association in relation to the

\begin{enumerate}
\item Proposal 109/2005 for CA page 153, Mähönen – Sälläkivi – Villa page 500, Airaksinen – Pulkkinen – Rasinaho II page 218. Also methods used in determining share exchange rate or valuing the companies have to be denoted in addition to these methods’ adequacy, see Proposal 109/2005 for CA page 153; Mähönen – Sälläkivi – Villa page 500; Airaksinen – Pulkkinen – Rasinaho II page 218.
\item CA 2006 § 16:4.1; Mähönen – Sälläkivi – Villa page 500; Reinikainen – Pelkonen – Lydman page 268.
\item Airaksinen – Pulkkinen – Rasinaho II page 219.
\item Mähönen – Sälläkivi – Villa page 493.
\item Mähönen – Sälläkivi – Villa page 493.
\item CA 2006 § 22.1.1; Proposal 109/2005 for CA pp. 194-196; Immonen – Nuolimaa pp. 264-269; Compare Vuorenmaa page 9 and Peng page 381, stating that over half or even over 70 per cent of company restructuring operations fail.
\end{enumerate}
company, shareholders or others. The threshold for the actualisation of responsibility is even at a higher level compared with the previous situation.

1.2.3. CONCLUSIONS ON DRAFT TERMS AND APPROVED AUDITOR’S STATEMENT FROM EMPLOYEES’ PERSPECTIVE

Due to the Companies Act’s starting point with its narrow stakeholders’ definition and the general principles underlining the Companies Act’s interpretation, leaving outside employees and public power, being consequently largely outsiders in a limited liability company context, the Finnish national level merger law’s problems and challenges, the draft terms’ and approved auditors’ statement’s contents included, are very much the same as stated in connection with the 3rd directive’s evaluation.

One aspect worth of attention has to do with the draft terms’ character. It is a preliminary agreement, after approval a binding agreement between the participating companies on a merger’s conditions. One group of stakeholders, the employees, are outside the draft terms’ and approved auditor’s statement’s enacted and consequently mandatory scope. The stakeholders’ scope in the approved auditor’s statement is also worth of noting. The stakeholders include shareholders and creditors, into addition to boards of directors as auditors’ principal. No other constituents are mentioned. The matters included in the statement have to do solely with narrowly defined economic aspects, on consideration’s valuation and distribution and competence of paying monetary debts, no other matters included.

The draft terms and auditor’s statement completely neglect to evaluate in a national level merger its employee implications. This is regrettable due to employment relationships basically and primarily economic character. From the Finnish point of view, this point of view is further to be emphasised due to public limited liability companies’ status as large-scale employers, the Finnish economy’s dependency on export and the rapid increase in Finland in the M&A activities since 1990s.

The Companies Act’s preparatory works emphasise the importance of stating a merger’s reasons as a part of the draft terms as an important source of information. It is considered to be important into

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1778 Immonen – Nuolimaa pp. 269-270.
addition to shareholders and creditors, also from the other constituents’ perspective, the latter’s circle being undefined. The reasons are considered to be important in these groups’ evaluating the merger’s consequences on their status. From the employee point of view, crucial is timing in delivering the draft terms, reasons included. The directive on Transfers of Undertakings emphasises information and consultation to take place primarily in good time.\footnote{Directive on Transfers of Undertakings Chapter III article 7 1.-2, see, however, 7 6.} According to Finnish labour law, the company under the acquisition procedure has to fulfil its information obligation in good time. As regards the acquiring company, its information obligations are to take place from the date of registration on enforcement, thus a fully completed merger in a company law sense.\footnote{ACU 2007 §§ 7:41.1-2; Proposal for ACU 2007 page 40; Hietala – Kaivanto pp. 107-111; Rautiainen – Äimälä - Hollmén page 174; Rautiainen – Äimälä page 149.} The company being the target of the procedure has only limited options to fulfil the information obligations, taking place in the framework set by the acquiring company on the successor company’s future plans. Also the draft terms’ contents have be taken into account. These factors added with the acquiring company’s information obligations’ timing are all apt to reduce effectively the draft terms’ practical significance with regards to informing the employees.

The practise to express a merger’s reasons by using standard definitions is apt to weaken the actual significance of stating the reasons. From the employee point of view, one has good reasons to argue the actual importance of information contained in the statement of reasons in the draft terms. Of more importance would be an estimate on a merger’s consequences in the form of employee implications, now lacking, highlighted by company and labour law’s and their procedures’ separateness.

The Companies Act’s provisions on the draft terms and auditors’ statement lack an obligation to set out a national level merger’s consequences. With this is referred to a merger’s goals’ achievement due to a merger procedure’s actual carrying out\footnote{See Vuoremmaa pp. 9 and 96.} and its consequences on a company’s status at the product-markets,\footnote{See Ellsworth pp. 1 and 163.} all these aspects having employee and employment implications. Employee and employment implications are a part of the wider social implications of carrying out business in a limited liability company form.\footnote{See Stiglitz pp. 190 and 203, Elkington pp. 73, 216 and 331.} The present provisions reflect a reactive view on a merger, leaving out the future oriented proactive perspective. It is important especially from the employees’ and public power’s perspective, due to a merger’s probable employment implications both inside

\footnote{See Stiglitz pp. 190 and 203, Elkington pp. 73, 216 and 331.}
and outside the company, and the importance of employee inputs to a company’s productive well-being, resulting in its economic success. In a nutshell, the chosen point of view both in the draft terms and auditors’ statement represents a narrow definition of a limited liability company’s stakeholders, considered as a relationship between shareholders, creditors and the company, management acting as these groups’ agent. The chosen point of view both in the draft terms and auditors’ statement represents also a narrow definition of a limited company’s social obligations.

From the employee perspective, especially the long-time employment prospects are important. In company law theory the additional Companies Act based conditions on the employees’ status are evaluated to be only informational in character, with no legal force as such. The interpretation on additional conditions’ employee implications can be evaluated to be void. It does not in practise extend the stakeholders’ circle in the Companies Act or improve protection’s level, irrespective of the principle on validity of contracts. Taking into account the principle on validity of contracts, the statement on the legal effects of additional conditions can, however, be evaluated from another point of view, implying to employment contracts’ actual continuance as such, with no threat of changes in conditions or employment relationships’ actual continuation, highlighting a merger’s general succession character.

Reconsideration is needed on the draft terms’ and approved auditors’ statement’s contents’ employee implications and implementation in practise. Reconsideration is important due to a limited liability company’s social obligations, in order to balance responsibilities between a company and society. Reconsideration is important due to a company’s own further success. In present knowledge-based production employees are the core assets in production.

The above evaluation on the employees’ protection in a national level company law merger reveals the established legal state with regards to employees. There is not to be perceived a stakeholder status, irrespective of the employment relationships’ fundamentally economic nature. The Companies Act procedure is labelled by a lack of commitment in relation to employees.

1785 Lehto pp. 6, 31 and 46-47.
1787 Compare CA Committee 1992:32 page 316.
1788 See Stiglitz page 194.
1789 Ellsworth page 221.
1790 Supiot page 518 emphasising the protection of the employees’ physical and economic security as value being fundamental in all forms of work based on agreement.
The board members’ enacted liability for damages in the Companies Act due to a breach of the draft terms’ contents and also widely in a merger context may be considered inadequate, when evaluated from these measures’ social effects. According to the established interpretation social effects and costs caused by a merger, for example, in the form of unemployment, re-training and re-education costs, externalised by the company, are outside liability for damages.

1.2.4. DRAFT TERMS’REGISTRATION, MERGER’S APPROVAL AND REGISTRATION FOR ENFORCEMENT FROM EMPLOYEES’ PERSPECTIVE

The participating companies have to notify the national level merger’s draft terms for registration within one month after their signing, together with the auditor’s statement. The information on the participating companies’ financial status is not to be attached, but it is to be held available to shareholders. The authority is to examine the fulfilment of the Companies Act’s legal formalities.

The registration makes the procedure public. Shareholders, creditors and other groups may evaluate the merger and its consequences. Employees have not expressly been mentioned in this context. It is to be remembered that in their enacted form the draft terms and auditor’s statement do not cover in a national level merger as a mandatory element any conditions or evaluations on employee implications. The directive on Transfers of Undertakings emphasises information and consultation to take place primarily in good time. Finnish labour law theory emphasises, however, a date of registration on enforcement crucial with regards to the timing of information and consultation rights, denoting to a completed merger. The established Finnish labour law interpretation on the timing of employee information and consultation rights effectively reduces employees’ options to evaluate a national level merger’s implications on them during the company law procedure, irrespective of the draft terms’ registration’s purpose, taking also into account the draft terms’ enacted contents.

1791 CA 2006 § 16:5.1-2. See also CA Committee 1992:32 page 508.
1793 Airaksinen – Pulkkinen – Rasinaho II page 224.
1796 Directive on Transfers of Undertakings Chapter III article 7 1.-2, see, however, 7 6.
1797 Hietala – Kaivanto page 110; Rautiainen – Äimälä page 149; Rautiainen – Äimälä – Hollmén page 174. In Sweden employee representatives have to be consulted on a transfer of undertaking, covering also a merger, before an employer makes a decision on the transaction’s carrying out, see ACW §§ 11-14, Bylund – Elmér – Viklund – Öhman pp. 92 and 222-223, Iseskog pp. 339-340, van Peijpe pp. 80-81 and 94.
The Companies Act’s preparatory works expressly emphasise the importance of creditor protection in a merger, due to fundamental changes often taking place in debt relationships as a consequence of mergers. The statement of the preparatory works is worth of merit in its express reference to fundamental changes often taking place in debt-relationship as a merger’s consequence. This statement’s narrow scope is regrettable, denoting to parties with monetary claims with the company. In the Companies Act’s preparatory works, the implications of a national level merger’s evaluation in a wider social context would have been meaningful, by taking into account public limited liability companies’ status as employers in Finland and the rapid increase in the M&A activities since 1990s.

The creditors’ circle covers into addition to debt holders also obligations under dispute, denoting to persons injured in a company’s actions’ context, for example, employees. The creditor-concept is defined in an unsatisfactory way. It is not reasonable to demand a person with this kind of a claim to secure her/his status as a creditor in a merger by demanding investigations on information registered in the commercial register. Into addition to tax claims public power may have a considerable stakeholder status in a merger, due to its consequences on employment and tax incomes. In the Companies Act’s preparation works no attention has been paid to the public power’s status in the procedure.

According to the 3rd directive, Member State laws must provide for an adequate system of protection for creditor interests in merging companies if their claims antedate the draft terms’ publication and have not fallen due at the publication’s time. In Finland, the implementation has taken place by enacting the registration authority’s obligation to issue a public notice, covering also the acquiring company’s creditors if the payment of debts is supposed to be endangered. The company has to provide a written public notification to the known creditors. They have a right to object the merger.

A merger’s direction connected with the end result of the acquired company’s ceasing affects different stakeholders’ status. The participating companies decide the measures’ direction. The

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1801 See Skog page 22.
1802 The 3rd Directive Chapter II article 13.1.
1804 CA 2006 § 16:16.1.
direction may be affected by tax consequences or by factors being merely accidental in character, like participating companies’ public image or images on management’s authority. Almost any merger could have in practice been carried out also in a reversed order, an acquiring company acting as the acquired one.\textsuperscript{1805} The consequences seldom affect economic end-results, company assets and debts always being unified. The merger procedure’s direction affects formal end-results, referring to the stakeholders’ actual status after the procedure’s completion, affecting the scope of shareholder and creditor protection.\textsuperscript{1806} The employees have to be included under this evaluation, too.\textsuperscript{1807} This is a matter to be taken under consideration, due to employee and employment implications, affecting into addition to employees also public economies, if a merger leads to workforce reductions, lessening tax revenues and increasing unemployment costs.

A merger is approved in the acquired company in its general meeting. A subsidiary company merger can be approved in the acquiring company’s board. Shareholders representing one-twentieth of the shares may request decision-making in the general meeting.\textsuperscript{1808} The general meeting decision requires a qualified majority of two-thirds of votes cast in each class of shares,\textsuperscript{1809} represented in the meeting.\textsuperscript{1810} The general meeting has to adopt the draft terms as such, no amendments or alterations are allowed. The requirement is purported to protect creditors.\textsuperscript{1811} The approving meeting has to be held within four months after the draft terms’ registration. Time-limit is to enhance the rightness of the draft terms’ information with regards to shareholders and creditors.\textsuperscript{1812}

The general meeting cannot be summoned before the draft terms’ registration. It has to be summoned at the earliest two months, at the latest one month before the meeting. Shareholders are consequently provided time to get acquainted with the merger’s material.\textsuperscript{1813} The material to be held available includes the draft terms, auditor’s statement and financial information.\textsuperscript{1814}

\textsuperscript{1805} See Äimälä page 111.
\textsuperscript{1806} Airaksinen – Pulkkinen – Rasinaho II pp. 143-144; See also Immonen - Nuolimaa pp. 233 and 236 in the context of general succession affecting the parties’ status in different agreements.
\textsuperscript{1807} Compare CA 2006 § 16:22.2 point 5 and § 16:22.3 and Government Proposal 103/2007 pp. 23 and 37-38.
\textsuperscript{1809} On different classes of shares, differing in rights attached to voting or profits, generally economic rights, see CA 2006 § 3:1; Proposal 109/2005 for CA page 51; Reinikainen – Pelkonen – Lydman page 44.
\textsuperscript{1810} CA 2006 § 5:27; Proposal 109/2005 for CA page 76; Reinikainen – Pelkonen – Lydman pp. 96-97 and 273. See also CA Committee 1992:32 p. 9, 505-506 and 508.
\textsuperscript{1811} CA 2006 § 16:12.2; Proposal 109/2005 for CA page 158.
\textsuperscript{1813} CA 2006 § 16:10; Proposal 109/2005 for CA pp. 156-157; Airaksinen – Pulkkinen - Rasinaho II pp. 238-241 Mähönen – Säläläkivi – Villa page 505. The summons to general meeting has to contain information on shareholders’ redemption rights, covering also option rights’ holders and holders of other special rights attached to shares, see CA
Approval of a national level merger is based on the enacted material, containing the draft terms, auditor’s statement and financial information, limiting the general meeting decision-making’s scope. The general meeting, in fact, shareholders, has no obligation to take under consideration a national level merger’s effects on employees and employment prospects in the future.\textsuperscript{1815} It does not either have to take under consideration a merger’s practical carrying out, to secure its achievement of goals, and a merger’s effects on a company’s status at the product-markets. The short investment-spans are also of significance. They weaken in practise the investors’ interest to focus on a long-time company development. Of practical importance may also be a lack of loyalty principle between shareholders and the company in their mutual relationships, extending its effects to shareholders’ relationships with a company’s other stakeholders. The employees can participate in the general meeting decision-making only as individual shareholders or on the basis of the EFA, not being a common practise.\textsuperscript{1816} The employees do not, consequently, have options to influence decision-making in a merger, comparable to that of shareholders and creditors, having available a right to object. The increasing of employees’ influence in a national level merger procedure and its adoption could be taken under evaluation. This can be grounded by a need to increase these procedure’s success, due to the employees’ increased importance in knowledge-based production.\textsuperscript{1817}

In a limited liability company the board is responsible on operative level business activities, covering decision-making in restructuring and its consequences. It has a role in preparing the draft terms, in a merger’s approval, in remarkable expansions or reductions in business activities covering closures and large-scale investments. It is responsible on personnel issues generally, workforce reductions included. It makes decisions on acquiring and establishment of subsidiary companies and decisions on alliances.\textsuperscript{1818} The employees only seldom can participate in the decision-making of the board as its full members.

In order to increase mergers’ and generally restructuring transactions’ success into addition to developing long-time competitive advantage, there are grounds to take under reconsideration the
principal/agent relationship. Both the board and the managing director should be seen also as the employees’ agents, their economic interests being no weaker compared with those of the shareholders. Also the concept on workability of contracts is to be emphasised, referring to a need to balance parties’ interests in company/employee relationships.\textsuperscript{1819}

The enacted national level merger procedure is targeted to increase the procedure’s flexibility and speed, grounded with creditor protection. A public notice to creditors can be proclaimed immediately after the draft terms’ registration, before a merger’s approval.\textsuperscript{1820} The fairly short time-span of the whole process, calculated from the draft terms’ registration, is not apt to increase the employees’ actual possibilities to affect the process, irrespective of the publicity due to registration. This can be grounded by referring to the labour law’s emphasis on the date of registration for enforcement being significant with regards to informing employees,\textsuperscript{1821} being a factual sign of company and labour law procedures` separateness.

An aspect linked with the present evaluation has to do with the concept of corporate citizenship, based on enterprises’ social and – outside this research’s immediate scope – also environmental responsibilities.\textsuperscript{1822} Corporate citizenship may be partly voluntary; partly it may be imposed on the enterprises. Its focus is on a corporation’s social, political and civil rights and obligations in relation to its business activities. Corporations’ social environment covers also employees. An enterprise is seen as an active player also in the social field. The concept is based on a wide stakeholders’ definition, including the society in general, being motivated by economic and political grounds.\textsuperscript{1823} The concept of corporate citizenship needs to be evaluated and developed further. It is important especially due to urgent challenges posed by globalised economy and the increase in the M&A activities. The concept of corporate citizenship implies a wider circle of responsibilities and stakeholders in restructuring context, compared with the established way of thinking enacted in the Companies Act.

\textsuperscript{1819} Ämmälä page 97.
\textsuperscript{1820} Proposal 109/2005 for CA page 145; Reinikainen – Pelkonen – Lydman page 248. The public notice is proclaimed also to an acquiring company’s creditors, if their status is to be endangered due to an evaluation based on the auditors’ statement, see CA 2006 § 16:6; Proposal 109/2005 for CA pp. 145-146.
\textsuperscript{1821} Hietala – Kaivanto page 110; Rautiainen – Äimälä page 149; Rautiainen – Äimälä – Hollmén page 174. See also Tiitinen - Kröger 2003 pp. 282-283.
\textsuperscript{1822} See Stiglitz pp. 190 and 203, Ellsworth pp. 29 and 145 and Toiviainen page 166.
\textsuperscript{1823} On the corporate citizenship see Crane – Matten pp. 61-71, especially page 64 and Crane – Matten 2007 pp. 70-79, especially page 73. See Elkington pp. 73, 155-156, 216, 272, 300, 311, 315 and 331.
The companies participating in a merger have a duty to register the merger in the commercial register within four months after the approval, or the merger will become void. The members of the boards in each of the participating companies and the managing director have to deliver the notification, containing information on the Companies Act’s procedure’s fulfilment. In Finnish labour law, a date of registration on enforcement, denoting to a completed merger, is crucial in timing the acquiring company’s information obligations’ initiating in relation to employees.

The obligations on registration procedure are grounded by legality, implying to some extent also to corporate social responsibility. The enacted obligation’s content is however a narrow one, based on fulfilling procedural legal formalities. The wider social implications in carrying out business in a limited liability company form are not taken under consideration. This is largely due to the enacted legislation’s scope, referring to the Companies Act’s general principles, stakeholder concept and the actual merger procedure itself.

1.3. FINNISH LABOUR LAW ON RESTRUCTURING IN THE RESEARCH CONTEXT

1.3.1. LEGAL STATE BEFORE THE MEMBERSHIP

In Finnish labour law theory and jurisprudence a merger has not traditionally at all been a transfer of an undertaking. The interpretation concerns also a division. This is due to these transactions’ character as general successes, denoting to transfer of rights and obligations as such.

In Finland, the Employment Contracts Act was reviewed in the end of the 1960s. As a part of this review the employees’ status in a transfer of an undertaking was changed. Up to the 1970 renewal the ECA had been based on an idea of an employment contract and relationship with its rights and obligations being a personal one, not transferable. In the 1970 renewal the former legal state was changed. An employment contract with its rights and obligations being in force during the time of a

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1824 CA 2006 § 16:14.1-2; Proposal 109/2005 for CA pp. 160-161; Reinikainen – Pelkonen – Lydman pp. 277-278. A certificate on sending creditor announcements has to be attached by a member of the board or the managing director. Auditor’s certificate on full consideration of an acquiring company’s equity has to be attached, together with information on the acquired company’s financial state and its effects on the acquiring company’s balance sheet and applied auditing methods, CA 2006 § 16:3.2 point 9.


transfer became transferable from a transferor to a transferee.\textsuperscript{1828} This rule was applicable also in a transfer of a part of a business. An essential precondition is a transfer of an entity as a going concern.\textsuperscript{1829}

From the employee side, the renewal was grounded with protective reasons. Abrupt employment contract terminations are not held reasonable. From an employer side, the renewal was grounded with economic reasons. Continuation of employment contracts is reasonable for business reasons.\textsuperscript{1830}

Irrespective of the rule on an employment contract’s transfer employees were granted a right to dismiss their employment contracts from a transfer’s date and in certain cases even later, depending on a transfer’s notification.\textsuperscript{1831} Also employers were granted a right to dismiss employees, by using a notification period of 14 days.\textsuperscript{1832} Employer’s dismissal right was later restricted, presupposing a special reason due to a transfer of an undertaking.\textsuperscript{1833} This denotes among the others to reasons entailing changes in the workforce, being in character economic, technical or organisational.\textsuperscript{1834}

Neither the ECA’s preparatory works nor the actual law text makes any specific reference to a merger.

\textit{1.3.2. CHANGES DUE TO THE MEMBERSHIP}

Finland had to examine and review its legislation due to the EU’s membership obligations. This took place as a part of the EEA ascension, leading to changes in labour law among the others in a transfer of an undertaking.

Due to the directive on Transfers of Undertaking, the scope of employer’s information obligations\textsuperscript{1835} was extended to cover both the transferor and the transferee, if the transfer is presupposed to affect the personnel. Also the delivered information’s scope was precised. It was to

\textsuperscript{1828} CR 1969:A25 pp. 26-27 and 52; ECA 1970 § 7; Kahri – Hietala pp. 45-46. See Tiitinen – Kröger pp. 259-260, Tiitinen – Kröger 2003 pp. 269-270 and Tiitinen page 53 footnote 16 stating that in the Finnish labour law transfer of rights and obligations in a transfer of an undertaking has been acknowledged since 1920s in collective argreements law and since 1940s in holidays enactments.
\textsuperscript{1829} Kahri – Hietala page 45.
\textsuperscript{1832} CR 1969:A25 pp. 53-54; ECA 1970 § 40.
\textsuperscript{1833} ECA 1970 § 40.2; Kahri - Hietala pp. 222-224.
\textsuperscript{1834} Kahri – Hietala page 223.
\textsuperscript{1835} Directive 2001/23/EC Chapter III article 7 1.
cover the grounds, the legal, economic and social implications for the employees and any measures envisaged. The timing of the actual carrying out of the information obligations was made more precise. The transferor was to deliver the information in good time before the actual carrying out of the transfer or the merger.\textsuperscript{1836} Due to the directive on Transfers of Undertakings the information obligation was extended to cover also mergers.\textsuperscript{1837}

Rules on employer liability between the transferor and the transferee were renewed. A joint liability was enacted on obligations due before the transfer’s date.\textsuperscript{1838} A joint liability was not enacted applicable in a transfer of an undertaking in which the transferor is under liquidation, unless the former owner is able to exercise dominant influence also after the transfer, based on ownership, an agreement or another kind of an arrangement.\textsuperscript{1839}

The directive on Collective Redundancies is applicable in dismissals \textit{effected by an employer for reasons not related to an individual employee} and fulfilling certain numerical thresholds, based on the Member States’ choice. The directive covers also dismissals occurring on \textit{an employer’s initiative for reasons not related to individual employees}, provided that the \textit{number of dismissals is at least five}.\textsuperscript{1840} Based on the directive’s definition on collective redundancies, the directive’s scope of application is wider compared with dismissals affected by restructuring. The directive is, however, applicable also in restructuring, company acquisitions often affecting workforce reductions.\textsuperscript{1841}

The directive on Collective Redundancies presupposes informing employee representatives and their consultation in collective redundancies fulfilling the directive’s preconditions, the numerical thresholds being based on a Member State’s choice. Due to the directive’s requirements the ACU 1978 was reviewed to be applicable in undertakings employing at least 20 but fewer than 30 employees if at least ten employees are contemplated to be dismissed due to reasons not connected

\begin{footnotesize}
\begin{tabular}{l}
1838 ECA 1970 § 7.3; Government Proposal 109/1992 page 3; Kahri – Hietala page 46.  \\
1840 Directive 98/59/EC Section I article 1 1. (a) and (i) - (ii). On the directive’s character and contents see Blanpain pp. 501-508.  \\
1841 See Lehto pp. 6, 31 and 46-47.
\end{tabular}
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with the employee’s person.\textsuperscript{1842} This being the case the ACU is also applicable on re-placing and re-training.\textsuperscript{1843}

The directive on Collective Redundancies presupposes the employer to notify the public authority in writing of any projected collective redundancies. The notification is to contain all the relevant information enacted in the directive.\textsuperscript{1844} The ACU 1978 was changed on notifying the public authority. An employer was obliged to notify the employment agency in writing and also on data accumulated during the negotiations with the employees’ representatives if the character of this data differed remarkably from the data delivered earlier to the employment agency.\textsuperscript{1845} The ACU 1978 was further reviewed on an employer’s obligations’ scope in a case of an employer contemplating a redundancy of at least ten employees. The employer was obliged to supply the employee representatives with all the relevant information in writing.\textsuperscript{1846}

\textbf{1.3.3. AN ASSIGNMENT OF AN EMPLOYER´S BUSINESS WITH A CONCEPTUAL EVALUATION}

In the ECA an employee is defined by a reference to a contract entered into. The ECA is applicable in contracts – employment contracts – entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer´s direction and supervision in return for pay or some other remuneration.\textsuperscript{1847} An employment contract is labelled by an employee´s personal work performance for an employer, in return for pay, and an employer´s direction right, denoting to a right to direct and supervise work performance.\textsuperscript{1848}

An employee´s status in an employment contract´s framework is an unindependent one in relation to an employer.\textsuperscript{1849} The view on an employment contract’s character forms the basis of labour law, affecting into addition to its contents also interpretation, forming the framework for labour market relationships at all levels.

\textsuperscript{1842} ACU 1978 § 2.2; Government Proposal 109/1992 pp. 4-5.
\textsuperscript{1843} Laatunen – Savonen – Äimälä page 21.
\textsuperscript{1844} Directive 98/59/EC Section III article 3 1.
\textsuperscript{1845} ACU 1978 § 7b; Government Proposal 109/1992 page 5; Laatunen – Savonen – Äimälä page 86.
\textsuperscript{1847} ECA 2001 § 1.1.
\textsuperscript{1849} Tiitinen – Kröger 2003 page 12; See Supiot 2007 page 617.
An employer’s direction right is based on an employer’s management right, this in its turn being based on the private right of ownership. An employer’s management right is generally referred to as an employer’s general right to manage a business or an undertaking due to ownership or right of property and freedom of trade. The concept on an employer’s management right covers employer’s economic and financial decision-making on business, including its purpose, scope and quality. It covers also employer’s right to decide on business planning and its carrying out, denoting to ways of organising production, organisation and marketing and investment decisions’ contents. Especially in public companies limited by shares and listed companies the private right of ownership is losing its grounds, due to changes in ownership structures and employees’ increasing significance in knowledge-based production. Ownership grounds have had validity in the early 19th century and may still have in the case of family- and related share-ownership. Present share-ownership is generally dispersed in nature, at least in public limited companies and listed companies. It takes largely place by pension funds and other institutional investors with short investment-spans. These forms of share ownership are labelled by a lack of personal responsibility.

The rule defining an employee defines also an employer, being the one for whom the work is performed. Another definition, based on an employment contract’s contractual basis, refers to an employer as the other contracting party to be held as an employer. The employee and employer definitions are applicable in defining the parties in a transfer of an undertaking – an assignment of a business – and a merger, too.

According to the ECA 2001 “assignment of the employer’s business refers to an assignment of an enterprise, business, corporate body, foundation or an operative part thereof to another employer, if

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1850 On direction right see Kairinen pp. 199-207.
1851 See Sandström page 255 on the Swedish legal theory. On ownership right see Aarnio page 81.
1852 Valkonen 2006 page 804.
1853 See Ellsworth pp. 91 and 221.
1855 Clarke – dela Rama page xxix.
1856 See Sennett 2007 pp. 42-43 on the American pension funds’ investment spans, having been in the 1960s about 46 months and in 2000 only 3.8 months. Compare Druckner pp. 132-133 on employees’ role in pension funds, not having affected work and company practises.
1858 Compare CA 2006 § 1:7.
1859 Kairinen 2006 page 123.
1860 ECA 2001 § 1:10.1. Differences in the used terminology are due to different language and translation versions. The term “assignment of an employer’s business” is used in an unofficial translation of the ECA 2001 by the Finnish Ministry of Employment and the Economy, purported to equal with “a transfer of an undertaking”.
the business or part thereof to be assigned, disregarding whether it is a central or ancillary activity, remains the same or similar after the assignment”.\textsuperscript{1861}

The provision on a transfer of an undertaking – or an assignment of an employer’s business – is not identical with the definition in the directive on Transfers of Undertakings.\textsuperscript{1862} Irrespective of the differences in wording, the legislator’s purpose is the Finnish law’s equivalence with the directive’s concepts.\textsuperscript{1863}

In applying and interpreting the Finnish provision also the directive on Transfers on Undertakings and the ECJ’s case-law\textsuperscript{1864} has to be taken into account. The ECJ’s case law is significant especially in constituting elements in the concept of a transfer of an undertaking in cases demanding interpretation.\textsuperscript{1865}

The obligation to take into account the directive and the ECJ’s case-law is due to the doctrine of indirect effect, developed by the ECJ itself. According to this doctrine national courts, in interpreting national legislation, have to take into account the directive’s wording and purpose, the procedure targeted to achieving the directive’s pursued result\textsuperscript{1866}.\textsuperscript{1867} In Finland, the doctrine’s scope is limited by the basic law, presupposing interpretation equivalent with the basic rights.\textsuperscript{1868}

The rule of the ECA 2001 does not contain a reference to a merger. This kind of a reference is neither found elsewhere in the ECA. Irrespective of this a merger is to be equalled with an assignment of business, due to the directive on Transfers of Undertakings\textsuperscript{1869}.\textsuperscript{1870}

\begin{flushleft}
\textsuperscript{1861} ECA 2001 § 1:10.
\textsuperscript{1862} Directive 2001/23/EC Chapter I article 1 1. (a).
\textsuperscript{1864} Rautiainen – Äimälä page 138.
\textsuperscript{1865} Hietala – Kahri – Kairinen – Kaivanto 2006 page 98.
\textsuperscript{1866} See Case 14/83 von Colson Summary 1 and paragraph 26 and Case C-106/89 Marleasing Summary 1 and paragraph 13.
\textsuperscript{1867} Hietala – Kahri – Kairinen – Kaivanto 2006 page 98; Tiitinen page 53; Tiitinen – Kröger page 260; Tiitinen - Kröger 2003 page 270; Kairinen 2006 page 129; Saloheimo pp. 251-252; Kairinen page 255 on the limitations of the doctrine of indirect effect, stating that a directive’s rule of application demanding interpretation does not have a binding effect in employers’ and employees’ mutual relationships, not leading to employer obligations; Koskinen – Linderborg – Mäki – Nyman – Vehtola on the doctrine of indirect effect in legal practise pp. 426-428, 435-450 and 455-459; Paasivirta pp. 466-467.
\textsuperscript{1868} Hietala – Kahri – Kairinen – Kaivanto 2006 page 98.
\textsuperscript{1869} See Directive on Transfers of Undertakings Chapter I article 1 1.(a); Tiitinen – Kröger page 261; Tiitinen – Kröger 2003 pp. 271-272.
\textsuperscript{1870} See Saarinen page 483.
\end{flushleft}
In the ECA 2001’s government proposal the EU labour law directives have been systematically presented, among these in the present context relevant directive on Transfers of Undertakings. In the proposal there is not however a reference to the relevant company law directives, denoting in the present context especially to the 3rd directive on mergers. This is regrettable, due to these directive’s overlapping areas of regulation.

In Finnish labour law, the interpretation on the concept of a transfer of an undertaking – or an assignment of business – has traditionally been made by defining the transactions under evaluation into three different categories. By channelling different legal transactions into different categories the transactions in the scope of the concept and consequently outside it become defined.

The first category covers transactions not held transfers of an undertaking – or assignments of business – at all. Decisive in the assessment is transactions’ character, not affecting an employer’s identity. The second category covers pure transfers in the labour law sense. Decisive in the assessment is a change in an employer’s identity. The third category covers transactions outside a concept of a transfer of an undertaking, irrespective of a change affecting an employer’s identity.

Different transactions’ legal character’s assessment is grounded also by these transactions’ differing legal consequences. In an assignment of business employment relationships’ rights and obligations are transferred to the assignee. This rule is applicable also in mergers due their character as general successions. The third category’s transactions, being an employer’s business’s termination, employees’ employment relationships with their rights and obligations are not transferred.

The first category of transactions not assignments of business in the labour law sense covers a merger and a division. This interpretation is based on

1872 Tiitinen page 53; Tiitinen - Kröger 2003 page 271; Tiitinen - Kröger page 260; Rautiainen - Äimälä pp. 138-141 and 149.
1873 Rautiainen – Äimälä pp. 137 and 150.
1874 Rautiainen – Äimälä page140.
1875 Rautiainen – Äimälä page 137.
the company law, denoting to a general succession with a transfer of rights and obligations as such, without a need of additional labour law regulation.\footnote{1876}

Strict labour law interpretations on company law transactions’ character have become more flexible. This has been affected by changes in legal practise and the EU-law. If the company law transactions are carried out connected with other kinds of measures denoting to a transfer of an undertaking as a going concern, the transaction as a whole may be interpreted an assignment of business also in the labour law sense.\footnote{1877} With regards to mergers, the labour law’s flexibilisation in interpretation is due to the EU-law, being affected by the directive on Transfers of Undertakings’ scope, including mergers.\footnote{1878, 1879}

The first category of transactions not held as assignments of business covers a sell of shares, also the majority or even all of them. In the case 1975 II 15 all the Hotelli Teljänhovi Oy’s shares were transferred to another company. After the sell of shares business activities had been reorganised to increase productivity.\footnote{1880} The sell of shares is not interpreted to be an assignment of business.\footnote{1881} This is grounded with the transaction’s character as a form of company finance.\footnote{1882} In partnerships or limited partnerships selling of a partner’s share is equated with a sell of shares in a limited liability company, being thus outside the concept of an assignment of business.\footnote{1883} The labour law interpretations have however become more flexible. A sell of shares, connected with transfer of assets and employees, has been interpreted as an assignment of business.\footnote{1884}

\footnote{1876} Tiitinen pp. 53-54; Tiitinen-Kröger 2003 pp. 271-272; Tiitinen - Kröger page 261; Rautiainen - Äimälä pp. 139-140; Valkonen 2006 page 583; Hietala – Kaivanto page 108; Äimälä 1995 page 115; Äimälä pp. 109-111; Valkonen 1999 page 95.\footnote{1877} KKO 1997:105 on setting up a limited liability company. The National Board of Public Building was closed down, resulting in a transfer of its cleaning activities to a company formed by incorporation under civil law, without a contractual relationship between the transaction’s parties. Also floating and fixed assets had been transferred to a company. A transfer of business activities continuing in the incorporated company could be assessed, in addition to a change in the person carrying employer obligations and rights. Hietala – Kahri – Kairinen – Kaivanto 2006 page 100; Rautiainen – Äimälä page 148; Koskinen pp. 81-83; Kairinen pp. 261-262; Engblom pp. 108-109; Huhtala pp. 248-249; Koskinen – Linderborg – Mäki – Nyman – Veihtola pp. 433-434; Saarinen page 495. See also TT 1993-78 on incorporation by an establishment of a subsidiary company and Rautiainen – Äimälä page 140.\footnote{1878} Compare Tiitinen page 54, Tiitinen – Kröger page 261, Tiitinen – Kröger 2003 page 271.\footnote{1879} See Valkonen 1999 page 95.\footnote{1880} KKO 1975 II 15.\footnote{1881} Tiitinen pp. 53-54; Tiitinen – Kröger 2003 page 271; Rautiainen - Äimälä page 139; Hietala – Kaivanto page 108; Valkonen 2006 page 583.\footnote{1882} Valkonen 1999 page 100.\footnote{1883} KKO 1992:38; Tiitinen – Kröger page 261; Tiitinen – Kröger 2003 page 271; Compare, however, Hietala – Kaivanto page 108.\footnote{1884} In KKO 2007:7 share capital of an indemnity insurance company, owned by the parent company in the concern, was first transferred to a bank and in the following day to another insurance company. In addition to share capital, the transfer had included clients, employees needed in the insurance business and necessary tangible and intangible assets, for example different kinds of rights of use and two different trademarks. The business had also continued as such.
A transfer due to an employer’s death, the estate continuing the deceased’s business, and an assignment of business under liquidation are outside the concept of an assignment of business.\textsuperscript{1885}

The first category covers also law-based changes in corporate form not affecting legal entity’s identity. As an example can be mentioned a partnership’s change to a limited partnership. If the entity’s legal identity changes due to a corporate form change, transaction is generally interpreted an assignment of business in the labour law sense. As an example can be mentioned a cooperative society’s change into a limited liability company.\textsuperscript{1886}

The third category covers, for example, a closing down of a business and a formation of a new business, affecting employer identity. Employees are granted no special right to continue at the new employer’s employ. A transfer of an employment contract with its rights and obligations does not necessarily take place. An employment contract may be terminated. The continuation of employment contracts has to be agreed separately into addition to conditions. As an example of transactions belonging to the third category can be mentioned the case KKO 1985 II 164 on carrying out of business by an association, Sotainvalidien Veljesliitto, based on an agency agreement made by it with Oy Matkahuolto Ab. After the completion of new business premises the agency agreement was terminated by Oy Matkahuolto Ab, who began to carry out the business activities formerly carried out by Sotainvalidien Veljesliitto. The business was in core similar with the one carried out formerly by the association. The situation as a whole was interpreted to be a closing down of a business, an employee not being granted a right to continue at the new employer’s employ.\textsuperscript{1887}

From practical point of view the established division into different categories is artificial. A merger, division, sell of shares, an assignment of business and dissolution of a company all represent different forms of restructuring. All may affect, even negatively, the consequences in employee protection due to an employer’s management right.\textsuperscript{1888}
The transactions defined to be an assignment of business have to fulfil certain preconditions. The transaction has primarily be based on an agreement, leading to a change in a person carrying out employer obligations, its target being a transfer of an entity as a going concern. Contractual relationship between the parties does not have to be a direct one. Consensus between the parties is anyway supposed, at least of some degree.\textsuperscript{1889} \textsuperscript{1890}

In the case KKO 12.3.1987 D:S 86/862 N:o 800 an oil company owning a real estate terminated a co-operation agreement with an entrepreneur. The company made a new agreement with another entrepreneur. The business was continued at the same real estate. The first entrepreneur sold a part of its floating assets to the oil company, this in its turn selling the same assets to the new entrepreneur. The transaction was interpreted to be an assignment of business.\textsuperscript{1891}

In the case KKO 2001:49 A had made a lease contract on carrying out catering business in a hotel. The lease contract was made with B, owning the hotel. A denounced the lease with B. B organised a tender, both A and C participating. After the lease between A and B had expired, C began to carry out catering business on a lease in the hotel owned by B. No assets and employees were transferred from A to C. As factors indicating the activities’ continuance and, consequently, an assignment of business were emphasised the following: Changes indicating the activities’ suspension could not be shown. The trade name and the company’s advertising had continued similar, based on former commercial elements, having as its goal the maintenance of former clients based on established goodwill.\textsuperscript{1892}

In the case KKO 1989:78 A had carried out business consisting of tractors’ sales and service. A had an agreement with B on tractors’ sale. A sold to C the equipment needed in selling tractors. The agreement on tractors’ selling was transferred from B to C, A finishing the business of selling tractors. C began to carry out this business immediately without suspensions, in the previous business place employing A’s staff. There was not a direct contractual relationship between the transaction’s parties. The transaction was interpreted to be an assignment of business.\textsuperscript{1893}

\textsuperscript{1889} Hietala – Kahri – Kairinen – Kaivanto 2006 page 98.  
\textsuperscript{1891} KKO 12.3.1987 D:S 86/862 N:o 800; Rautiainen – Äimälä pp. 141-142.  
\textsuperscript{1892} KKO 2001:49, see Tiitinen –Kröger 2003 page 275, Saarinen page 477.  
\textsuperscript{1893} KKO 1989:78 dating before the EEA and EU ascension, see Tiitinen – Kröger 2003 pp. 272-273.
The transfer can be based on a unilateral decision-making even by a public body, or it may result from an award of a public service contract, leading to a change in the employer’s identity.\textsuperscript{1894} The transaction’s target has to be an economic entity functioning on a permanent basis, retaining its identity.\textsuperscript{1895} The transfer has to concern a stable economic entity, its business continuing same or similar compared with the previous business.\textsuperscript{1896, 1897} The entity’s functioning has to continue as such without an interruption, although short interruptions are acceptable.\textsuperscript{1898}

In the assessment also the employees’ transfer is significant. Even the transfer of key persons as an organised grouping without a transfer of assets may be interpreted as assignment of business. In the general assessment also the branch in question has to be taken into account.\textsuperscript{1899}

The assignment has to concern an entity functioning for economic goals on a permanent basis. It is not necessary that it has profit-gaining objective. The parties’ legal character is irrelevant. The entity’s functions may be organised by any natural or a legal person. When legal persons, the parties can be private- or public-law bodies, and when private-law bodies, also associations or foundations are included.\textsuperscript{1900}

In individual cases an assignment has to be based on a general assessment. The weight put on different factors varies. The assessment is largely based on the Spijkers-test’s factors: a legal transaction’s character forming an assignment’s basis,\textsuperscript{1901} type of an undertaking or a business,\textsuperscript{1902} whether tangible business assets are transferred or not and these assets’ value at the assignment’s


\textsuperscript{1895} In KKO 2001:48 a change in the transferred entity’s identity was assessed due to significant changes relating to the transfer, resulting there not being an assignment of business. See also KKO 2001:49 and KKO 2002:54. KKO 2000:12 on the unification of a business as a part of an assignee’s business. Rautiainen – Äimälä page 144; Valkonen 2006 pp. 601-607.

\textsuperscript{1896} Rautiainen – Äimälä page 144; Valkonen 2006 pp. 601-607.

\textsuperscript{1897} Proposal for ECA 2001 pp. 65-66; Hietala – Kahri – Kairinen – Kaivanto 2006 pp. 98-99; Tiitinen – Kröger 2003 pp. 272-273 and 277; Valkonen 1999 page 109; See KKO 1991:85 relating to unifying of two departments, not held to be an assignment of business, there not being a stable economic entity, the departments even unified not being able to carry out business activities independently, see Rautiainen – Äimälä page 143.

\textsuperscript{1898} Rautiainen – Äimälä pp. 144-145; Valkonen pp. 79-80, Valkonen 1999 pp. 107-109; Kairinen page 262.

\textsuperscript{1899} Rautiainen – Äimälä pp. 143-144.

\textsuperscript{1900} KKO 1999:69; Tiitinen pp. 54-55; Tiitinen – Kröger 2003 page 276; Tiitinen – Kröger page 266; Valkonen 1999 pp. 109 -112.

\textsuperscript{1901} KKO 1999:69 on exports promotion activities having been transferred without suspensions from the Ministry of Foreign Affairs to an association, following a unilateral decision-making by the Finnish Parliament. The activity did not cover use of public powers, although it was and is primarily funded by state subsidiaries. The transaction was assessed as a whole an assignment of an economic entity, thus an assignment of business. See Kairinen pp. 256-259; Saarinen page 495.

\textsuperscript{1902} KKO 2001:48.
time, whether or not the employees’ majority are taken over by the new employer, clients´ transfer, the degree of similarity between activities carried out before and after the assignment\textsuperscript{1903} and the period of which the activities were possibly suspended.\textsuperscript{1904} Crucial in the assessment is retaining of business identity.\textsuperscript{1905} Decisive is a transfer of an entity as a going concern.\textsuperscript{1906} In service sector important for an assessment of an assignment, especially in second-round contracting out, are a transfer of assets and/or majority of workforce.\textsuperscript{1907}

In subcontracting central is an enterprise’s decision to renounce its in-house activities. Usually subcontracted activities are ancillary in character compared with the main functions.\textsuperscript{1908} Traditionally, subcontracting has not been considered an assignment of business in Finland.\textsuperscript{1909} Generally, a subcontractor’s change has not been interpreted as an assignment of business.\textsuperscript{1910} Both of these interpretations cannot be applied straightforward as such, but need to be applied with care.\textsuperscript{1911}

As a general rule subcontracting is interpreted an assignment of business when the preconditions of the ECA 2001 and directive on Transfers of Undertakings are met\textsuperscript{1912} .\textsuperscript{1913} This applies also in a subcontractor’s change.

In assessing subcontracting as an assignment of business an essential precondition is to assess a transfer of an economic entity retaining its identity. The assessment is based on the Spijkers-test. Majority of staff in competence and numbers has to be transferred to the assignee’s employ, irrespective of a transfer of floating or fixed assets.\textsuperscript{1914} Transfer of assets is presumed in branches

\textsuperscript{1903} KKO 1990:129; KKO 1999:70 on the transfer of an entity having as its business the calling of taxes, arranged on a basis of new technology in a new company founded for this purpose; Tiitinen – Kröger 2003 pp. 279-280; Tiitinen – Kröger 2001 page 269; Valkonen 1999 pp. 105-107; Saarinen page 477.


\textsuperscript{1905} Rautiainen – Äimälä page 144; See KKO 2000:12 the transferred entity did not retain its identity, the transaction consequently not being an assignment of business.

\textsuperscript{1906} Hietala – Kahri – Kairinen – Kaivanto 2006 page 99.

\textsuperscript{1907} KKO 2001:44; Hietala – Kahri – Kairinen – Kaivanto 2006 page 99; Rautiainen – Äimälä pp. 146-147; See C-340/01 Abler Summary, directive 2001/23/EC having been held applicable in a second-round contracting out, although the second contractor did not have an intention to take on the first contractor’s employees.

\textsuperscript{1908} Rautiainen – Äimälä pp. 145-146.

\textsuperscript{1909} KKO 1977 II 98; Äimälä page 103; Valkonen 2006 page 616.

\textsuperscript{1910} Rautiainen – Äimälä page 146.

\textsuperscript{1911} Rautiainen – Äimälä page 145.


\textsuperscript{1913} Valkonen 1999 pp. 121 and 123.

where these form an essential precondition for business’s carrying out. The mere similarity of the transferred tasks does not solely denote to an assignment of business. In the assessment the task’s similarity can be taken into account as an additional factor.

Factors decisive in assessing subcontracting’s character as an assignment of business are decisive also in assessing the character of a subcontractor’s change. In the case KKO 2001:48 Uimaharjun Tehtaiden Ruokalaosuuskunta, a cooperative society, had carried out a staff canteen for a limited liability company Enocell Oy’s staff in Enocell Oy’s premises and by equipment owned by Enocell Oy. Due to economic difficulties Uimaharjun Tehtaiden Ruokalaosuuskunta had decided to close down its business, dismissing its staff. The employees’ employment relationships still in force Enocell Oy declared a tender on carrying out of its staff canteen, resulting in an agreement with a limited liability company Oy Polarkesti Ab on carrying out the staff canteen business. The transaction as a whole was not interpreted as an assignment of business. The purpose of the cooperative society was not profit-making, unlike that of Oy Polarkesti Ab, a limited liability company, carrying out staff canteen business in 200 other places of business. Also the ways of action and making of supplies into addition to staff were different between Uimaharjun Tehtaiden Ruokalaosuuskunta and Oy Polarkesti Ab. Business activities between them were different. Oy Polarkesti Ab carried out also cleaning and foodstuff deliveries. Oy Polarkesti Ab employed only three out of nine cooperative society’s employees. The number of the staff employed by Oy Polarkesti Ab was remarkably smaller compared to that of the cooperative society. The employees employed by Oy Polarkesti Ab were not managers, neither had they any remarkable branch expertise. Due to these factors the differences between the cooperative society’s and the limited liability company’s businesses were essential in character, affecting a change of the identity of the business, resulting there not being an assignment of business.

The case C-172/99 Oy Liikenne Ab, also KKO 2001:44, concerned an assessment of a transfer of an undertaking within the directive on Transfers of Undertakings´ meaning and consequently employees´ status due to award of scheduled local bus routes, a procedure under the directive on the coordination of procedures for the award of public service contracts. Resulting from this procedure

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1915 KKO 2001:44.
1916 Rautiainen – Äimälä pp. 146-147; Valkonen 1999 pp. 138-139.
1917 Rautiainen – Äimälä page 146.
1918 Rautiainen – Äimälä page 134; Saloheimo pp. 250-261; Valkonen 1999 page 124; Valkonen 2006 page 617.
1919 KKO 2001:48, Saarinen pp. 478-479; Compare with the Spijkers-test and KKO 1991:141. See also KKO 2002:54, an assignment of business not being assessed in a case on catering business. A change in the identity of business was assessed due to changes in the character of business, clients and ways of action, not including a transfer of the staff.
Oy Liikenne Ab began to operate bus routes operated formerly by Hakunilan Liikenne, which dismissed a part of its staff. Pekka Liskojärvi and Pentti Juntunen, former employees of Hakunilan Liikenne, were employed by Oy Liikenne Ab with employment conditions based on a national collective agreement but generally less favourable compared with the former employment conditions. The directive on Transfers of Undertakings is in principle applicable when a legal person governed by public law successively awards the operation of scheduled local bus routes to two undertakings, based on a procedure under the directive on the coordination of procedures for the award of public service contracts, there not being a direct contractual link between these two undertakings. The applicability of the directive on Transfers of Undertakings is however preconditional. It depends on the transfer of an economic entity retaining its identity. This is characterised especially by a transfer of tangible assets to a significant extent, contributing significantly and being necessary to perform the activity in question, scheduled public transport by bus. In a case concerning Liikenne’s replacing Hakunilan Liikenne as an awarde, there had not been between these undertakings a transfer of vehicles or other assets connected with the bus routes’ operation. Liikenne had only leased two buses for two or three months from Hakunilan Liikenne, while waiting for 22 new buses, which it had ordered. Liikenne had also bought from Hakunilan Liikenne some of the employed drivers’ uniforms. There not having been a transfer of significant tangible assets between these two undertakings, the directive on Transfers of Undertakings was not held applicable. The transaction in question was not either held be an assignment of business in the meaning of the ECA 2001. The inapplicability of the directive on the Transfers of Undertakings, resulting in an equivalent national level interpretation, was based on an employer’s decisions on business assets. The employment relationships were not transferred. From the employees’ perspective the end-result with its legal effects equals with that of company dissolution.

A bankrupt estate can act as an assignor in an assignment of business. An assignment of business was assessed in a transaction consisting of lease agreement’s transfer, followed by a transfer of staff and works. In the assessment time period for the carrying out of the entity’s actions was also taken into account. An assignment of business is assessed in transactions in which the

1920 Case C-172/99 Oy Liikenne Ab Summary 1-2 and paragraphs 2, 9-10, 25, 39 and 42-44.
1921 KKO 2001:44; Rautiainen – Äimälä page 147; Kairinen pp. 263-264; Saarinen page 495.
1923 See KKO 1990:61 on a case A having made with B a lease on business premises and equipment 31.10.1986. Only three days later 3.11.1986 A made a bankruptcy application, followed 4.11. by the staff’s dismissals due to the bankruptcy, without following notice periods. On the same day B had employed almost the whole of A’s staff,
staff’s employment contracts have still been in force at the time of the bankrupt estate’s transfer, denoting to a transfer of an economic entity, business operations continuing as such.\textsuperscript{1924} An assignment has not been assessed in a case of employment contracts having been lapsed before an assignee employing the staff.\textsuperscript{1925} An assignment has not been assessed when an agreement on a sale of fixed and floating assets had been under planning and negotiations before the seller company’s bankruptcy, the creditors’ meeting having approved the agreement only after the final termination of employees’ employment contracts, having been given dismissal notices by the bankrupt estate immediately after the company was declared bankrupt.\textsuperscript{1926} \textsuperscript{1927}

A bankrupt estate had transferred an entity consisting of floating and fixed assets and staff. The transaction was assessed to be an assignment of business, although the floating assets had been transferred on a lease contract and the fixed ones were sold on a commission.\textsuperscript{1928}

With incorporation is referred most commonly to divisions, being general successions. Incorporations carried out by a sell of a business or in the form of transferring a business as a capital contribution to a company belonging to same concern are however interpreted assignments of business.\textsuperscript{1929}

Transfer of a transferable right of use may be interpreted an assignment of business. Also transfers of service contracts, tenancy and an annulment of a sale or a tenancy as well as transfers in relation to an execution may fall under the concept.\textsuperscript{1930}

Outside the concept are transfers of a mere department of an enterprise\textsuperscript{1931} or an integration of an entity into the assignee’s business as its inseparable part.\textsuperscript{1932} Outside an assignment of business are continuing to carry out activities similar to those carried out by A and taking immediately place in the leased premises, in works contracted previously by A.

\textsuperscript{1924} KKO 1996:10 and KKO 1996:11.
\textsuperscript{1925} KKO 1992:191.
\textsuperscript{1926} KKO 1993:127; See also KKO 1985 II 114.
\textsuperscript{1927} Rautiainen – Äimälä pp. 144-145.
\textsuperscript{1928} KKO 1990:81.
\textsuperscript{1929} TT 1993-78; Rautiainen - Äimälä page 140; Saarinen pp. 484-485.
\textsuperscript{1930} KKO 1990: 61; Valkonen 1999 pp. 95-96 and 102; Valkonen 2006 page 584; Koskinen – Nieminen – Valkonen page 260.
\textsuperscript{1931} KKO 1991:85.
\textsuperscript{1932} Rautiainen - Äimälä pp. 142 -143; Valkonen 2006 pp. 590-596; Äimälä pp.102 -103; Kairinen pp. 258-259; Saarinen pp. 479-480.
transactions with individual character. With this is referred to a sell of a machine\textsuperscript{1933} or other equipment taking place as individual transactions, and a sell of stored articles.\textsuperscript{1934}

The development of the concept of a transfer of an undertaking – or an assignment of business – has been in the labour law’s focus in Finland since 1970s, due to national legislative changes affecting legal practise. Due to the Membership obligations a change in the Finnish legal jurisprudence with regards to the concept of a transfer of an undertaking – or an assignment of business – has, however, been evaluated having taken place. More emphasis is put on the ECJ case-law compared with the previous legal state. On the other hand, this state of affairs has been evaluated to show there not having been any essential differences in interpretations on a transfer of an undertaking.\textsuperscript{1935}

In the Finnish labour law in interpreting the legal character of different transactions in assessing an assignment of business the former fairly strict division into three categories is getting blurred. In the assessment the emphasis in however on factors being largely within an employer’s decision-making, outside employees’ influence. In defining different transactions’ legal character more emphasis should be put on their factual consequences, by taking into account employees’ protection and employment perspectives.\textsuperscript{1936} From the employee point of view, consequences are of importance. From the employee perspective, there are not necessarily differences regarding a transaction’s form between a merger, a sell of shares, an assignment of business or a company’s dissolution, all representing restructuring in differing forms, being ultimately affected by an employer’s managerial decision-making.\textsuperscript{1937}

One of the factors in assessing an assignment of business has to do with the effects of legal transactions on an employer’s identity, either affecting it or not. In the Finnish labour law a merger has traditionally not been held an assignment of business, it not affecting an employer’s identity in the company law sense. In the directive on Transfers of Undertakings a merger is equalled with a legal transfer, both denoting to a transfer of an undertaking.\textsuperscript{1938} This equalling is not primarily due

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\textsuperscript{1934} Hietala – Kahri – Kairinen – Kaivanto 2006 page 100; Rautainen – Äimälä page 143.
\textsuperscript{1936} Compare KKO 2001:48, KKO 2001:44 and directive on Informing and consulting employees Preamble point (10).
\textsuperscript{1937} See Bylund – Elmér – Viklund – Öhman page 92 on the legal definitions in Sweden, a transfer of an undertaking covering also a merger.
\textsuperscript{1938} See directive on Transfers of Undertakings Chapter I article 1. (a).
\end{flushright}
to effects affecting an employer identity, but due to these legal transactions’ purposes and legal effects, being equal under the directive.\textsuperscript{1939}

Finnish labour law has acknowledged mergers affecting changes in employment relationships.\textsuperscript{1940} With regards to evaluating a concept of a merger in the Finnish labour law, hardly any attention has been put on a merger’s purpose in the EU framework and its consequences, affecting a merger’s character as a legal transaction. The low level of attention may largely be due to this transaction’s established character as a general succession, denoting to employment relationships’ continuance with former rights and obligations.\textsuperscript{1941} With regards to legal consequences, a merger resulting in an employment relationship’s termination equals however with company’s dissolution.\textsuperscript{1942} In defining a merger in the Finnish labour law without attention are the consequences of EU membership obligations generally, the EU being a form of furthering economic integration, and employee consequences in practise. The membership obligations affect the direction of societal changes, business included. This takes place first by the ideological level, directing societal change, secondly at the practical level. The EU’s strong economic imperative and its emphasis on furthering free enterprise especially by carrying out economies of scale and scope inevitably affect at the Member State level in business transactions’ practical carrying out.\textsuperscript{1943}

In legal theory in defining a merger more emphasis should be put on a merger’s purpose in the EU framework and practical consequences, affecting also this transaction’s legal character. Also the rapid increase in the M&A activities in Finland since 1990s give grounds to evaluate a merger’s nature anew, due to practical employee effects. From the purpose’s and consequences’ perspective in the Finnish labour law theory a merger should be equalled with an assignment of business, thus affecting and moulding the present division of legal transactions into different categories.

From the employee and employee protection perspective, in emphasising especially employment, there is to be perceived another weakness in assessing labour law transactions’ character in an assignment of business context. This concerns cases, in which a change of employer’s identity has been assessed, the provision on an assignment of business however not being applicable. These cases are legally characterised by factors in an employer’s decision-making due to management

\textsuperscript{1939} Directive on Transfers of Undertakings Chapter II articles 3-4.
\textsuperscript{1940} Kairinen page 269. On an employer’s dismissal right see Saarinen page 484.
\textsuperscript{1941} Tiitinen – Kröger 2003 pp. 271-272.
\textsuperscript{1942} See Lehto pp. 6, 31 and 46-47 and CA Committee 1992:32 page 316.
\textsuperscript{1943} Compare Ali-Yrkkö on Finland’s and Sweden’s activity in the M&A pp. 19-22 and updated 2006.
right, outside employees’ influence. The application of the rule on an assignment of business requires as one of its preconditions taking on a majority of workforce or assets, depending on the branch. Ultimately also this issue is a matter of employer decision-making, outside employees’ influence.\textsuperscript{1944} The criteria used in defining an assignment of business put to the secondary place employee implications, by emphasising factors in an employer decision-making, resulting even in the termination of employment relationships, the end-results equalling with those of company dissolution, limiting the scope of employee economic protection.

1.3.3.1. Share of Responsibilities

When an enterprise is assigned, the assignor and the assignee are jointly and severally liable for the employee’s pay or other claims deriving from the employment relationship having fallen due before the assignment. Unless otherwise agreed, however, the assignor is liable to pay the assignee employee claims that have fallen due before the assignment.\textsuperscript{1945}

A shared responsibility is enacted between an assignee and an assignor on claims deriving from employment relationship, having fallen due before the assignment. In spite of the shared responsibility an assignee has a right of recourse. It covers claims having fallen due before the assignment, if the assignor and the assignee have not agreed otherwise.\textsuperscript{1946}

The assignee is responsible on claims having arisen after an assignment. The most common of these is the monthly salary. The same rule concerns claims having arisen before an assignment but fallen due after it. As examples can be mentioned overtime compensations or holiday pay, to be paid before a holiday’s beginning.\textsuperscript{1947} 1948

In an assignment of a bankrupt estate, the assignee is not liable for employees’ pay or other claims deriving from an employment relationship and having fallen due before the assignment, except if

\textsuperscript{1944} Compare in the context of the directive on Transfers of Undertakings Barnard pp. 642 – 644 and O’Leary pp. 265-266.
\textsuperscript{1945} ECA 2001 § 1:10.2; Rautiainen – Äimälä page 155.
\textsuperscript{1947} AHA § 3:9; KKO 1989:78; KKO 1990:61.
controlling power in the bankrupt enterprise and in the assignee enterprise is or has been exercised by the same persons on the basis of ownership, agreement or other arrangement.\textsuperscript{1949}

A merger is characterised by a transfer of an acquired company’s all obligations to an acquiring company, the company being acquired ceasing to exist. This applies also in situations leading to a formation of a new company. After a merger’s registration for enforcement, the issue on the share of responsibilities is merely an academic one, there not being in existence a company legally responsible on the former employer’s obligations. Only the acquiring company can be held responsible, also with regards to obligations being born before the merger, referring to the date of registration.

1.3.3.2. Transfer of Rights and Obligations

According to an established rule on a merger’s consequences, an employment relationship with its former rights and obligations is transferred to an acquiring company, due to a merger’s character as a general succession. With regards to an assignment of business – being a special labour law concept – an employment relationship with its rights, obligations and employment benefits valid at an assignment’s time devolve to a new owner or proprietor\textsuperscript{1950}  \textsuperscript{1951}

The transfer of rights and obligations both in a merger and in an assignment of business takes place automatically.\textsuperscript{1952} The rule on the transfer of rights and obligations is applied also to employees who at that time are on a leave due to studies, sickness or family reasons, be it paid or unpaid. The leave’s character does not affect the interpretation.\textsuperscript{1953} In an assignment of a part of a business, only employees performing work in this part of a business are transferred. Decisive in the assessment is an entity’s formal organisational structure and the employees’ actual tasks\textsuperscript{1954}.\textsuperscript{1955}

\textsuperscript{1949} ECA 2001 § 1:10.3; KKO 1996:2; Hietala – Kahri – Kairinen – Kaivanto 2006 page 104; Tiitinen – Kröger 2003 page 286; Tiitinen – Kröger page 274; Rautiainen – Äimälä page 156; Saarinen page 517.
\textsuperscript{1950} ECA 2001 § 1:10.2.
\textsuperscript{1951} Tiitinen – Kröger 2003 pp. 271-272 and 281.
\textsuperscript{1952} Rautiainen – Äimälä page 150.
\textsuperscript{1953} Tiitinen page 57.
Decisive in assessing an assignment’s time is concretely an entity’s possession’s transfer. Decisive is not an ownership transfer as such. With regards to a merger, decisive is the registration date for merger’s enforcement.

An employee does not have a right to resist an assignment by staying at the assignor’s employ. An agreement on the employment relationship’s continuation at the assignor’s employment is possible. In Sweden, an employment contract is not to be transferred, if an employee objects the transfer. A merger is characterised by the acquired company’s ceasing. Thus, continuing at the acquired company’s employ is a practical impossibility. This applies also in a merger leading to a formation of a new company.

Company acquisitions generally lead to workforce reductions. From the employee perspective, the obligatory transfer to an assignee’s employ may decrease the options on further employment. In a merger the options on further employment generally decrease.

An employment relationship already expired before an assignment’s date or a merger’s registration date is not transferable. If an employment relationship is not in force at that time, for example, due to a dismissal, be it legal or illegal, the relationship is not transferred. If the dismissal, having taken place before an assignment or a merger, is however targeted to circumvent the enacted legislation’s application, measure is held illegal as such.

All rights and obligations deriving from an employment contract or relationship in force at the assignment’s time or a merger’s registration date are assigned as such to the assignee or to the acquiring company or to the company being formed. This covers fringe benefits, arrangements

1961 See CA 2006 § 16:16.
1962 See Lehto pp. 6, 31 and 46-47.
1963 Tiitinen - Kröger 2003 page 282; Tiitinen - Kröger page 270; Rautiainen – Äimälä page 150.
1964 Tiitinen pp. 57-58; Rautiainen – Äimälä page 150; Hietala – Kahri – Kairinen – Kaivanto 2006 page 102 and KKO 2005:50 presupposing the existence of particularly weighty reasons with regards to the assignee for a basis to continue a non-competition agreement made with the assignor, see ECA 2001 § 3:5.1-2. Hietala – Kahri – Kairinen – Kaivanto 2006 page 104 recommending due diligence with regards to the scope of rights and obligations being transferred. KKO 1989:78.
on working-time and additional pension rights. Additional benefits are equal with employment relationship’s actual terms and conditions, being thus also transferred. Benefits consisting of collective rights of use or collective usufructs are not transferred. They include, for example, a right to use an employer’s summer or skiing cottage, Christmas presents or support for sports. The assignee, the acquiring company or the company being formed is consequently not bound to offer these kinds of rights or benefits. Legal theory has included under the non-transferable rights also option rights, being based on general meeting decision-making or a decision by the board. The interpretation may be an opposite one, if the rights are based on special terms in individual working contracts.

The assignee is bound to apply on the assigned employee collective agreement binding the assignor until to this collective agreement’s expiring. When the term expires, the assignee is entitled to apply a collective agreement otherwise applicable in the undertaking in question. An assignee may however agree with the employees on applying the former collective agreement, offering better conditions. These rules on collective agreements’ applying are valid also in mergers, due to the directive on Transfers of Undertakings.

In employment relationships’ individual terms and conditions between the assigned employees and those formerly employed by the assignee discernible and even remarkable differences may be assessed. This is not against the rule on equal treatment. Due to an assignment of business an employer has an acceptable reason to determine employees’ salary in the same work on different basis. Due to the principle on equal treatment an employer should strive to remedy the differences. The actual possibilities to carry out this kind of a policy are, however, limited ones. The rule on
differences in employment relationships’ individual conditions and their equalling is applicable in mergers, too.

1.3.3.3. Protection against Dismissals?

The assignee may not terminate an employee’s employment contract merely due to an assignment of an enterprise. The provision is mandatory. An employment contract’s parties do not have powers to agree otherwise, to an employee’s detriment. The rule is applicable in mergers, too.

An assignment of business or a merger is not as such a legal ground for employment contract’s termination. The enacted provision and the directive on Transfers of Undertakings do not however hinder dismissals based on economic, technical or organisational reasons entailing changes in the workforce. Both an assignor, an assignee and parties in a merger are allowed to terminate an employment contract on grounds related to an employee’s person or on financial and production-related grounds.

With an employer’s management right is referred to the employer’s general right to manage a business or an undertaking. It is a based on concepts of ownership or right of property and freedom of trade. The concept on employer’s management right covers employer’s economic business decision-making, including its purpose, scope and quality. It covers also an employer’s right to decide on the way of carrying out the business, future plans included. This denotes to ways of organising production, organisation and marketing and investment decisions’ contents. Management right is the basis for an employer’s decision-making in company matters. Employees’ options to affect it depend on the level of their influence in company’s central decision-making bodies.

1976 See directive on Transfers of Undertakings Chapter I article 1 1. (a) and Chapter II Article 4 1.
1977 See directive on Transfers of Undertakings Chapter II Article 4 1.
1979 ECA 2001 § 7:3.
1981 On ownership right see Aarnio page 81.
Financial or production related dismissal grounds enacted in the ECA 2001 do not limit the use of an employer’s management right. The concept on an employer’s management right facilitates the employer’s decision-making on the scope of the business, resulting especially in a reorganisation of business operations. An employer has a right to terminate its business actions or arrange their carrying out in a way considered to be more efficient compared with the former production ways. The right to reorganisation covers also profit-making undertakings. These arrangements may result in dismissals. Central in assessing financial and production-related dismissal grounds based on an employer’s management right is an individual employer’s strive to secure its status in competition. Business actions are allowed to be carried out in ways considered the most productive.

An employment contract may be terminated only on proper and weighty reasons. A dismissal reason may not be a discriminating one. In dismissals based on individual reasons relating to employees’ actions, in the form of breaking obligations based either on an employment contract or law, also factors relating to dismissal’s fairness have to be taken into account. In assessing dismissal’s legality all the facts in the case have to be taken into account. A general assessment based on fairness is not done in dismissals based on financial or production-related grounds, resulting from the use of management right in changes in an employer’s business and being related to it. In dismissals based on financial and production-related grounds an employer’s and employee’s individual circumstances are not taken into account. A comparison is not done between employer’s financial, production-related and organisational circumstances and employee’s economic and social circumstances.

Dismissals based on financial and production-related grounds have a larger role in restructuring, assignments of business and mergers included, compared to dismissals based on individual person-related grounds. The economic effects of workforce reductions extend often outside an individual employee level, covering local and even national levels, due to the scale of the measures.

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In dismissals based on financial and production-related grounds the work to be offered has to be diminished substantially and permanently for financial or production-related reasons or for reasons arising from an employer’s operations’ reorganisation.\textsuperscript{1989} An employment contract may not be terminated, if the employee can be placed in or trained for other duties.\textsuperscript{1990} In contemplated dismissals based on collective reasons it is to be assessed before the dismissal’s actual carrying out if an employer can be required to take action targeted to employees’ re-employment, even by offering training, instead of dismissing.\textsuperscript{1991} This is a part of an employer’s general duty of loyalty towards an employee. This forms also a part of assessing “proper and weighty reasons”.\textsuperscript{1992} In an employer’s operations’ reorganisation a termination ground cannot be constituted, if it has not resulted in actual reduction of work.\textsuperscript{1993}

The diminishment of work to be offered due to financial or production-related reasons or for reasons arising from an employer’s operations’ reorganisation result solely from an employer’s own actions and decision-making. Financial or production-related grounds do no limit an employer’s management right. Irrespective of the enacted dismissal grounds an employer has a right to finish, expand or reduce its business activities. Due managerial right a decision to reduce workforce may be grounded with any kind of a managerial decision unrelated to an employee’s person.\textsuperscript{1994} A dismissal reason’s practicality and its managerial grounds are not a part of assessing dismissal ground’s legality and the dismissal itself\textsuperscript{1995}.\textsuperscript{1996}

Generally dismissals based on financial and production-related grounds require the following: Into addition to assessing proper and weighty reasons, the work to be offered has to be diminished both substantially and permanently. The diminishment has to be due to financial or production-related reasons or for reasons arising from an employer’s operations’ reorganisation. A dismissal cannot be carried out, if an employee can be placed in or trained for other duties.\textsuperscript{1997} These principles are applicable in an assignment of business\textsuperscript{1998} and consequently also in a merger, due the indirect effect.

\textsuperscript{1989} ECA 2001 § 7:3.1; Rautiainen – Äimälä pp. 259-260.
\textsuperscript{1991} Tiitinen page 77.
\textsuperscript{1993} ECA 2001 § 7:3.2 point 2; Rautiainen – Äimälä page 262; Valkonen 2006 page 845.
\textsuperscript{1994} Tiitinen – Kröger 2003 page 385.
\textsuperscript{1995} Also Valkonen 2006 pp. 804-805.
\textsuperscript{1996} Tiitinen page 85.
\textsuperscript{1998} Hietala – Kahri – Kairinen - Kaivanto 2006 page 321.
The diminishment of work to be offered has to be substantial and permanent in character.\textsuperscript{1999} In defining substantial and permanent diminishment into account is taken an employer’s duty to offer work\textsuperscript{2000} and training required by it, having been defined as a part of an employer’s social obligations, belonging thus to the sphere of an employer’s corporate citizenship\textsuperscript{2001}, and individual notice periods’ length\textsuperscript{2002} in addition to employees’ re-employment\textsuperscript{2003, 2004}. In reorganisation there is to be assessed a reduction affecting work to be offered or the change may concern also the offered work’s quality, due to changes in production or production range, machinery and equipment acquisitions and general work arrangements\textsuperscript{2005, 2006}. Due to management right an employer has a right to make decisions on production ways including, among the others, decreasing of the quality of products and services.\textsuperscript{2007}

Solely financial factors may lead to dismissals, denoting to reasons outside a company’s powers, but also in financial decision-making.\textsuperscript{2008} Often financial reasons lead also to production-related reasons or reasons arising from an employer’s operations’ reorganisation as a dismissal ground.\textsuperscript{2009} Profit-making organisations may use financial reasons to dismiss in an anticipatory sense.\textsuperscript{2010}

An employer’s duty to offer work is linked with a duty of offering training required by work. In the assessment, reasonableness is taken into account. Employee’s skills were not evaluated to be in a level required for carrying out offered tasks without a lengthy familiarising period. A dismissal ground was assessed.\textsuperscript{2011} A dismissal right was not assessed in a case requiring only a short period of training and familiarising.\textsuperscript{2012} The training’s reasonableness is based on its length, training’s organiser also affecting in the assessment. A training of several months by an outside institution has

\textsuperscript{1999} Valkonen  2006 pp. 836-837.
\textsuperscript{2000} See ECA 2001 § 7:4.3, the duty to offer work extending to another enterprise or corporate body if an employer in fact exercises control in personnel matters in another enterprise or corporate body on the basis of ownership, agreement or some other arrangement, see Rautiainen – Āimālā pp. 267-269, Valkonen 2006 pp. 857-860 and 847-880.
\textsuperscript{2001} See Crane – Matten 2007 page 74.
\textsuperscript{2002} See ECA 2001 § 6:3, varying from an employer’s side from 14 days to 6 months, depending on an employment relationship’ length; Tiitinen page 75; Tiitinen – Kröger 2003 pp. 326-327; Rautiainen – Āimālā page 205.
\textsuperscript{2005} Tiitinen pp. 89-90; Valkonen 2006 pp. 814-815.
\textsuperscript{2007} Valkonen 2006 page 814.
\textsuperscript{2008} Valkonen 2006 page 808.
\textsuperscript{2009} Rautiainen – Āimālā page 260-261.
\textsuperscript{2011} See TT 2005 – 53.
not been held reasonable. As a general rule, in large companies the offered training may last about two months. In small- and medium-sized enterprises the length is some weeks.

Employer´s duty to offer work is linked with offering training as a part of assessing dismissal reason. In offering training an employer has however also general obligations, proactive in nature. An employer has to ensure that employees are able to carry out their work even when the enterprise´s operations, the work to be carried out or the work methods are changed or developed. The employer shall strive to further the employees´ opportunities to develop themselves according to their abilities so that they can advance in their careers. In company practises this rule´s importance should be increased intentionally, by linking it also with the Act on Co-operation 2007´s personnel plans and training objectives. Skills development is a fundamental preconditions in carrying out company strategies, resulting in developing an employer´s competitive advantage in a proactive manner.

In Finland there is not enacted a dismissal order in the ECA 2001. An employer has a freedom to choose the employees to be dismissed. Dismissal orders are common in collective agreements, being generally based on a priority to offer work to employees with special skills or training. Dismissal order is in practise decided by an employer. The principle “last in, first out” is seldom applied.

Although an assignor and an assignee have to apply same rules in terminating an employment contract, the assessment may differ with regards to these parties. This is due to differences in availing circumstances and factors used in the assessment.

Before an assignment, an assignor has a dismissal right on reasons relating to an employee´s person and on financial or production-related grounds but only, if a dismissal cannot be avoided by offering work, linked with offering training. An assignor has a right to carry out necessary

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2014 Valkonen 2006 page 871.
2015 Compare with TT 2005-53 in assessing a dismissal ground.
2018 Hyvinvointi versoo tuottavuudesta pp. 11-12 and 14-15.
rationalisations, irrespective of an assignment. An awareness of a forth-coming assignment does not hinder an assignor’s right to dismiss. A right to dismiss is however limited. It cannot be used by referring to a closing down of a business or its part, if this business or a part is an assignment’s target. If an employment contract has been terminated without legal grounds, an assignee is responsible to pay compensation, varying from three to 24 months’ salary.

In assessing an assignee’s right to dismiss the decision is affected by the need of workforce, this in its turn being affected by managerial decisions on the undertaking’s future ways of action. In this assessment into account has to be taken the entity carrying out an undertaking’s activities after an assignment. An assignment commonly results in different kinds of business activities’ unification and reconciliation. Consequently, there may be needs to adjust the personnel to changed business environment, preconditioning dismissals. The work to be offered has to be diminished substantially and permanently for financial or production-related reasons or for reasons arising from an employer’s operations’ reorganisation. An employment contract may not be terminated, if the employee can be placed in or trained for other duties.

A merger’s general succession character denotes to an employment relationship’s continuation as such. Finnish legal theory has largely neglected to analyse an employer’s dismissal right and its effects in a merger, affecting also this transaction’s character. The dismissal right is evident due to the directive on Transfers of Undertakings. Secondly, it is based on an employer’s management right as such, used within the framework set by the legislation, denoting to the ECA 2001 rules.

In a merger a company being under acquisition or a party in the formation of a new company has a right to dismiss during the merger procedure on reasons related to an employee’s person or on financial or production-related grounds. A dismissal cannot anyway be grounded by a reference to a forthcoming merger. An acquiring company or a company being formed has a right to use its
managerial rights best suiting to its business needs, as far as a dismissal is not grounded by the merger itself. Due to a merger, the company being under the acquisition process ceases to exist. This naturally affects its managerial and business interests and scope of action, affecting the needs to use managerial rights resulting in employment relationship terminations. A company being under the acquisition or formation procedure and however dismissing employees due to financial and production-related grounds should specially be required to ground the terminations.

Restructuring, mergers included, generally lead to workforce reductions in the form of dismissals. Because of this there are valid reasons to argue a merger’s general succession character. The rules on an employer’s management right connected with rules on dismissal do not in practise protect employees’ employment contracts’ continuation in a merger. This concerns also an assignment of business. Consequently, protection of employee’s economic rights is weakened. From the legal consequences’ perspective, a merger and an assignment of business often equal themselves with a company’s dissolution. This being the case, from the employees’ point of view a merger refers only to a modified model of general succession, denoting in fact with regards to legal effects to a company’s dissolution, being often applicable in an assignment of business, too.

If an assignor has dismissed personnel on financial and production-related grounds before an assignment, employment contracts still in force at an assignment’ time, an assignee has to offer work to these employees. When needing workforce for tasks same or similar compared with the former ones, an assignee has a duty of re-employment on employees dismissed on economic and production-related grounds before the assignment, if these employees are still seeking work via an employment office. The duty covers the first nine months after termination of the employment relationship. The said is applicable in mergers, too.

An assignee and in a merger an acquiring company or a company being formed do not have a right to terminate employment contracts made for fixed term. These contracts continue to be in force as

\[2030\] Compare ECA 2001 § 7:5.1; Proposal for ECA 2001 pp. 104-105.
\[2031\] See Lehto pp. 6, 31 and 46-47.
\[2032\] See Supiot page 518 emphasising the protection of employees’ physical and economic security as a value being fundamental in all forms of work; See also Villiers 1998 page 202 emphasising economic values inherent in an employment relationship.
\[2033\] See CA Committee 1992:32 page 316.
\[2034\] Proposal for ECA 2001 page 104.
such irrespective of an assignment or a merger. 2036 It is neither allowed to change an employment contract valid indefinitely for a fixed term one due to an assignment or a merger. 2037 Special protection offered to employees on family leaves and employee representatives continues to be in force as such 2038, 2039.

Employees have a right to terminate employment contracts as from the assignment’s date regardless of the notice period otherwise applied or regardless of its duration, if they have been informed of the assignment by the employer or the new proprietor no less than one month before the assignment’s date. If employees have been informed later, they have a right to terminate their employment contracts as from the assignment’s date or from a date following it, no later than within one month of having been informed of the assignment. 2040 Also employees with fixed-terms contracts have a right to terminate employment contracts due to an assignment. 2041 These rules are applicable in a merger, too.

1.3.3.4. Changing Employment Contract’s Conditions

An assignment of business is not as such an acceptable reason for detrimental changes in employment contract’s conditions. Alterations are however permitted on preconditions applicable in other situations outside an assignment. This rule applies in also in mergers, due to the directive on Transfers of Undertakings. 2042

With regards to employment terms and conditions, the employees’ status does not necessarily stay as such in an assignment of business. An assignment of business does not guarantee former rights’ staying unaffected. 2043 This concerns also mergers.

Employment relationships’ conditions’ change is always allowed on contracting parties’ mutual consent. 2044 Changes may be affected due to an employer’s direction right. A comparison on an

2037 Saarinen page 1039.
2038 ECA 2001 §§ 7:9-10; Koskinen – Nieminen – Valkonen page 271; Saarinen page 1042.
2039 Valkonen 2006 page 889.
2042 Cases 324/86 Daddy’s Dance Hall paragraphs 17-18, C-209/91 Rask and Christensen paragraph 31, C-343/98 Collino and Chiappero paragraph 53; Barnard pp. 656-658.
2043 Kairinen page 269.
employee’s prospects is however needed. If the intended changes can be evaluated reasonable, they
can be carried out based solely on the direction right.  

An assignee has a right to change unilaterally the employment contracts’ conditions only on
grounds and to an extent applicable with regards to an assignor. As a precondition is commonly
required a dismissal reason. This is applicable in a merger, too.

An employer is entitled to change unilaterally an employment contract into a part-time one on
dismissal reasons, referring to financial and production-related grounds. An employer has a right
to change unilaterally an employment relationship’s essential and fundamental condition, like a
salary basis, on proper and weighty reasons, denoting to dismissal reasons, within the framework of
enacted notice periods. If work has diminished substantially and permanently, an employer cannot
however unilaterally change an employment contract’s condition on tasks. Offering of work is
required first.

Irrespective of the general rule on employment contracts’ continuation with their former rights and
obligations as such in an assignment of business and a merger preconditions to change conditions
unilaterally by an employer are often met in these transactions. The requirement on dismissal
reasons as a ground to changes is fulfilled due to organising business and business environment,
afecting the contents of employment conditions. Among the conditions to be affected can be
mentioned, for example, employee’s place of work and duties, referring to tasks.  

The assignee is bound to apply on the assigned employees a collective agreement binding the
assignor until to this collective agreement’s expiring. When the term expires, the assignee is
entitled to apply a collective agreement otherwise applicable in the undertaking in question. An
assignee may however agree with the employees on applying the former collective agreement, with

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199-207.
2046 Rautiainen – Äimälä page 152; Saarinen pp. 508-509.
2047 ECA 2001 §§ 7:11 and 7:3; Tiitinen – Kröger 2003 pp. 562-564; Tiitinen – Kröger pp. 545-546 ; Kairinen pp. 224-
225.
2048 ECA 2001 §§ 7.3 and 7.4.1.
Kröger pp. 550-553; Valkonen 2006 pp. 509, 516-517 and 627; Rautiainen – Äimälä – Hollmén page 153; Kairinen
2051 CAA § 5; TT 1987 – 66; Saarinen pp. 83-84 and 511-512.
better conditions. These rules on application of collective agreements are valid also in mergers, due to the directive on Transfers of Undertakings. The framework on collective agreement’s terms’ change may lead even to significant alterations in employment terms’ and conditions’ level.

If an employment contract is terminated resulting from an employee’s working terms’ and conditions’ substantial weakening due to an assignment of business or a merger, the employer is responsible for the employment contract’s termination. An employee himself/herself terminates the employment contract due to substantial changes affected by an employer. The assignee or the acquiring company or the company being formed are held responsible for the contract’s termination. As examples can be mentioned salary changes and new employer’s unreliability as a salary-payer. Included are also changes due to differences in the applicable law or collective agreement, in business culture or in the ways of carrying out business or employer’s direction right.

1.3.3.5. CONCLUSIONS ON DISMISSAL PROTECTION AND CONTINUATION OF FORMER CONDITIONS

In the Finnish labour law employer’s dismissal right in a merger, affecting also a merger’s character as a general succession has hardly been handled. Restructuring often leads to workforce reductions. Irrespective of this in the labour law the emphasis is on a merger’s character as a general succession and in references to an employment relationship’s transfer with its rights as such, implying to continuance and stability. The mere employment relationship’s transfer as such is no guarantee of former legal state’s continuation.

In an assignment of business and a merger the employee implications are linked with company law. The present Finnish company law theory recognises as fiduciary into addition to shareholders’ relationships with the limited company also relationships between the majority and minority

2053 Rautiainen – Åimäälä page 153; Valkonen 2006 pp. 630-631; Case C-396/07 Juuri paragraph 36.
2056 See, however, Saarinen page 484.
2057 Lehto pp. 6, 31 and 46.
shareholders and the company between its creditors. Employees are not included. According to the Companies Act, the management has no general duty to further other interest groups’ interests, covering also employees.

Irrespective of the scope of fiduciary relationships, there is, however, acknowledged an obligation to apply law, labour law included.

An employer’s dismissal right in an assignment of business and a merger is carried out in a framework formed by an employer’s management right, direction right and the ECA 2001’s dismissal grounds. An employer’s management right in organising business activities cannot be questioned, not being a part of the evaluation of dismissal grounds. Unquestionable managerial powers resulting in restructuring context with equal powers in reorganising business may largely negate from the employees’ perspective a merger’s character as a general succession, although general succession originally implies to an employment relationship’s continuation as such. This is applicable also in assignments of business with regards to the continuation of employment contracts. The economic imperative with regards to dismissal right in a merger and in an assignment of business is a strong one. It can be evaluated having largely overridden in labour law on restructuring employees’ protection perspective, claimed to be the cornerstone of the labour law. As a consequence, protection of employee economic rights is considerably weakened.

The concepts on employer’s management right and direction right in their traditional and established form largely leave without attention present dispersed investments strategies and short investment spans, carried out especially by institutional investors in listed and public limited companies. They do not either take into account the basic economic character of employee employment contracts, comparable to the inputs of shareholders. Also without attention is left employees’ inputs’ fundamental importance in creating products and services based on know-how

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2058 Mähönen – Säiläkivi – Villa page 44.
2059 See CA 2006 BR point 171 on the directors’ duty to promote the success of the company, taking into account enacted factors, among the others, the interests of the company’s employees. According to Explanatory notes page 50, this enshrines enlightened shareholder value. See Bourne pp. 146-148 and 166 and a critical view on enlightened shareholder value Talbot pp. 149-152, 182-183 and 191.
2060 Mähönen – Säiläkivi – Villa page 52. See Dine page 228 on a company’s members.
2062 See Sennett 2007 pp. 42-43 on the American pension funds’ investment spans, having been in the 1960s about 46 months and in 2000 only 3.8 months.

In Sweden, the board of directors has to take care on human resources’ organising, being suitable for business activities. A part of this is examining an organisational plan, to get an overview of the personnel’s practical actions. The purpose is to create an organisational model making possible quality supervising and security. The board and the managing director have to give yearly an account on the management, including important development trends in economy, environment, personnel and risks. See CA 2005 § 8:4, Sandström pp. 95 and 211 and AYA § 7:31.
2060 Mähönen – Säiläkivi – Villa page 52. See Dine page 228 on a company’s members.
in a knowledge-based production. Due to short investment-spans in the present business environment employees often represent permanence in company structures. However, they are largely outsiders in company decision-making, thus in decision-making affecting centrally their own status. These aspects do not correspond with employees’ increased importance in production. Employer’s management, direction and dismissal rights are linked with employees’ status in company decision-making and dismissal protection. In these areas is needed re-evaluation with regards to used concepts and balancing of interests, resulting in practises.

In the ECA 2001 there are provisions on employer’s obligations to offer training as the primary alternative to a dismissal. According to an established interpretation on an employer’s training obligations, it covers in large companies approximately two months’ training, in smaller ones the offered training’s length is shorter. This established interpretation on the training’s length may well be questioned. The grounds have to do with restructuring transactions’ practical carrying out. These transactions fail often. Over 50 per cent, even over 70 per cent of them fail. This denotes to these procedures’ poor governance. In addition to high failure percentages, they often result in workforce reductions. Evaluated from the perspectives of companies’ social obligations and furthering employment, the offered training’s length should be lengthened, being linked with increasing responsibility in company actions’ long-term planning. In the re-evaluation employers’ general obligations have also to be remembered. An employer has a general obligation to ensure that employees are able to carry out their work even when the enterprises’ operations, the work itself or work methods are changed or developed. A proactive point of view is emphasised. Into account has also to be taken the purpose of the ACU 2007, targeted to collectively develop undertaking’s operations, also emphasising proactivity. The collective development of undertaking’s operations is concretised in personnel plans and training and education objectives, targeted to proactive company development, thus facilitating business activities’ successful long-term continuation. Training and education objectives have a role to play in governing restructuring transactions. Skills development may be needed in a changed business environment,
also due to changes in employment contracts’ tasks. Committed company development, based from personnel’s perspective on skills development, often offers a remarkably more successful and long-standing alternative compared to restructuring targeted to established companies’ acquisition.\textsuperscript{2072}

Regarding the former employment contract’s conditions’ continuation, legal theory and practise and company practises do not support an assessment on their continuation as such. Changes under employer’s direction right are common. A merger and an assignment of business generally create room for changes made unilaterally by an employer, based on dismissal grounds. Changes affected by changes in the applicable collective agreements are common, too.

In employment relationships a merger’s established character as a guarantee of stability and continuance in the form of general succession can well be questioned,\textsuperscript{2073} due to law, resulting in company practises.

In Finland, in dismissals taking place for financial or production-related grounds employees or their representatives or public power do not have a right to question or object dismissals.\textsuperscript{2074} In dismissals taking place in restructuring context a method of assessment could be taken into use.\textsuperscript{2075} In the assessment the restructuring situation is evaluated as a wholeness. Into account are taken in an objective manner grounds and targets, the situation before the restructuring procedure and after its completion, in order to assess if the dismissals are in practise due to a merger or an assignment of business, although they are grounded, by using the wording in the directive on Transfers of Undertakings, by economic, technical or organisational reasons entailing changes in the workforce.\textsuperscript{2076} Into addition redefining of financial and production-related dismissal grounds is needed, by narrowing their scope.\textsuperscript{2077} Effects extend also to employment conditions’ changes. The most compelling reason is companies’ own advantage in developing competitive advantage, being based on long-time employment relationships and skills’ development.\textsuperscript{2078} Dismissals generally decrease trust, resulting in productivity decreases.\textsuperscript{2079} The proposals can also be grounded by a need

\textsuperscript{2072} See Porter page 677.
\textsuperscript{2073} Compare CA Committee 1992:32 page 316.
\textsuperscript{2074} Compare Act on Financial Inspection §§ 1:3, 3:14-15c and 3:23-24 and Chapter 4. See also Toiviainen 2004 page 159 on employees’ veto-rights.
\textsuperscript{2075} Professor Heikki Toiviainen 24.1.2008.
\textsuperscript{2076} Compare Case 101/87 P. Bork International paragraph 18.
\textsuperscript{2077} Compare Toiviainen 2004 page 159. See Hellsten 2007 pp. 16-17.
\textsuperscript{2078} See Robbins – Judge page 445; Elkington page 242.

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to balance further undertakings’ social obligations, due to a need to balance public power responsibilities resulting from a shrunken economic space. Due to management and direction rights in defining dismissal grounds one encounters also general company law principles. A company’s business is directed by general company law principles, forming the legal framework for carrying out company activities. In the present context important are especially the ones on company purpose, limited liability, stakeholders connected with the equality principle and management’s duties.

1.3.4. INFORMATION AND CONSULTATION

1.3.4.1. Scope of Application and General Remarks

In Finland, the tradition on employee involvement in the form of information and consultation is fairly long. In Finland employee involvement systems’ development in these forms has been expressed to begun in the 1940s. Traditionally information and consultation procedures in their established forms have been interpreted not to limit an employer’s decision-making right. Decision-making power is interpreted as an employer issue. An agreement or consensus in the form of unanimity resulting from the negotiations between the parties may however denote to limitations in an employer decision-making in an area or areas covered by the agreement or consensus, consequently in the framework covered by it.

2080 Elkington pp 73, 216, 272 and 327.
2081 CA 2006 § 1:5 compared with Elkington page 300, Ellsworth on especially customer-based purpose pp. Preface x, 1, 19, 42-51, 94, 136 and 225, see also Toiviainen 2004 page 157.
2082 CA 2006 § 1:2.1 compared with Stiglitz page 190, Elkington page 331 and Ellsworth page 4.
2083 Mähönen – Säiläkivi – Villa pp. 18-19 and 22-23 compared with Elkington pp. 300 and 310 and Dine page 228.
2084 Ca 2006 § 1:7.
2085 CA 2006 § 1:8 compared with Elkington page 345.
2086 See Hietala – Kaivanto pp. 1-5.
2087 Kairinen – Uhmavaara - Finne page 33, Hietala – Kaivanto pp. 8, 27 and 29, Rautiainen – Äimälä – Hollmén page 109; See ACU 2007 Chapter 5, especially § 5:30 and Chapter 8 on reducing the workforce, especially § 50 compared with the Directive 98/59/EC article 2 1 on consultations with the workers’ representatives “with a view to reaching and agreement”. See also Äimälä – Rautiainen – Hollmén page 180. See in the context of the ACU 1978 Nieminen pp. 67-68, 324-326, 332-333, 354-355, 358-359 and 380. See directive 2001/23/EC Chapter III article 7 2: where the transferor or the transferee envisages measures in relation to his employees, he shall consult representatives of his employees in good time on such measures with a view to reaching an agreement. See directive 2002/14/EC on Informing and consulting employees Preamble point (7) and article 4, 2 (c) and 4 (e) on information and consultation on decisions likely to lead to substantial changes in work organisation or contractual relations, the consultation taking place with a view to reaching an agreement on decisions within the employer’s powers. Compare ACU 2007 § 1:1 with KKO 1994:3.
Co-operation procedures under the Act on Co-operation\textsuperscript{2088} are to a certain extent applicable in undertakings\textsuperscript{2089} normally employing at least 20 persons. In full the obligations are applicable in undertakings normally employing at least 30 persons.\textsuperscript{2090}

Co-operation procedures are carried out between the employer and the personnel. With the personnel is denoted to employees having an employment contract with the undertaking in question. In a merger, division and business transfer, the receiving undertaking or the transferee are parties.\textsuperscript{2091} The ACU 2007 is not applicable to certain groups of workforce with atypical contracts. Hired workers\textsuperscript{2092} and self-employed are not in its scope of application in undertakings for whose benefit the work is done. The personnel is represented by a shop steward, an elected representative, occupational safety delegate or a co-operation representative, depending on the ways of arranging employee representation and the issue itself.\textsuperscript{2093} Co-operation issues may also be handled in a joint meeting or a joint committee.\textsuperscript{2094}

The present Act on Co-operation has a three-fold purpose. The purpose is to promote undertaking’s and its personnel’s interactive co-operation procedures, based on timely provided sufficient information on the undertakings’s state and plans. The act is purported to develop internal decision-making mechanisms. The objective is also to collectively develop undertaking’s operations and the employees’ opportunities to exercise influence in undertaking’s decisions relating to their work, working conditions and their position in the undertaking. The purpose is also to strengthen co-operation between the employer, the personnel, and the employment authorities to improve the employees’ position and to support their employment in relation to changes in the undertaking’s operations.\textsuperscript{2095} Increased internationalisation’s effects on work and personnel, being linked in governing change, are background factors.\textsuperscript{2096}

\textsuperscript{2088} Terminology used in this part is based on an unofficial translation of the ACU 2007 by the Ministry of Employment and the Economy.

\textsuperscript{2089} On the definition of an undertaking see ACU 2007 § 1:3; Proposal for ACU 2007 page 27; Hietala – Kaivanto pp. 33-34 and 36.


\textsuperscript{2094} ACU 2007 § 2:9; Proposal for ACU 2007 page 30; Hietala – Kaivanto pp. 52-55; Rautiainen – Äimälä – Hollmén pp. 50-55.

\textsuperscript{2095} ACU 2007 § 1:1; Hietala – Kaivanto pp. 28-30.

\textsuperscript{2096} Committee Proposal 2003 page 1, Kairinen – Uhmavaara – Finne page 65.
In co-operation procedures central are their effects in increasing undertakings’ business activity and productivity due to increased and open interactive communication.\textsuperscript{2097} Competitive advantage in global business environment more than ever depends on employees’ competence, know-how and innovativeness.\textsuperscript{2098} According to research, the best competitive advantage is achieved in business environment granting employees opportunities to exercise influence.\textsuperscript{2099} The ACU 2007’s provisions emphasise significance of consultation and striving for consensus as factors developing profitability.\textsuperscript{2100}

The high failure percentages\textsuperscript{2101} in restructuring transactions denote to these transactions’ poor governance.\textsuperscript{2102} From the company perspective, failures affect monetary and production losses and from the employee perspective, in the form of job and incomes loss.\textsuperscript{2103} Trust plays an important role in these transactions’ governance. Trust is based on interaction and communication, developing through them.\textsuperscript{2104} Consequently, the ACU 2007’ procedures have a role to play in restructuring transactions’ success, in their practical implementation. The ACU 2007 is targeted also to support employees’ re-employment in relation to changes in the undertaking´s operations, being linked with restructuring transactions, generally effecting workforce reductions.

In Finland, information and consultation procedures are an established way of carrying out employees’ involvement.\textsuperscript{2105} Irrespective of the tradition on employees’ involvement in these forms, the estimates on these procedures’ practical significance vary considerably. According to a survey made on the Act on Co-operation 1978’s, a vast majority of employer representatives evaluated employee involvement to be at a good or very good level. From employee representatives, only a minority of 14 per cent shared this view. A majority of 40 per cent of employee representatives evaluated employee involvement to be at a low level, 12 per cent evaluated it be at a very low level. In consultations on workforce reductions even 40 per cent of employee representatives

\textsuperscript{2097} Compare Robbins – Judge page 445.
\textsuperscript{2098} See Ellsworth page 221 and Hyvinvointi versoo tuottavuudesta pp. 11-12 and 14-15.
\textsuperscript{2100} Hietala – Kaivanto page 29.
\textsuperscript{2101} See Vuorenmaa page 9 and Peng page 381.
\textsuperscript{2102} Vuorenmaa page 96 emphasising these procedures’ governance as a prerequisite for their success.
\textsuperscript{2103} See Lehto pp. 6, 31 and 46-47.
\textsuperscript{2104} See Vuorenmaa pp. 10, 57, 82-83, 89, 92-93, 118, 128-129, 222 and 226.
\textsuperscript{2105} Kairinen – Uhmavaara – Finne page 65.
evaluated the employee involvement to be at a very low level, whereas 44 per cent of employee representatives evaluated it to be at a low level, rates of employer representatives being consequently 2 and 31 per cent\textsuperscript{2106, 2107}

Evaluated on the basis of the renewed legislation’s objectives and research and survey results, combined with the importance of trust and interaction in restructuring transactions’ practical carrying out in order to achieve their goals, it is not exaggeration to define the renewed procedures’ implementation a challenge. This evaluation is still furthered by the label of the former Act on Co-operation 1978, labelled largely as an act on dismissal procedure.\textsuperscript{2108}

1.3.4.2. Co-operation Procedure in connection with a Merger and a Business Transfer

Both the company under the acquisition or the formation process and the acquiring or the formed company and in a business transfer the transferor and the transferee have to inform the employees’ representatives of the transaction’s time or intended time, its reasons and legal, economic and social consequences caused by it, into addition to planned measures on employees. Information is to be provided to employees affected by the merger or transfer. The obligation to inform cannot be circumvented by referring to a controlling undertaking’s decision-making, preventing the undertaking covered by the information obligation from implementing it.\textsuperscript{2109}

Reasons denote to primary reasons affecting the transaction’s carrying out. Merger’s or business transfer’s legal, economic and social consequences denote to at least to an employer’s change. Under the information obligation are also planned measures on employees. They may concern tasks’ changes or workforce reductions.\textsuperscript{2110} A merger’s carrying out in the company law sense or a business transfer’s carrying out in the meaning of using an employer’s management right are not under the enacted provisions’ scope.\textsuperscript{2111}

\textsuperscript{2106} Kairinen – Uhmavaara – Finne page 34.
\textsuperscript{2107} Kairinen – Uhmavaara – Finne page 19.
\textsuperscript{2108} Committee Proposal  2003 page 33.
\textsuperscript{2110} Rautiainen – Āimālā – Hollmēn pp. 174-175. Compare the 3rd directive Chapter II article 9 on the administrative or management bodies obligation to draw up a written report on a merger’s draft terms, setting out among the others legal and economic grounds for them and CA 2005 § 16: 3 (2) on the draft terms containing an account of the merger’s reasons.
\textsuperscript{2111} Hietala – Kaivanto page 108.
The company being the target of the merger procedure or the transferor have to provide employee representatives with available information “in good time” before the transaction’s completion.\textsuperscript{2112} The acquiring company and the company being formed or the transferee is to provide employee representatives with information \textit{no later than a week} from the transaction’s completion.\textsuperscript{2113} In the case of a merger this denotes to a \textit{date of registration for a merger’s enforcement},\textsuperscript{2114} thus to a fully completed legal transaction in company law sense. In the case of a business transfer crucial is the date of possession or the date on which the new employer in fact begins to use decision-making powers in the entity.\textsuperscript{2115}

The provisions on informing employee representatives in a merger can be evaluated fully only in the light of the Companies Act’s provisions on a national level merger. The Companies Act’s provision on the draft terms’ mandatory contents, extending its effects in a national level merger to other company law documents, do not cover evaluations on national level merger’s employee implications.\textsuperscript{2116} Conditions on employees are however commonly included, but interpreted to be only informational in character.\textsuperscript{2117} In a national level merger’s practical carrying out at the company level, in the company law process employees are outsiders.

The directive on Transfers of Undertakings requires employees to be informed in good time. The information obligation covers the company being the target of the acquisition process. This company’s factual options to fulfil the information obligation are limited ones. The process as a whole affects its existence’s ceasing. It is not necessarily fully informed of the acquiring company’s business plans, being based on this company’s business strategy. In a business transfer the transferor is not necessarily informed of the transferee’s business plans.

Restructuring commonly affects workforce reductions or the changes in the terms and conditions of employment contracts in a negative manner. With regards to the acquiring company or the company being formed in a merger, crucial for the information obligation’s initiation is the date of registration for enforcement. As regards a business transfer, crucial for initiating information obligations is the date of possession or the date on which the new employer begins to use decision-making powers in the entity.

\\textsuperscript{2112} ACU 2007 § 41.2 and Proposal for ACU 2007 page 40; See Directive on Transfers of Undertakings Chapter III article 7 1. compared with Rautiainen – Äimälä - Hollmén pp. 174-175.  
\textsuperscript{2113} See ACU 2007:41.3 and Proposal for ACU 2007 page 40; Rautiainen – Äimälä – Hollmén page 176.  
\textsuperscript{2114} Hietala – Kaivanto page 110; Rautiainen – Äimälä page 149; Rautiainen – Äimälä – Hollmén page 174.  
\textsuperscript{2116} Compare CA 2006 § 16:22.2 point 5 and 22.3-5.  
\textsuperscript{2117} Airaksinen – Pukkinen – Rasinaho II page 211.
making powers. In both of these cases the timing with regards to information obligations’ initiating is difficult to include under the concept of “in good time”, required by the directive on Transfers of Undertakings. The provision on informing is to facilitate the acquiring company’s, the formed company’s or the transferee’s participation in dialogue, targeted to minimise doubts and fears caused by the transaction. The timing on information obligations’ initiating is apt to weaken this obligation’s fulfilment.

The evaluation on the information obligations’ timing with regards to their initiation is apt to give further grounds for a national level merger’s re-evaluation, covering substantive rules’ contents, based both on the company and labour law. The need of re-evaluation is grounded especially by a need to enhance a proactive approach in anticipating employee implications in a national level merger, especially due to employment effects.

If a merger or a business transfer is to cause changes in business operations affecting personnel and work arrangements, matters have to be handled under co-operation negotiations. If the merger or transfer is to affect personnel resulting in workforce reductions denoting to employment contracts’ terminations, lay-offs or employment contracts’ reductions to part-time ones, the co-operation procedure on reducing the workforce has to be initiated.

1.3.4.3. Changes in Business Operations affecting the Personnel and Arrangement of Work

Restructuring transactions, mergers and business transfers included, generally affect changes in employment contracts, due to unifying different companies with differing business environments, cultures, practises and premises. Changes may be carried out on an employer’s direction right. This preconditions a comparison on an employee’s prospects. If the intended changes are evaluated reasonable in character, they may be carried out solely by the direction right.

Matters under the employer’s direction right and caused by changes in business operations affecting personnel and arrangement of work are under obligations on co-operation negotiations. The denoted changes cover an undertaking’s or its part’s closure, its transfer to another place or its operations’
expansion or reduction, machinery and equipment acquisitions, services’ or products’ production changes and other similar changes in the business operations, referring to business development decisions, if they affect the personnel, arrangement of work and use of external labour, denoting to use of external labour and temporary agency work.\textsuperscript{2122}

When these measures within an employer’s direction right affect employees’ position causing any major changes in duties, working methods, work and work premises arrangement, transfers from one duty to another, arrangements in the regular working hours amendments and regular working hours’ commencement and ending included, and rest and meal times, matters have to be handled in the co-operation negotiations before decision-making. An important limitation on carrying out the negotiations has to do with the measures’ scope. The intended changes are not to result in workforce reductions, denoting to employment contracts’ terminations, lay-offs or reductions to part-time ones.\textsuperscript{2123}

An employer contemplating changes in business operations has to evaluate if the changes affect the personnel and work arrangements. From the employee perspective, based on a general assessment, the changes have to be major ones, by taking into account their scope and length. In assessing the changes’ character also practises in different branches, undertakings, trades and professions play a role. Important is also a comparison between the present and future state of affairs due to contemplated changes.\textsuperscript{2124}

Before the employer decides a matter due to changes in business operations affecting personnel, grounds, effects and alternatives have to be handled in the spirit of co-operation to obtain consensus. The procedure is targeted to achieving a common point of view on the matter under negotiations.\textsuperscript{2125}

\textsuperscript{2122} ACU 2007 § 6.32.1; Proposal for ACU 2007 page 38; Hietala - Kaivanto page 99; Rautiainen – Āimālā – Hollmēn pp. 148-152.
\textsuperscript{2125} Co-operation negotiations are based on employer’s initiative, done as soon as possible taking into account the time-frame for implementing the plan causing the negotiations. The employer is to provide the employee representatives with information necessary for handling the matter, see ACU 2007 §§ 6.35-36; Proposal for ACU 2007 pp. 39; Hietala – Kaivanto page 104; Rautiainen – Āimālā - Hollmēn pp. 157-160; ACU 2007 § 6.37 on employee representatives’ right of initiative, see also Proposal for ACU 2007 page 39, Hietala – Kaivanto page 105 and Rautiainen – Āimālā – Hollmēn pp. 160-161.
In interpreting the end-result in the form of consensus on negotiations on changes in business operations affecting the personnel and arrangement of work, the provisions in the directive on Transfers of Undertakings have to be taken into account, requiring on envisaged measures consultations with employee representatives with a view to reaching an agreement.\textsuperscript{2126} In the case of an agreement the end-result denotes to an end-result with binding legal effects.

In interpreting the end-result also the directive on Informing and consulting employees has to be taken into account. According to the directive, consultation shall cover consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, with a view to reaching an agreement on decisions within the scope of the employer’s powers.\textsuperscript{2127} In the directive nor in the legal literature thus far there are not to be found interpretations on the terms and concepts of “substantial changes in work organisation or in contractual relations” and “decisions within the scope of the employer’s powers”. In the present context the interpretation has to be based on the terms’ and concepts’ established definitions in the Finnish labour law. It is evident that substantial changes equal with major changes. It is also evident that decisions within an employer’s powers equal with decisions within an employer’s direction right. Due to the provision of the directive on Informing and consulting employees, the end-result in the form of an agreement denotes to an end-result with binding legal effects.\textsuperscript{2128}

In the case of consensus not having been reached, an employer has fulfilled the duty to negotiate if the provisions on co-operation procedure have been applied, the matters having been handled in the spirit of co-operation to obtain consensus.\textsuperscript{2129} This end-result equals with the traditional consultation concept. Employees are consulted, however in the spirit of co-operation, granting them an option to affect employer decision-making, in the case of a failure in getting a mutually binding end-result the employer has freedom of action on measures and their scope, being limited by the framework for using direction right. Evaluated from this end-result’s perspective, the procedure can be evaluated to be a formal one, even procedural in character, not necessarily ultimately fulfilling the purpose of ACU 2007.\textsuperscript{2130}

\textsuperscript{2126} Directive on Transfers of Undertakings Chapter III Article 7 2.
\textsuperscript{2127} See directive on Informing and consulting employees article 4 2 (c) and 4 e.
\textsuperscript{2128} Compare Proposal for ACU 2007 page 38; Hietala – Kaivanto page 99.
\textsuperscript{2130} ACU 2007 § 1.1.
1.3.4.4. Co-operation Procedure on reducing the Use of Workforce and on Measures Mitigating Consequences

If a merger or a business transfer results in employment contracts’ terminations, lay-offs or employment contracts’ reductions to part-time ones, the co-operation procedure on reducing the use of workforce has to be initiated.\textsuperscript{2131} It has to be initiated also, when an employer is considering measures, which may lead to workforce reductions on financial or production-related grounds.\textsuperscript{2132} Co-operation procedure covers also workforce reductions due to an undertaking’s or its part’s closure, transfer to another place or operations’ expansion or reduction, machinery or equipment acquisitions, changes in the services’ or products’ production and other similar changes in business operations, arrangement of work and use of external labour. A precondition is intended changes’ resulting in employment contracts’ terminations, lay-offs or reductions to part-time ones.\textsuperscript{2133} The provisions are applicable, although the decisions on reductions are made by a controlling undertaking.\textsuperscript{2134}

In considering measures the employer has not yet made decisions on reductions at the time of commencing the co-operation procedure. The employer is only contemplating measures,\textsuperscript{2135} which may affect reductions.\textsuperscript{2136} The need for reduction has however to be clear in an adequate way to activate the co-operation procedure.\textsuperscript{2137}

The negotiations together with employment measures are commenced by a written proposal delivered at the latest five days prior to commencement of negotiations by the employer to employee representatives, including the suggested agenda’s outline.\textsuperscript{2138} In the Act on Co-operation these are one of the best applied provisions. According to a survey made on the Act on Co-operation 1978’s workability of employer representatives, 98 per cent and of employee representatives a vast majority of 83 per cent shared this view.\textsuperscript{2139} The high level of application may

\textsuperscript{2131} ACU 2007 § 7:41.4; Proposal for ACU 2007 page 40; Hietala – Kaivanto pp. 107 and 111. See Lehto pp. 6, 31 and 46.
\textsuperscript{2132} See ACU 2007 § 8:44.1; Proposal for ACU 2007 pp. 40-41; Rautiainen – Äimälä – Hollmén page 180; Hietala – Kaivanto page 113.
\textsuperscript{2133} ACU 2007 § 6:32.2.
\textsuperscript{2134} See directive on Transfers of Undertakings Chapter III article 7 4; Proposal for ACU 2007 page 40; Hietala – Kaivanto page 113. See also ACU 2007 § 9:62.3, Proposal for ACU 2007 page 47, Hietala – Kaivanto pp. 143-144.
\textsuperscript{2135} Compare in the context of the directive on Collective Redundancies Case C-188/03 Junk paragraphs 36-37, Case 284/83 Nielsen Summary 2 and paragraphs 15 and 17 and Nyström page 253, Barnard page 679.
\textsuperscript{2136} Compare Kairinen – Uhmavaara - Finne pp. 36 and 67-68.
\textsuperscript{2137} KKO 1997:55; Rautiainen – Äimälä - Hollmén page 181.
\textsuperscript{2138} ACU 2007 §§ 8:45-46; Proposal for ACU 2007 page 41; Hietala – Kaivanto pp. 114-115; Rautiainen – Äimälä – Hollmén page 181. The proposal for negotiations may be delivered also to individual employees.
\textsuperscript{2139} Kairinen – Uhmavaara – Finne pp. 27 and 66.
well be due to the provision’s character, being technical or procedural in nature, covering only little or not at all controversial elements.

If the employer is considering terminations, lay-offs for over 90 days or reducing an employment contract into a part time one affecting over ten employees, the employee representatives are to be provided with available information in writing. The information is to cover at least measures’ grounds, initial estimate on affected employees’ numbers, report on principles to determine employees under reductions and time-estimate for implementation of reductions. The provision is based on the directive on Collective Redundancies. The provision is purported to provide the employee representatives with adequate and right information, facilitating them to form a clear picture of the matters under negotiations. The employer has to deliver the proposal or its material contents in writing to the employment office, no later than at the commencement of negotiations.

The duty to negotiate on contemplated workforce reductions is affected by the directive on Collective Redundancies. If the business decisions contemplated by the employer are indisputably estimated to result in dismissals, lay-offs or employment contracts’ reductions to part-time ones, these measures’ grounds and effects, action plans and principles, ways to limit the affected people’s number and alleviation of consequences have to be handled in co-operation

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The information has to be attached to the negotiations proposal. If an employer has got information after having made the proposal, the new information has to be delivered at the latest in the commencing meeting of the co-operation procedure, ACU 2007 § 8:47.2, Proposal for ACU 2007 page 41, Hietala – Kaivanto page 116, Rautiainen – Äimälä – Hollmén pp. 184-185.

The provision on providing employee representatives with available information is generally applied well, see Kairinen – Uhmaara – Finne pp. 27 and 66.


2143 See directive on Collective Redundancies Section II article 2 1.-2. on an employer contemplating collective redundancies, having an obligation to begin consultations with the workers’ representatives in good time with a view to reaching an agreement. The consultations with the workers’ representatives shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.


negotiations. The negotiations have to be carried out in the spirit of co-operation to obtain consensus.2146

Commencement of negotiations weakens immediately working-climate, decreasing efficiency2147 and reducing profitability.2148 Negotiations on workforce reductions and measures following them should be conceived as crisis measures, due to their effects on productivity, affecting also at the individual employee level consequences difficult to manage.2149

Estimates on the need to negotiations differ, but not remarkably. According to the survey, even two-thirds of employer representatives evaluate there to be unanimity on the need. Of employee representatives 60 per cent share this view. Selection of negotiating principles is apt to cause disagreements into addition to measures´ grounds and contemplated reduction numbers, focus and order. Included are also the measures´ timing, alternatives and effects.2150

The grounds for the measures refer to managerial decisions affecting reductions.2151 Managerial decision-making as such is outside the negotiations, limiting consequently the actual scope of negotiations.2152 Managerial decision-making is based on application of general company law principles in a limited company´s every day business. They and the theories of business economics in restructuring form the basis for restructuring transactions´ carrying out. From among the general company law principles important in the present context are the principles on a company´s purpose,2153 its limited liability,2154 stakeholders connected with the equality principle2155 and management´s duties.2156 The co-operation negotiations do not cover managerial decision-making having affected the need for negotiations. The co-operation negotiations do neither cover the application of general company law principles in company business transactions. The general

company law principles in their present form do not on the other hand cover employees, restricting their use by the employee representatives. All these factors limit the scope of negotiations, which affects directly the scope of actions of employee representatives.

Mitigating the consequences of workforce reductions refers especially to working arrangements and training needed for further employment. Negotiated matters have especially to do with provision for training and education.\textsuperscript{2157} Unemployment or other kinds of pensions are generally used as alternatives to dismissals. This may be evaluated questionable, due to these measures´ social policy character.\textsuperscript{2158} Salary and other employment terms and conditions may be cut. Dismissals may be replaced by lay-offs or part-time work. Fixed-term contracts may not be renewed. Different leaves, like study leaves, are used as an alternative solution. Decreasing of the established level of services and products may be used, although this measure contains a negative message of the produced services´ or products´ value to customers and employees. Re-training and re-placement services offered by employment authorities or private actors may be used, the latter however depending on an employer´s choice. Training is an alternative proposed often by the employee representatives, met, however, often with apprehension by the employers.\textsuperscript{2159} The used measures are partially targeted towards reduction of company costs, partly to increase employees´ re-employment; this, however, at the moment taking place in a more organised way by the use of action plans and principles.\textsuperscript{2160}

In Finland, alleviation of the consequences of workforce reductions takes place based on the model on action plans and principles.\textsuperscript{2161} If an employer intends to dismiss at least ten employees on financial or production-related reasons, the employer has to provide employee representatives on commencing negotiations a report on an action plan to promote employment. In preparing the plan the employer has together with the employment authorities to examine the public employment services supporting employment. Purpose is to strengthen co-operation between the employer, the personnel and the employment authorities. The procedure is targeted to speed up employees´ flexible re-employment. An action plan is negotiated in the co-operation negotiations with the employee representatives. It contains among the others planned action principles on using public

\textsuperscript{2158} Compare directive on Collective Redundancies Section II article 2 2. and see Stiglitz page 190 on company costs´ externalisation, the evaluation, however, depending finally on the measures´ cost-structure.
\textsuperscript{2159} Kairinen – Uhmavaara – Finne pp. 32-33, 39-41 and 69.
\textsuperscript{2160} ACU § 8:49.1 and 49.3.
\textsuperscript{2161} ACU § 8:49.1 and 49.3.
employment services and advancing training or education and applying for work during the notice period. The employer affirms the action plan only after the negotiations. In the case of non-consensus, the matter is decided solely by the employer.\footnote{2162}

If the intended workforce reductions affect under ten employees, an employer has to present at commencing the co-operation negotiations action principles on an employer’s support during the notice period on employees’ independent applying for work, training or education or their employment with the public employment services.\footnote{2163}

The use of action plans and principles has had positive effects on speeding up re-employment. The percentage of employed under the model has been approximately four per cent higher compared to persons not under the measures. The positive results are due to the Employment Authorities’ early intervention, activation in seeking employment and speed use of training options.\footnote{2164} As a whole, the model is apt to shorten the length of unemployment.\footnote{2165} The model on action plans and principles enhancing re-employment focuses on the use of public services, depending on the available services and resources. The model does not however preclude companies’ own interventions. As a whole the model may not necessarily take into account in a balanced way the share of responsibilities between the public power and companies.\footnote{2166} Another challenge with the model is its largely reactive nature. The measures take place when the problems to be tackled are largely in hands.

Employees’ right to employment leave has been enacted in the ECA 2001.\footnote{2167} When an employment contract is terminated on economic or production-related grounds, an employee has a right to leave with full pay during the notice period. The leave’s purpose is to facilitate participation in drawing up of an employment programme,\footnote{2168} labour market training, practical training and on-the-job learning, job-seeking and job-interview or re-assignment of coaching. The leave’s length does not depend on the length of the employment relationship, but on the duration of the notice


\footnote{2163} ACU 2007 § 8:49.3; Proposal for ACU 2007 page 42; Hietala – Kaivanto page 118; Rautiainen – Äimälä – Hollmén page 188; See also ACU 2007 § 9:62.3; Proposal for ACU 2007 page 47; Hietala – Kaivanto pp. 143-144.

\footnote{2164} Muutosturvan arviointitutkimus pp. 12, 55 and 115.

\footnote{2165} Muutosturvan arviointitutkimus page 55.

\footnote{2166} Compare Elkington page 216 on unintended consequences.

\footnote{2167} ECA 2001 § 7:12; ACU 2007 § 8:49.4; Proposal for ACU 2007 page 42; Hietala – Kaivanto pp. 118-119.

\footnote{2168} See APES.
period. The leave’s length varies from five days to 20 working days.\textsuperscript{2169} The leave is targeted to speed up re-employment process after dismissals based on economic or production-related grounds.\textsuperscript{2170} The leave is connected with the model on action plans and principles.

In dismissals based on financial or production-related grounds an employer has to inform an employee of a right to an employment programme and employment programme supplement. A person applying for work has a right to an employment programme due to at least three years of employment or, in fixed-term employment, due to employment of at least three consecutive years or periods of at least 36 months in preceding 42 months. In both of these cases an employer has to inform employment office on terminations without delay.\textsuperscript{2171}

Co-operation procedure has to be carried out in the spirit of co-operation to obtain consensus. Finnish legal praxis has interpreted the scope and manner of consultation obligations, the case-law predating also the Finnish EU-membership. But it has significance in evaluating the scope of employer’s consultation obligations and the ways of their carrying out. Important is exchange of views and establishing a dialogue in practise. This is affected especially by the scope and timing of the transmitted information. Into account is taken especially if the employee representatives are enabled sufficiently to prepare themselves for the negotiations. Before the commencement of negotiations, an employer has to provide the employee representatives with information needed for handling the matter. Decisions on redundancies before the actual carrying out of negotiations are a breach of the enacted obligations. Fulfilment of employer negotiation obligations requires at least delivering the employee representatives with data on grounds, effects and different solutions. They have to be granted an option in practise to exchange views on the matter. The information has to contain the economic consequences for the company of the contemplated measures.\textsuperscript{2172} According to the present ACU 2007, also the objects of the co-operation generally and the spirit in the actual negotiations are meaningful.

\textsuperscript{2169} See ECA 2001 § 7:12; Rautiainen – Äimälä pp. 210-211.
\textsuperscript{2170} Hietala – Kahri – Kairinen – Kaivanto 2006 pp. 366-367.
\textsuperscript{2172} ACU 2007 § 8:50 and in connexion with § 8:51 on negotiation periods, varying from 14 days to six weeks. TT 1989 – 54 TT, 1987 – 93; TT 1987 – 155; See also TT 1989 – 48 on the timing of delivering information.

Hietala – Kaivanto page 120. See directive on Informing and consulting employees article 1 3, denoting to working in the spirit of cooperation and with due regard for reciprocal rights and obligations, taking into account both the undertaking’s and employees’ interests.
Co-operation negotiations on workforce reductions cover normally from three to five negotiations, lasting six weeks.\textsuperscript{2173} If consensus has not been obtained, the employer has powers to decide reductions after the enacted negotiations’ periods of either 14 days or six weeks have elapsed, depending on the scope of reductions.\textsuperscript{2174}

In the context of a merger or a transfer of an undertaking the end-result in the form of consensus on negotiations reducing the use of workforce, resulting in lay-offs and employment contracts’ reductions to part-time ones, has to be interpreted by taking into account the provision in the directive on Transfers of Undertakings. It requires on envisaged measures consultations with employee representatives \textit{with a view to reaching an agreement}.\textsuperscript{2175} An agreement denotes to a legally binding end-result. Otherwise the end-result in the form of consensus in the context of reducing the use of workforce has to be interpreted in the light of the directive on Collective Redundancies, requiring consultations \textit{with a view to reaching an agreement}, an agreement denoting to a legally binding end-result.\textsuperscript{2176}

According to the survey made on the Act on Co-operation 1978’s workability, the views of employer and employee representatives on the agreement’s character vary, however, considerably. Employer representatives evaluate it as a non-binding consensus. Employee representatives consider it merely consent.\textsuperscript{2177} Both of these views do not denote to a power balance between the negotiating parties, neither to mutual interests.\textsuperscript{2178} These factors affect negatively negotiating culture, being linked with trust creation and company’s productivity, affecting it negatively.\textsuperscript{2179}

After the duty to negotiate has been fulfilled, an employer has to provide within a reasonable time employee representatives a general report on decisions due to negotiations. It is to contain information on the carrying out of reductions and an estimate on the timing regarding the carrying out of reductions.\textsuperscript{2180} In delivering the report an employer is most commonly contemplating a decision, the matter not being finally decided. The Finnish labour law theory has defined the

\textsuperscript{2173} Kairinen – Uhmavaara – Finne pp. 31-32 and 67.
\textsuperscript{2174} ACU 2007 § 8:51; Proposal for ACU 2007 pp. 42-43; Hietala – Kaivanto pp. 120-122.
\textsuperscript{2175} Directive on Transfers of Undertakings Chapter III Article 7.2.
\textsuperscript{2176} See Directive on Collective Redundancies Section II article 2.1. See also Äimälä – Rautiainen – Hollmén page 180 compared with the Proposal for ACU 2007 page 42 and Hietala - Kaivanto page 119 being silent on the matter. See in the context of the ACU 1978 Nieminen page 380.
\textsuperscript{2177} Kairinen – Uhmavaara – Finne page 37.
\textsuperscript{2178} Compare directive on Informing and consulting employees article 1.3.
\textsuperscript{2179} See Robbins – Judge page 445. See directive on Informing and consulting employees Preamble point (7).
\textsuperscript{2180} ACU 2007 § 8:53; Rautiainen – Äimälä – Hollmén pp. 194-196.
report’s character as a guideline. The reports’ character is, however, affected by the information delivered by the employer before the commencement of negotiations and the scope and nature of their end-result. The employer is to provide before the commencement of negotiations employee representatives, among the others, the time estimate for the implementation of reductions. If the time-estimate has been handled in the negotiations and been taken as a part of the end-result consensus, in the form of a binding agreement, the time estimate cannot be interpreted to be a mere guideline but a part of a binding agreement. The time estimate is a framework for the carrying out of reductions. From the employee perspective, it is meaningful in decreasing insecurity, by stabilising the situation on workforce reductions within a set timely framework, creating preconditions for productivity, thus affecting a company’s economic success.

According to survey results on the Act on Co-operation 1978, the experiences on workforce reduction negotiations are not consoling, having even labelled the former Act on Co-operation 1978 as an act on dismissal procedure. Even 46 per cent of the employer representatives were of the opinion that matters under negotiations are, in fact, decided before the commencement of negotiations. Irrespective of this 80 per cent of employer representatives evaluated there to be a genuine strive to negotiate with a view to reaching an agreement. Of employee representatives, a vast majority of 70 per cent shared the view on matters under negotiations in fact being decided before their commencement. Of employee representatives, only 32 per cent evaluated there to be a genuine strive to negotiate with a view reaching an agreement.

According to the survey results, negotiations at least when not resulting in an agreement have in fact to do with delivering of information and presenting grounds for employer’s decisions. This is, however, far from the goals of the directive on Collective Redundancies on consulting on ways and means of even avoiding collective redundancies or reducing the affected into addition to mitigating consequences, and the present Act on Co-operation 2007, purported to collectively develop undertaking’s operations and the employees’ opportunities to exercise influence in undertaking’s decisions relating to among the others to their position in the undertaking. Survey results may be interpreted reflecting changes having taken place in business environment.

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2182 ACU 2007 § 8:47.1 point 4.
2183 Committee Proposal 2003 page 33.
2184 Kairinen – Uhmavaara – Finne pp. 36 and 67-68.
2185 ACU 2007 § 1:1.
2186 Directive on Collective Redundancies Section II article 2 2.
decision-making powers’ scope may reflect globalisation’s increased effects, having minimised companies’ national level decision-making powers.2188

In fact the negotiations affect the end-result, decreasing the number of dismissed compared with the negotiations’ proposal. 2189 Decreasing the number of affected does not change the negotiations’ character. They are to affect negative changes in employees’ economic protection. They are carried out in a procedure, which, when evaluated in company decision-making practises’ context, takes place at its surface level.2190

1.3.4.5. Personnel Plan and Training Objectives

An undertaking has to prepare annually a plan on personnel and training objectives. It takes place in co-operation negotiations. In the training objectives is to be assessed employees’ training needs to maintain and develop competence and skills in changing business environment. Objectives are to include annual training needs for each personnel group and yearly implementation plan. Plan’s and objectives’ contents depend on an undertaking’s size. The larger is the undertaking, the greater are the demands on their contents.2191

In the Finnish legal literature the ACU 2007’s obligations on an undertaking’s general plans, principles and objectives, including the obligation to prepare personnel plan and training and education objectives, have been interpreted as “the general playing rules of the workplace, the creation of which is at least in the interest of the employees”.2192 With regards to personnel plan and training and education objectives, these have, however, in core to do with the employer interest.

In restructuring personnel plans and training objectives are governance tools.2193 They are to facilitate the realisation of the procedures’ targets, by serving different purposes. In a merger different companies’ unification with their practises unification may lead to needs of updating skills. Restructuring generally leads to workforce reductions. From the employee perspective, still continuing at an employer’s employ, personnel plans’ and training objectives’ updating is important

2188 Kairinen – Uhmavaara – Finne page 36.
2190 See CA 2006 Chapters 5 and 6, especially § 6.2.
2191 ACU 2007 § 4.16.1; Proposal for ACU 2007 page 33; Hietala – Kaivanto pp. 71-73. Compare Finnish rules on personnel plan and training objectives with directive on Informing and consulting employees Preamble, especially points (7) - (9) and the adopted obligations.
2192 Rautiainen – Äimälä – Hollmén page 115.
2193 Compare Vuorenmaa page 96 denoting to procedures’ governance as a prerequisite to their success.
in facilitating skills development, for example, due to changed tasks. Long-term committed company development based on employee know-how is an alternative to restructuring. Personnel plans and especially training and education objectives are central personnel policy tools in carrying out company strategies based on employee know-how. The plan and objectives are tools in proactively maintaining employment in a long-time perspective.

In preparing the plan the foreseeable changes in the undertaking’s operation likely to be relevant for the personnel’s composition, number or occupational skills have to be taken into account. The plan and the objectives are to include, depending on the undertaking’s size, among the others personnel’s composition, number and an estimate of their development, the employees’ occupational skills assessment, any changes in the skills requirements and their reasons. The plan and the objectives are to include annual training objectives for each personnel groups and the plan’s and objectives’ implementation’s follow-up procedure.

In preparing the plan and objectives into account has to be taken in proactive manner foreseeable changes in a company’s or undertaking’s operation. This denotes to a company’s or its essential part’s foreseeable closures, expansions or reductions, M&As, machinery and equipment acquisitions, production changes in products and services, and other similar changes in business operations. The provision on training and education objectives is purported to increase proactivity in company practises with regards to employees’ skills development. Restructuring transactions are in character confidential business secrets long when under preparation. The provision on training and education objectives’ application preconditions company strategy’s active proactive implementation, preparing, consequently, the personnel to foreseeable changes in spite of restructuring transactions’ confidentiality when under preparation.

If an employer terminates employment contracts for financial or production-related reasons, the necessary changes for the personnel plan and training objectives have to be made in the co-operation procedure on reducing the workforce, see ACU 2007 § 4:16.6, Proposal for ACU 2007 page 34, Hietala – Kaivanto page 74, Rautiainen – Äimälä – Hollmén pp. 98 - 99 and 152, Rautiainen – Äimälä – Hollmén pp. 152-153.

See Porter pp. 657, 665 and 677 and Ellsworth page 221 on employees’ significance in knowledge-based production and a warning example pp. 253-254.

Compare with directive on Informing and consulting employees Preamble point (10) and generally the targets of the OMC, Barnard pp. 26-27.


As regards personnel plan’s and training objectives’ importance in increasing business strategies’ and restructuring transactions’ successful carrying out, the grounds are convincing. The obligation to prepare personnel plan and training objective originates from the 1980s. The enforcement period has been fairly long. According to a survey made on the application of the Act on Co-operation 1978, in companies in which personnel plans and training objectives are made, only 22 per cent of employee representatives estimated personnel’s options to affect them good. Even 41 per cent employee representatives estimated the options low. In companies not preparing personnel plans and training objectives, a vast majority of 64 per cent of employee representatives evaluated their actual options to affect low. Survey results are alarming, when evaluated on the basis of the plan’s and training objectives’ purpose. The survey results reveal there to be a widely extended non-understanding on the plan’s and objectives’ role as tools in company development and restructuring procedures’ governance.

Prior to implementing a personnel plan and training objectives, its grounds, objectives, purposes and effects have to be handled in the spirit of co-operation with the employee representatives in order to obtain consensus. This denotes to genuine interaction between the parties. It covers an exchange of views and a dialogue in practise, by taking into account mutual interests. The purpose is to handle the measures’ wholeness, including reasons, goals and effects both on an undertaking and the personnel. Also changes have to be handled in the negotiations. In preparing

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2199 ACU 1988 § 6b.
2201 ACU 2007 § 4:20; Proposal for ACU 2007 page 35; See Directive on Informing and consulting employees article 13. on defining and implementing practical arrangements for information and consultation: an employer and employee representatives shall work in a spirit of co-operation and with due regard for their reciprocal rights and obligations, taking into account the interests of both of the undertaking or establishment and the employees. If an employer has failed to prepare the personnel plan and training objectives, the Ministry of Employment and Economy may request, based on employee representatives request, a court of law order to oblige the employer to prepare the plan and objectives, see ACU 2007 § 9:2, Proposal for ACU 2007 pp. 47-48, Hietala – Kaivanto pp. 145-146. See directive on Informing and consulting employees article 13.
the personnel plan and training and education objectives the purpose of the ACU 2007 of collectively developing the undertaking’s operations has to be taken into account.\textsuperscript{2204}

As regards the end-results in the form of consensus, the Finnish labour law theory emphasises employer decision-making on personnel plan and training and education objectives, the matter being decided solely by the employer. According to legal literature consensus does not have legally binding force, equalling not with an agreement.\textsuperscript{2205} The end-result in the form of consensus denotes to parties’ unanimity, the parties \textit{sharing common views covered by the end-result in its framework}. Consensus is to be interpreted in the light of the enacted purposes of the ACU 2007 and directive on Informing and consulting employees, with its provision on implementing practical arrangements for information and consultation, taking also into account the meaning inherent in unanimity, not being a new concept in the Finnish labour law.\textsuperscript{2206} In consensus is inherent an element limiting parties’ freedom of action. It may affect employer decision-making.\textsuperscript{2207} In the case of consensus not having been obtained, the matter is to be decided solely by the employer, equalling with unilateral delivering of information.\textsuperscript{2208}

Personnel plans and training objectives are a legislative basis for knowledge management. In the Finnish legal literature the provision on personnel plan and training objectives has been evaluated comparing it with the preparatory works, stating there to be a contradiction between these two. The ACU 2007’s provision sets an obligation to prepare the training and education objectives. The Government Proposal refers to \textit{a yearly implementation plan} of the objectives, not having been stated in the provision itself.\textsuperscript{2209} In interpreting the provision on personnel plans and training and education objectives into account has to be taken the ACU 2007’s purpose, targeted to collectively develop undertaking’s operations.\textsuperscript{2210} If the purpose were only to prepare the plan and objectives without actually implementing them, one can with good grounds argue also the ACU 2007’s purpose on developing collectively an undertaking’s operations not becoming applied in practise, covering also developing competitive advantage in practise.\textsuperscript{2211} One has also to keep in mind the

\textsuperscript{2204} ACU 2007 § 1:1. See directive on Informing and consulting employees article 1 3.
\textsuperscript{2205} Rautiainen – Äimälä – Hollmén page 118, compare, however, page 109.
\textsuperscript{2206} See ACU 2007 § 1:1 in its original Finnish formulation “yhteisymmärryksessä” compared with KKO 1994:3, directive 2002/14/EC Preamble point (7) and article 1 3.
\textsuperscript{2207} See in the context of the ACU 1978 Nieminen pp. 354-355 and 358-359.
\textsuperscript{2208} Kairinen – Uhmavaara – Finne page 70.
\textsuperscript{2210} ACU 2007 § 1:1.
\textsuperscript{2211} See Hyvinvointi versoo tuottavuudesta pp. 11-12 and 14-15.
enacted follow-up procedure for the implementation of the plan and objectives, surely requiring implementation as a basis for its actual carrying out. This further emphasises the legislator’s purpose to make the plan’s and objectives’ preparation and implementation a living practise in undertakings. In furthering the use of personnel plans and training and education objective, special attention needs to be put on the length and quality of training and education.

1.3.4.6. Confidential Information and Derogations to inform

Employees and their representatives have to keep confidential information obtained in the co-operation procedure. This covers matters relating to business, trade secrets and employer’s non-public financial position. Decisive in defining employer’s business and trade secrets is the employer’s interest and assessment in keeping information confidential. Generally, business and trade secrets cover information on employer’s agreements and finances.

The provisions on confidentiality do not prevent employees’ representatives disclosing confidential information to other employees or their representatives to a necessary extent due to this employees’ role in realising co-operation’s purpose. Confidentiality preconditions an employer’s indication of the information’s nature as business and trade secrets or otherwise confidential. It is also required that individual employees and employees’ representatives inform the employees and their representatives on the confidentiality.

The employer is not obliged to provide the employees or their representatives with information the disclosure of which would without prejudice cause significant damage or harm to the undertaking or its operations. The rule has to be interpreted strictly.

The rules on confidential information and derogations to inform are interpreted and applied strictly. In listed companies the mere informing of employees by their representatives is not among the

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2216 ACU 2007 § 9:59.
acceptable scope of action. The interpretation instructions’ adopted by the ECJ are apt to put to the secondary stage employee and employment implications affected by restructuring.

1.3.4.7. CONCLUSIONS ON INFORMATION AND CONSULTATION

The ACU 2007’s scope of application is based on the number of employees employed by an undertaking. Its application depends on and procedures cover employees with an employment contract with the undertaking in question. Taking into account the new forms of work, the enacted scope of application leaves outside the provisions’ scope, for example, hired employees and self-employed, their extended use being based on new company strategies emphasising flexibility. At the company level this definition narrows the provisions’ scope of application. The increased use of atypical forms of work, resulting in diminishing the scope of affected persons under the provisions’ application, reflect a concept of a company as a bundle of narrowly defined economic relationships, instead of the concept of an enterprise, the focus of which is on the larger scope of the legal entity’s stakeholders and activities.

Company decision-making in based on the Companies Act’s provisions. From this perspective, the co-operation procedures take place at company’s decision-making structure’s surface. In restructuring the co-operation procedures cover matters centrally affected by the use of an employer’s management right, forming the basis for the procedures’ carrying out, affecting the employees’ representatives or employees themselves scope of action. The effects are furthered by the low level of employee representation in the board of directors.

Evaluated on the basis of the survey of the ACU 1978’s application, the carrying out of co-operation procedures is labelled by a power imbalance. This can be grounded by referring to evaluations on these procedures’ carrying out, especially on negotiations on workforce reductions. The evaluations on procedures’ practical significance vary considerably. A majority of employer representatives evaluated employee involvement generally to be at a good level, except in negotiations on workforce reductions, the evaluations being more cautious. A majority of employee

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2218 See C-384/02 Grøngaard, Bang Summary.
2220 See Werlauff 2003 pp. 189-190 on the difference between these concepts. See Toiviainen page 166, Elkington page 311, Stiglitz page 190, Berle – Means page 356. See, however, ACU 2007 § 1:1.
2221 See Toiviainen 2004 page 136-137 on employee representation in the board.
representatives evaluated employee involvement to be at a low or even at a very low level, especially in negotiations on workforce reduction.\textsuperscript{2222} In negotiations on workforce reductions matters under negotiations are largely held in fact decided before the negotiations’ commencement.\textsuperscript{2223} The interpretations on an end-result’s character in the form of an agreement varied from an unbinding document to a consent.\textsuperscript{2224} The interpretations do not denote to negotiations between parties having strong mutual interests.\textsuperscript{2225} Outside an agreement the negotiations have in fact to do with delivering of information and presenting the grounds for employer’s decisions,\textsuperscript{2226} followed by measures taking place by an employer’s unilateral decision-making. Under the company law employees do not have stakeholders’ status. The experiences on the ACU 1978’s application cannot either be interpreted denoting to a stakeholder status in the area covered by co-operation law, too.\textsuperscript{2227}

The ACU 2007’s provision on personnel plan and training and education objectives has significance in restructuring among the others in facilitating these procedures’ practical governance, thus enhancing restructuring transactions’ success.\textsuperscript{2228} The provision is significant from the company perspective, forming the basis for company activities’ success in knowledge-based production. The Preamble of the directive on Informing and consulting employees emphasises employees’ access to training and employability, forming a part of employment development anticipation and risk-prevention. The Finnish provision on personnel plan and training and education objectives can be evaluated to concretise the Preamble’s targets, being a part in restructuring transactions’ economic aspects, having strongly to do to do with proactive protection of employee economic rights.\textsuperscript{2229} From the company perspective, training and education objectives have also to do with steering of change.

As a whole co-operation procedures are affected by the enacted scope of matters and procedures.\textsuperscript{2230} Co-operation procedures’ end-results in the form of consensus and agreement may have effects affecting employer decision-making in the areas and framework covered by the

\textsuperscript{2222} Kairinen – Uhmavaara – Finne pp. 19 and 34.  
\textsuperscript{2223} Kairinen – Uhmavaara – Finne pp. 36 and 67-68.  
\textsuperscript{2224} Kairinen – Uhmavaara – Finne page 37.  
\textsuperscript{2225} Compare ACU 2007 § 1:1.  
\textsuperscript{2226} Kairinen – Uhmavaara – Finne page 70.  
\textsuperscript{2227} See Tiitinen – Kröger 2003 page 12 and Kairinen page 67 on subordination.  
\textsuperscript{2228} Compare directive 2002/14/EC Preamble point (9) denoting only to timely information and consultation as prerequisites for the success of restructuring with Vuorenmaa page 96 emphasising the procedures’ governance.  
\textsuperscript{2229} See directive 2002/14/EC Preamble points (7)-(8) and (13).  
agreement or consensus. Outside an agreement or consensus in their framework matters under the Act on Co-operation are to be decided primarily solely by an employer. Matters under co-operation negotiations in restructuring context generally have employee implications. They may be deteriorations in employment contracts’ terms and conditions or workforce reductions, affecting employees’ economic protection. Compared with the shareholders’ status under the Companies Act, decision-making under the Companies Act resulting in changes to shareholder rights without their active involvement would be interpreted to be against this group’s stakeholder interests. This is the most crucial difference between the employees and shareholders in the company context, being, however, in both of the groups’ case based on law.

Based on the survey results on the Act on Co-operation 1978’s workability, from long-term company development’s and employees’ perspective co-operation procedures’ effects can be evaluated to be in character more accidental than systematic, depending largely on individual negotiations’ end-results on matters covered by the procedures within the legal framework.

1.4. CONCLUSIVE EVALUATION ON EMPLOYEES’ PROTECTION AND STATUS IN FINLAND

The Finnish labour law is based on the principle of protecting employees as the weaker party in an employment relationship, being in need of legislative protection. The directive on Informing and consulting employees emphasises, especially in employee information and consultation, proactivity: enhancing of restructuring transactions’ success, employment development anticipation, risk prevention and taking into account the taken decision’s economic aspects. These aspects unified with the employee protection principle are crucial in evaluating employee protection and status in and due to restructuring.

The Finnish national level merger procedure’s problems and challenges regarding the employees are very much the same as stated in evaluating the EU’s merger law. The division of law into branches with different concepts, in the present context into the company and labour law is apt to conceal the procedures’ differences. It is also apt to conceal the differences in the legal protection.

2231 Compare in the context of ACU 1978 Nieminen page 333.
2232 Compare with the Swedish system, there being a goal of an end-result based on negotiations, Iseskog page 632.
2233 Nieminen on deteriorations pp. 290-323 and betterments page 324.
2234 CA 2006 § 1:7.
2235 Compare Nieminen pp. 60-61 on negotiations on work-force reductions and Sílén pp. 95-112.
2236 See Kairinen 2006 page 42. See directive on Transfers of Undertakings Preamble point (3) and directive on Collective Redundancies Preamble point (2) on protective starting-points.
2237 Compare directive on Informing and consulting employees Preamble points (7)- (9) and (13).
and different stakeholders’ status. Into account has also to be taken the low level of employees’ representation in boards, being however the central decision-making body in matters with strategic character, into addition to general meeting.

In the Companies Act procedures shareholders have a genuine stakeholder status. Among the enacted measures can be mentioned the enacted material’s focus on the shareholders, targeted to their economic rights’ protection, as such, and their role in the procedures’ governance, covering also the minority shareholders’ rights to demand decision-making in a general meeting and a right to object a merger’s acceptance, if not held advantageous. In this context employees are outsiders. They are neither covered by company law safeguards.

Labour law’s information and negotiation obligations’ actual significance from the employees’ point of view is largely affected by their timing. The directive on Transfers of Undertakings requires informing of employees’ representatives to take place “in good time”. The company being under the acquisition procedure is required to fulfil the information procedure in good time. The acquiring company or the company being formed is required to fulfil the requirement – as within a week – from the transaction’s completion. A merger affects the acquired company’s existence’s ceasing. Its options to fulfil the information obligation regarding substance are in practise limited compared with the acquiring company or the company being formed. Because of this, the information obligations’ initiation with regards to the acquiring company or the company being formed is far more significant in practise. These companies are however to inform the employees only with regards to from the date of a merger’s enforcement, resulting also in negotiations obligations’ timing on envisaged measures. When compared with the shareholders’ status under the company law procedure, taking also into account the draft terms’ contents, not covering employee implications in a national level merger, the information obligation’s and negotiations’ timing with regards to envisaged measures cannot be evaluated from the employees’ perspective to increase effectively and proactively employment development anticipation and risk prevention. The framework on information and negotiations’ obligations timing is applied also in an assignment of business. The employees are met with similar challenges, if not even larger. This is due to the centrality of an employer’s management right in assessing an assignment with its different constituting elements. The timing of information – and in the case of envisaged measures –

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2238 See directive on Transfers of Undertakings article 7 1.
2239 See ACU 2007 § 7:41.2-3.
2240 See ACU 2007 § 7:41.3.
negotiations’ obligations’ initiating could be held acceptable, if merger’s legal effects in company reality in practise could be assessed due to the traditional labour law interpretation on a general succession denoting to former rights’ and obligations’ continuation. In company practises’ reality this is not however the case. Restructuring generally affects negative changes in employment contract’s conditions or even the contract itself, equalling the legal effects with those taking place in company’s dissolution. This conclusion is relevant also in an assignment of business. Employees are not parties in a merger procedure, neither in the procedures leading to an assessment of an assignment of business. Due to the employees’ role as suppliers of labour, they may be evaluated to be participants in restructuring transactions’ consequences. This does not denote to the employees’ stakeholders’ status in an enterprise.

In Finland, employers’ managerial and dismissal rights were tested in full during the recession in the 1990s. Redundancies and lay-offs numbered hundreds of thousands. The redundancies were quick and cheap to carry out. The level of employees’ protection in collective dismissals can be evaluated to be a low one in Finland. Dismissals on financial and production-related grounds are cheap in Finland, essentially cheaper compared to many other European countries, except to the other Nordic countries. Since the recession of the 1990s, Finland has joined the EU and renewed its legislation due to the Membership obligations. Provisions on dismissal grounds have also been further affected.

The Finnish labour law theory emphasises employer’s management right in affecting dismissals based on economic – and production related grounds. This point of view is naturally based on law. Irrespective of the labour law’s protective starting point, the legal theory has largely neglected to evaluate employees’ economic rights’ protection in and due to restructuring.

2242 Lehto pp. 6, 31 and 46-47.
2243 Compare CA Committee 1992:32 page 316.
2244 Compare Hellsten 2007a pp. 29-33 in the context of the EU-labour on a premise of employees not being a commodity.
2245 See Elkington pp. 311 and 317.
2246 Bruun – Malmberg page 93. See also Poijula pp. 11 and 40. Compare Kairinen 2006 pp. 42-44.
2247 Maliranta page 267; Hellsten page 31.
2250 See, however, Kairinen page 23, denoting to employees’ right to stay employed as a weaker right compared to social rights due to terminated employment relationships.
Enhancing of restructuring transactions’ success has also to do with taking into account these decisions’ economic aspects on employees.\footnote{See directive 2002/14/EC Preamble (13) in the context of information and consultation, see also point (9).} In this proactive action is to be emphasised.

The Finnish model on training and education objectives is a form of proactive action, targeted to increase employees’ employability. The model covers different employee groups. The model is however undervalued and too little used in practise. Its practical application needs more attention. Also the length and quality of the training and education needs more attention.

The model on action plans and principles on furthering employment have had positive effects on speeding up re-employment after economic and production-related dismissals. The percentage of employed under the model is approximately four per cent higher compared to persons not under the measures. This results from the Employment Authorities’ early intervention, activation in seeking employment and speed use of training options.\footnote{Muutosturvan arviointitutkimus pp. 12, 55 and 115.} The model shortens the length of unemployment.\footnote{Muutosturvan arviointitutkimus page 55.} Positive is also the model’s coverage, covering all the employee groups. The model relies very much on public services offered by the Employment Authorities. These services are affected by the Employment Authorities’ resources, limiting the framework of the offered services. The Finnish model lacks as a supporting element a personal level consultation in carrying out the planned measures.\footnote{Compare Bruun 2005 page 196.} The Finnish model in its present form, largely emphasising public power measures, is not necessarily apt to lead to levelling out of costs between companies and the society, consequently not necessarily levelling out share of obligations between companies and surrounding society.\footnote{Stiglitz pp. 190 and 194.}

In spite of the positive results affected by the model on actions plans and principles on re-employment, further balancing legislative acts are still needed. This is due to the burden of unsuccessful restructuring operations, adding costs on public power and affecting at the individual employee level in the form of unemployment, re-training and re-education needs.

Company acquisitions generally affect workforce reductions.\footnote{Lehto pp. 6, 31 and 46-47.} According to the survey made on the workability of the ACU 1978, a merger or a business transfer results in workforce reductions only in six per cent of cases having led to co-operation negotiations. Of workforce reductions 69 per
cent are grounded with financial or production-related grounds.\textsuperscript{2257} These research and survey results are easily explainable by evaluating the ECA 2001 and its preparatory works, based on the relevant EU-law. Dismissals based on an assignment of business – and consequently due to the directive on Transfers of Undertakings on a merger – are forbidden. Workforce reductions on economic, technical or organisational reasons entailing changes in the workforce are, however, allowed.\textsuperscript{2258} The research and survey results create room for an evaluation that the enacted provisions’ circumvention is easy due to their formulation. This affects a need to their re-evaluation.\textsuperscript{2259} In dismissals taking place in restructuring context a method of assessment could be taken into use.\textsuperscript{2260} In the assessment the restructuring situation is evaluated as a wholeness. Into account are taken in an objective manner grounds and targets, the situation before the restructuring procedure and after its completion, in order to assess if the dismissals are in practise due to a merger or an assignment of business, although they are grounded, by using the wording in the directive on Transfers of Undertakings, by economic, technical or organisational reasons entailing changes in the workforce.\textsuperscript{2261}

A merger material needs renewal. Employment relationships’ economic character should be emphasised more strongly. Employee implications in a national level merger should be taken into account. General company law principles’ re-evaluation in company context is needed. Of special importance in restructuring are the general principles on company purpose,\textsuperscript{2262} limited liability,\textsuperscript{2263} stakeholders\textsuperscript{2264} linked with the equality principle\textsuperscript{2265} and management’s duties.\textsuperscript{2266} Resulting from this reconsideration employees’ rights in company law merger procedure could be strengthened comparable to those available to the minority shareholders. This refers to a right to demand decision-making on a merger in a general meeting and a right to object its acceptance.\textsuperscript{2267} With regards to shareholders, minority rights are not considered to be against a right of establishment or free movement of goods or services or a forbidden restriction on competition.\textsuperscript{2268}

\textsuperscript{2257} Kairinen – Uhmavaara – Finne pp. 28-29 and 66.
\textsuperscript{2258} ECA 2001 § 7:5.1; Proposal for ECA 2001 page 105; Directive 2001/23/EC Chapter II Article 4.
\textsuperscript{2259} See Toiviainen 2004 page 159. See Hellsten 2007 pp. 16-17.
\textsuperscript{2260} Professor Heikki Toiviainen 24.1.2008.
\textsuperscript{2261} Compare Case 101/87 P. Bork International paragraph 18.
\textsuperscript{2262} CA 2006 § 1:5 compared with Ellsworth pp. Preface x, 1, 15, 19, 40, 45, 93-94, 95, 125, 221 and 225 and Elkington page 300.
\textsuperscript{2263} CA 2006 § 1:2.1 compared with Stiglitz page 190, Elkington page 331 and Ellsworth page 4.
\textsuperscript{2264} Mähönen – Süläkivi – Villa pp. 18-19 and 22-23 compared with Elkington pp. 300 and 310 and Dine page 228.
\textsuperscript{2265} CA 2006 § 1:7.
\textsuperscript{2266} CA 2006 § 1:8 compared with Elkington page 345.
\textsuperscript{2267} Compare Toiviainen 2004 page 159 on employees’ veto rights. Compare Kuoppamäki 2007 pp. 200-201, especially page 201.
\textsuperscript{2268} Compare Kuoppamäki 2007 pp. 200-201, especially page 201.
The present research evaluations on the Finnish company and labour law denote at the moment to a concept of an enterprise with a wide scope of stakeholders and goals with social connotations largely in a weak form. There are, however, to be perceived signs of positive change, when evaluated from the point of view of the employees’ protection and enhancing their status in company context. The emphasis of the ACU 2007 on interactive co-operation procedures denotes to a concept of an enterprise with a wide scope of stakeholders. The model on personnel plans and training and education objectives denotes to a concept of an enterprise with a wide scope of stakeholders and proactivity in company actions. The model on action plans and principles can be interpreted to denote to a model of an enterprise with goals labelled also by social connotations, in spite of the emphasis of the public power actions in alleviating the consequences of workforce reductions.

2 RESTRUCTURING LAW IN SWEDEN IN THE RESEARCH CONTEXT

2.1. ON LIMITED COMPANIES LAW

2.1.1. EMPLOYEE REPRESENTATION

Finland and Sweden are historically evaluated to be a part of the same legal system, the Nordic or Scandinavian legal system. In spite of this common background, in a limited liability company context social and economic factors and socially and economically remarkable relationships are valued and evaluated in differing ways in organising them, denoting to different concepts on democracy. In Sweden, the employer/employee relationship is based on equality, both socially and economically. The solutions adopted in employee representation differ considerably between these two countries.

In Finland, the decision on employees’ board membership is done by the company itself, granted seldom. In Sweden, employee representation in board of directors is enacted mandatory in

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2270 ACU 2007 § 1:1.
2272 ACU 2007 § 49.1 and 49.3.
2275 See Toiviainen 2004 page 10 on direct participation.
certain private sector corporations.\textsuperscript{2276} Employees’ work and shareholders’ investments are equalled in facilitating for both of the groups participation in company decision-making.\textsuperscript{2277}

The Swedish provisions on employee representation are applicable in limited liability companies and concerns, having employed at least on average 25 employees during the last accounting year. In a company acting in different branches the demand of the average employed is 1,000. On its own decision-making a limited company may arrange employees’ participation under the enacted threshold. In a company employing on the average 25, the employees have a right to two representatives and also to deputies. If the employees’ average number is 1,000, employees have a right to three representatives and three deputies.\textsuperscript{2278}

Local employees’ organisation bound by a collective agreement with the company makes a decision on setting the representatives, informing the company. It also elects the representatives.\textsuperscript{2279} Employee representatives should be elected among the company’s own employees, or in a concern among the employees of it.\textsuperscript{2280} The organisation decides representatives’ term of office, at the maximum four accounting years.\textsuperscript{2281}

Employee representation is a part of labour law with corporate law character.\textsuperscript{2282} Employee representation in company management is based on mutual information on company’s business actions, to be influenced.\textsuperscript{2283} Employee representation’s character differs from employee consultation.\textsuperscript{2284} Employee representation is focused on decision-making in company management, all the board members striving for the company’s best. The consultation in the form of co-determination, targeted to influencing employment relationships’ terms and conditions, is never carried out in the board. In the consultations, employer and employee representatives may represent opposite sides.\textsuperscript{2285}

\begin{itemize}
\item[AER] §§ 1-2 and 4.1.
\item[2276] Proposal 1987/88:10 page 44; Lavén page 84; Moberg page 27.
\item[2277] AER §§ 2 and 4; Lavén pp. 22, 47, 49-53, 56-57 and 59-60; Moberg pp. 36-38; af Sandeberg page 93; Skog pp. 197-198; PTK pp. 11-12 and 18; Liukkunen page 230.
\item[2279] AER § 9; Lavén pp. 78-80; Moberg pp. 54-56; Skog page 199.
\item[2280] AER § 10; Lavén pp. 80-81 and 85; Moberg pp. 57-58.
\item[2281] Liukkunen page 231.
\item[2282] AER § 1; Lavén page 58; Moberg page 18; PTK page 7.
\item[2283] ACW, for example §§ 1 and 10.
\item[2284] See ACW § 11, Lavén pp. 36 and 87, PTK pp. 7 and 20.
\end{itemize}
In the board decision-making is based on the majority rule. Employee representatives are always a minority in the board. Employee representatives are equal with the members elected by the general meeting. They are all covered by the duty of loyalty, or the loyalty principle. A board member is to prioritise the company interest in taking care of its matters. The principle is linked with company purpose, generating profits for shareholders. Board members are not bound by an enacted duty of secrecy. The duty of loyalty limits, however, open delivering of information in company matters.

As board members employee representatives are bound in their actions by the company purpose. They may however evaluate the company purpose from a wider perspective compared with a narrowly defined profits generation. Issues on employment, working environment or developing human resources management may be taken into account. The company’s best may thus be valued from different perspectives, giving to it different connotations.

A general meeting is principally a shareholders’ meeting, participation being primarily based on share ownership. As board members, employee representatives have a participation right in general meetings, not covering a right to make proposals, neither a voting right.

Employee representatives are forbidden to participate in decision-making in matters on collective agreements and strikes. Excluded are also matters in an employees’ organisation’s interest with a character apt to lead to an interest conflict with the company. Matters under an employer’s management right are not excluded. An employee representative is not forbidden to participate in decision-making on restructuring matters. Employees have a genuine way of influencing company decisions of strategic character, restructuring issues included. Employees’ possibilities to affect and to be informed of a limited company’s business decisions with strategic character are at a higher level in Sweden compared with Finland.

2286 Moberg page 28, Skog page 198, Sandström page 208.
2287 AER § 11; CA 2005 § 8:2; Lavén pp. 82, 84 and 89; Moberg page 59; Skog page 200; PTK page 20; Liukkunen page 231.
2288 AC Chapter 18; CA 2005 § 3:3; af Sandeberg pp. 136-137 and 140.
2289 Lavén page 90; Moberg page 128; PTK page 24.
2290 Lavén page 87.
2291 Skog page 168.
2292 CA 2005 §§ 7:67 and 7:32; af Sandeberg pp. 81 and 83-84; Lavén pp. 101-102; Moberg page 63.
2293 AER § 14; Lavén pp. 104-110; Skog page 200.
2294 Lavén page 109.
2.1.2. LIMITED COMPANY’S STRUCTURE AND GENERAL PRINCIPLES FROM EMPLOYEES’ PERSPECTIVE

The history of limited liability companies began in Sweden in 1731 with the establishment of the East-Indian Company. The foundation of limited liability companies was enacted in Sweden in 1848 in the first Companies Act,\textsuperscript{2295} justified by the society’s interest.\textsuperscript{2296}

The present Swedish Companies Act does not contain a definition of a limited liability company as a company form.\textsuperscript{2297} This may be due to this company form’s long history in Sweden. The legislator has taken for granted this juristic person’s legally constituting elements.\textsuperscript{2298} As already stated in the research in evaluating the Finnish Companies Act, this kind of a habitual thinking may however be a barrier to a critical thinking.

In Sweden there are about 310,000 limited liability companies. Only 1,300 are public companies, and about 270 are listed ones.\textsuperscript{2299} The ownership structure in the listed companies has changed largely since the end of the 1990s. Foreign investors, largely pension funds or other institutional investors with short-span investment policies and a low level of interest in a long-time company development,\textsuperscript{2300} own over a half of the largest limited companies in Sweden. Also the character of Swedish share-owners has changed. Institutional investors have to a great extent replaced individual ones.\textsuperscript{2301} In Sweden share-ownership is however still concentrated, facilitating majority voting rights’ effective use.\textsuperscript{2302} Changes in the ownership structure have affected the Companies Act’s renewal. The shareholders’ role as investors has become stronger, based on their stakeholders’ status. Flexibility and self-regulation are emphasised, due to national and international business demands, especially the Anglo-American legal system’s effects.\textsuperscript{2303}

A limited company’s establishment is based on its registration.\textsuperscript{2304} The Companies Act’s most fundamental principle has to do with bound share-capital, limiting an individual shareholder’s risk

\textsuperscript{2295} Hemström page 21; See also Skog page 13.
\textsuperscript{2296} af Sandeberg pp. 16-17.
\textsuperscript{2297} CA 2005 came into force 1.1.2006 together with coming into force of the Act on its Enforcement.
\textsuperscript{2298} Svensson page 11.
\textsuperscript{2299} Sandström page 57; Svensson pp. 7 and 9.
\textsuperscript{2300} Compare Porter page 164 on competitive advantage, to be found in branches, where shareholders and employees have developed a long-standing commitment both on the company and branch in question.
\textsuperscript{2301} SOU 2001:1 pp. 22-23.
\textsuperscript{2302} af Sandeberg page 28.
\textsuperscript{2303} SOU 2001:1 pp. 21 and 24, Svensson pp. 9-10, af Sandeberg page 18.
\textsuperscript{2304} CA 2005 § 2:25, registration is run by the Swedish Patent and Registration Office; Sandström page 70; Skog page 32.
to the made investment. Rights to profit-generation and participation in general-meeting decision-making are based on investments.

The Companies Act is based on four general company law principles. These principles protect shareholders’ mutual relations. The principles are the equality principle, general clause and principles on company purpose and its branch. They limit management’s actions. They can be disregarded only by a unanimous shareholder decision.

Principle on equal treatment denotes to the shares’ equality, carrying out same rights and obligations. The principle is applicable in shareholders’ mutual relationships.

General clause is applicable in general meeting’s, board’s and managing director’s decision-making. It forbids decisions granting to a shareholder or a third party advantage, being simultaneously disadvantageous from the company’s or another shareholder’s perspective. An action’s purpose is emphasised, irrespective of actual consequences.

The general principles’ contents and interpretations resemble the ones prevalent in Finland. They are applicable only in the narrowly defined company law based relationships.

In the Companies Act there is a presumptive clause on a company purpose of generating profits for shareholders. The shareholders’ relationships with the company are based on share ownership in the form of a share, denoting to a bond and referring to a part of a company’s assets. Company’s assets are not allowed to be used for a purpose not in the company’s interest from the long-time profit-making’s perspective.

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2305 CA 2005 §§ 1:3.1 and 1:4.1; SOU 2001:1 page 24; Skog page 21; Svensson page 27; af Sandeberg page 14.
2306 CA 2005 § 7:1; Sandström pp. 23 and 200; af Sandeberg page 57.
2307 af Sandeberg page 133.
2308 Sandström pp. 19-20; af Sandeberg pp. 133-139.
2309 af Sandeberg page 133.
2310 CA 2005 § 4:1; SOU 2001:1 page 25. The articles of association make possible varying of voting rights or a right to profit attached to shares, see CA 2005 § 4:2-3; More in detail see Sandström pp. 138-140 and af Sandeberg pp. 57-59.
2311 Skog pp. 130-135; Sandström pp. 196-197; af Sandeberg page 133-134; Svensson page 49.
2312 CA 2005 §§ 7:47 and 8:41; af Sandeberg pp. 134-135; Sandström pp. 197-198. The principle is applicable in all general meeting decision-making, including decisions requiring qualified majority, thus merger decisions, see CA 2005 § 23:17.1.
2313 af Sandeberg pp. 136-137.
2314 CA 2005 § 3:3; Svensson page 11.
2315 Skog page 127.
2316 af Sandeberg pp. 136-137.
of emphasising an enterprise concept\textsuperscript{2317} has been granted a higher value compared with Finland, company law theory included.

The right to participate in a general meeting is principally bound with share-ownership.\textsuperscript{2318} Decision-making is based on the majority rule. Influence in the decision-making depends on the extent of voting rights.\textsuperscript{2319} Voting rules are to create balance between majority and minority shareholders in decision-making.\textsuperscript{2320}

The protection principle covers shareholders and creditors.\textsuperscript{2321} The rules on minority shareholder and creditor protection are targeted to continuance on capital issuing, affecting its level in the long run. In creditor protection public power plays an essential role, due to tax law and public fees.\textsuperscript{2322} Into addition to involvement in general meeting decision-making, minority protection covers among the others minority’s rights to control company’s activities and protect their share-ownership.\textsuperscript{2323}

A limited liability company’s legal basis and structure are very similar in Finland and in Sweden, irrespective of the emphasis in Sweden on the concession theory and the enterprise concept. The shareholders are the primary stakeholders, being succeeded by the creditors. In Sweden, public power is acknowledged as a company creditor. In Finland, public power’s role in a limited company context is fairly unseen, although the factual end-results in this respect coincide, due to taxes and public fees.\textsuperscript{2324}

The Companies Act defines different company organs’ status and powers, denoting to general meeting\textsuperscript{2325} and board\textsuperscript{2326} as mandatory ones and to managing director, mandatory in a public limited company.\textsuperscript{2327} General-meeting as the highest decision-making body\textsuperscript{2328} makes the most important strategic decisions, one of which is board’s election.\textsuperscript{2329} The board has decision-making

\textsuperscript{2317} See Werlauff 2003 pp. 189-190.
\textsuperscript{2318} Skog page 168.
\textsuperscript{2319} Sandström page 194.
\textsuperscript{2320} Sandström page 174-175.
\textsuperscript{2321} Svensson pp. 11-12.
\textsuperscript{2322} Skog pp. 22-23.
\textsuperscript{2323} Sandström pp. 17-18; af Sandeberg pp. 84-89.
\textsuperscript{2324} See Toiviainen page 166.
\textsuperscript{2325} CA 2005 § 7:1.
\textsuperscript{2326} CA 2005 §§ 8:1 and 3. In a public company the board has two members, in addition one member acting as a substitute. In a public company the minimum members’ number is three, Svensson page 31; af Sandeberg pp. 93-94.
\textsuperscript{2327} CA 2005 Chapters 7 and 8, on the managing director see §§ 8:27-28 and 50, af Sandeberg page 104.
\textsuperscript{2328} General meeting has the powers to decide all company matters, see Svensson page 66.
\textsuperscript{2329} CA 2005 § 8:8; Sandström page 240; af Sandeberg page 95; Skog page 182.
powers in a more limited area, into addition to enforcement powers, these being granted also to the managing director.\textsuperscript{2330} The division of power is underlined by an idea of a division of tasks, shareholders acting as capital investors and management having an independent responsibility in operative issues.\textsuperscript{2331} The division of power between company organs has social importance due to its implications. It reflects social values. It may be a catalyst in economic development. In the present Companies Act shareholders’ status is increased compared with the status of the board and managing director.\textsuperscript{2332}

In principle a company and its management have a freedom of action on management and business activities, to be carried out, however, in an effective way from the perspective of profit generation. In spite of the freedom of action business is in practise largely based on the enacted rules, the labour law included.\textsuperscript{2333}

The board and the managing director are bound in their activities and decision-making by the loyalty principle. The company and its advantage are to be granted the first priority.\textsuperscript{2334} Shareholders’ mutual relationships and their relationships with the company are not covered by an equivalent principle. The shareholders have no duty to further the company interest.\textsuperscript{2335}

The board is responsible for a company’s organisation and its business management. It acts as a general meeting’s agent and represents the company in its relationships with the third parties. It has to supervise continuously company’s economic state. It has to take care of the company’s control in a trustworthy way.\textsuperscript{2336} The board has to take care of organising human resources, being suitable for business activities. As a part of this it has to examine an organisational plan, to get an overview of the personnel’s practical actions. The purpose is to create an organisational model making possible supervising and securing of quality. The board and the managing director have to give yearly an account on the management, including important development trends on economy, environment, personnel and risks, forming an important source of information for different stakeholders. The board has the main responsibility in making restructuring decisions. It is responsible for the

\textsuperscript{2330} Sandström page 23; af Sandeberg pp. 122-124.
\textsuperscript{2331} Sandström page 171.
\textsuperscript{2333} Sandström pp. 255-256.
\textsuperscript{2334} af Sandeberg page 140.
\textsuperscript{2335} Skog page 226.
\textsuperscript{2336} CA 2005 § 8:4; Sandström page 210 and an overview Sandström pp. 208-219; af Sandeberg pp. 122-124; Svensson page 69.
company’s economic management and strategic investment decisions. It takes care of company
development in a long-time perspective.2337

In Sweden a limited company’s management is based on a structure equalling with the Finnish one. There are however significant differences.

The first difference has to do with the board’s composition. In Sweden the employees have a mandatory standing in the board. It composes of shareholder and employee representatives, being based on inputs from both of these groups equalling. The board makes the most important decisions on restructuring, the employees having a permanent standing to affect this decision-making.

The second difference has to do with the board’s tasks, including the responsibility on a company’s organisation, referring to human resources management. The board has to take care of organising human resources, being suitable for business activities. It has to examine an organisational plan and to get an overview of the personnel’s practical actions, to create an organisational model making possible supervising and securing of quality.2338 The third difference has to do with the management’s obligation to give yearly an account on the development trends. It is an important source of information for all the stakeholders, the employees included. The status of the employees is in many respects affected by the democratic ideals prevalent in the Swedish society.2339 The status of the employees in a limited liability company reflects an inclusive view on company stakeholders.2340 It reflects also employees’ increased significance in knowledge-based production.2341

In both of these countries the employees have however no standing in general meetings in the form of a right of making proposals or voting rights. It has also to be remembered that shareholders are not bound in their relationships with the company and its other stakeholders with the loyalty principle, targeted to the best of the company.

2337 AYA § 7:31; Sandström pp. 95 and 211-213.
2338 Compare Ellsworth on especially customer-based purpose pp. Preface x, 1, 19, 42-51, 94, 136 and 225, see also Toiviainen 2004 page 157.
2339 See ”Eri tapoja kohdata” pp. 5 and 11.
2340 Elkington pp. 311 and 345 and Dine page 228.
2341 Ellsworth page 221.
The fourth difference is based on the labour law. It has to do with consultation’s with the employees’ representatives, covering their timing and scope. Consultation does not cover decision-making on company matters themselves. It covers however the procedure preceding employer decision-making. Matters under consultation cover issues under an employer’s management right, for example, transfers of undertakings, mergers included, closures, extensions and a sale of shares. A transfer of an undertaking and collective redundancies has always to be consulted. The consultation has to do with a transaction’s actual carrying out, if and how it should be carried out.

As a whole the Swedish limited liability company law reflects a more inclusive view on a limited liability company and its stakeholders compared with the Finnish one.

2.2. COMPANIES ACT’S MERGER PROVISIONS FROM EMPLOYEES’ PERSPECTIVE

Mergers have been enacted as civil and company law procedures in Sweden since 1944. Merger law’s roots, now a part of company law, are however in liquidation rules. The 3rd directive’s implementation led to great legislative changes, being substantive in character. A wholly renewed merger law was evaluated to be needed.

In Sweden mergers can be carried out as absorption, combination and wholly-owned subsidiary company mergers, the definitions corresponding with the 3rd directive. The Swedish merger law is applicable in national and cross-border transactions.

The main interest parties are shareholders, creditors and the public power. In the merger plan, denoting to the draft terms, the status of the shareholders and holders of rights to which special rights are attached have to be defined.

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2344 Sandström page 339.
2347 Sandström pp. 342-347.
Company and labour law procedures are also in Sweden separate ones. The draft terms in the form of a merger plan denote to a preliminary agreement on a merger’s conditions, to be later adopted as a binding agreement. It does not cover conditions on employees’ status. The Swedish company law merger provisions cannot be evaluated without taking into account labour law provisions on consultation. In Sweden, employee representatives have to be consulted on a transfer of an undertaking, covering also a merger, before an employer makes a decision on the transaction’s carrying out. Consultation covers transaction’s grounds and implications. The consultation as such does not guarantee employees’ point of views actual taking into account in the employer’s decision-making.

The merger plan in its enacted form, corresponding with the demands of the 3rd directive, reflects a concept of a company in its traditional form as a bundle of narrowly defined economic relationships. It lacks a wider stakeholder point of view. It does not cover the actual merger procedure’s governance, important in achieving the transaction’s goals, due to high failure percentages. The prevalent company law framework in Sweden, reflecting an enterprise concept with an inclusive stakeholders’ definition, covering employees due to the board membership and its tasks and public power due to its acknowledged creditor status, affects however a more inclusive interpretation on a national level merger compared to the one done in the Finnish company law context with regards to employees and public power. The framework on consultation’s timing and scope grants employees via their representatives a proactive option to affect employer decision-making.

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2350 SOU 1992:83 page 28: in the implementation legislation the requirements on the plan’s contents were strengthened with regards to delivered information.
2351 The 3rd directive Chapter II article 5.
2353 Heinestam pp. 109, 118-119 and 122 with a reference to costs’ savings due to a more appropriate organisation in a company with one management unit, implying to employment implications, containing important information to employees in evaluating their status.
2357 See Vuorenmaa pp. 9 and 96.
2358 See Vuorenmaa page 9, Peng page 381.
2359 See Werlauff 2003 pp. 189-190.
2360 Compare Elkington pp. 311 and 345.
According to the 3rd directive the merging companies’ managing bodies are to draft a written report explaining the draft terms and setting out their legal and economic grounds.\(^{2362}\) In Sweden, this report is a part of the merger plan, denoting to an account of the circumstances which can be of importance in assessing merger’s “suitability”.\(^{2363}\) The provision leaves open the concept’s interpretation. It can be interpreted in the light of the general company law principles combined with the definition on stakeholders. The concept may be interpreted to refer to the stakeholders narrowly defined, thus primarily to the shareholders, and to a company purpose of generating profits. The concept could thus denote to the suitability from the shareholders’ perspective in the light of profit-making. This interpretation equals with the one made in the context of the Finnish company law. Suitability for the companies can however be interpreted from another perspective. Due to the consultation’s timing and scope, the concept can be interpreted to cover a national level merger’s effects on employees\(^{2364}\) after its carrying out, being linked with a company’s status in the product markets after the merger’s completion.\(^{2365}\) This can be grounded by a reference to the shareholders’ status in the company context as surplus receivers, connected with the emphasis on long-term profit-making, and a reference to a board’s responsibility to secure supervising and securing of quality.\(^{2366}\) The suitability for the companies could also be assessed from the public powers’ perspective as an acknowledged company creditor.\(^{2367}\)

Auditors deliver statements on a merger plan in a report for each of the participating companies.\(^{2368}\) They evaluate merger as an integrated whole, formed by the participating companies. The report is based on good accounting practise and done in a necessary extent. The consideration, its distribution and grounds are evaluated. It covers also evaluation with its grounds on assets, debts and their suitability. In an absorption merger the auditors evaluate the merger’s possible effects in causing a danger to acquiring company’s creditors, done also in a subsidiary company merger with regards to parent company’s creditors. In a combination merger the evaluation covers the value of the acquired company’s correspondence with the acquiring company’s share-capital.\(^{2369}\) Although

\(^{2362}\) The 3rd directive Chapter II article 9.

\(^{2363}\) CA 2005 § 23:9, Heinestam pp. 111 and 119.

\(^{2364}\) Compare directive 2005/56/EC article 5 (d) on stating in the draft terms a cross-border merger’s likely repercussions on employment. See Lehto pp. 6, 31 and 46-47 on Finland’s part, company acquisitions generally leading to workforce reductions.

\(^{2365}\) Ellsworth page 1.

\(^{2366}\) Compare Ellsworth on especially customer-based purpose pp. Preface x, 1, 19, 42-51, 94, 136 and 225, see also Toivinen 2004 page 157.

\(^{2367}\) See Skog page 22.

\(^{2368}\) CA 2005 §§ 23:11 and 29; af Sandeberg page 233.

the auditors’ report is based on a future perspective and done in a necessary extent, its focus is on the narrowly defined financial relations. It does not cover the merger procedure’s actual governance, its effects on a company’s status at the product markets and a wider stakeholder perspective. Consequently, excluded are a merger’s effects from a wider stakeholder perspective, employees included.

In a company being acquired a merger is approved in a general meeting with a qualified majority, calculated from the shares and votes present. A minority of one-third of shareholders may object the approval. In an acquiring company a merger is principally approved in a board. In an acquiring company a minority of at least five per cent of shareholders may demand decision-making in a general meeting. Employees do not have equivalent rights of objecting a merger’s approval or demanding decision-making in a general meeting.

The Patent and Registration Office guarantees the procedure’s legality in matters of public policy. Within a month after the merger plan’s – or the draft terms’ – drafting the plan has to be registered by the Patent and Registration Office, to be later enforced due to an application. The registration with its publication is purported to increase legal certainty, considered important from the shareholder and creditor perspective. After the procedure as a whole a merger has to be registered for its enforcement, its legal consequences being connected with this.

The Patent and Registration Office’s role as a controlling authority is a formal one, equalling thus with the situation in Finland. The Patent and Registration Office’s task is to control a merger’s strictly defined formal legality as a civil law procedure in relation to narrowly defined stakeholders. Merger’s legality from a wider stakeholders’ perspective by taking into account its social implications, employment implications included, is not evaluated. The Patent and Registration Office does not either have powers to ban a merger due to its social effects and consequences, for example, due to its effects on employment.

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2370 CA 2005 §§ 23:15-18; Skog page 244, af Sandeberg page 231; Heinestam page 124, Sandström page 343, See SOU 1992:83 page 28 on the majority and minority rules, changed due to the implementation.
2371 CA 2005 §§ 23:14, 20 and 30; Sandström pp. 345-346, Heinestam pp. 112-113 and 123-125. Each of the participating companies has to inform their creditors on their intention to enforce the approved merger and on the right to object it. Employees, irrespective of having salary debts, are not informed, due to safeguards in the Act on Salary Protection, CA §§ 23:19 and 32. The effects from the competition law point of view are also reviewed, Sandström page 346 and Heinestam page 125. Heinestam page 21 on the implementation legislation.
The changes having taken place in the structure of share-ownership in Sweden are of interest in this context. The institutional shareholders’ interest in a long-term company development is generally evaluated to be at a low level due to short investment-spans. This may be furthered by a lack of loyalty principle in the shareholders’ relationships with the company, affecting also a company’s relationships with its other stakeholders. These are factors affecting restructuring transactions’ carrying out, affecting naturally the level of employees’ protection, at least in the long run.

2.3. SWEDISH LABOUR LAW ON RESTRUCTURING IN THE RESEARCH CONTEXT

2.3.1. TRANSFER OF AN UNDERTAKING, ITS CONSTITUENTS AND CENTRAL CONSEQUENCES

Swedish labour law had to be partly renewed due to Sweden’s Membership in the EU, preceded by the EEA ascension. Changes were effected by the directives on Transfers of Undertakings and Collective Redundancies.2373

The former Swedish labour law did not acknowledge employment relationships’ continuance. A new rule on an employment contract’s transfer to the transferee was needed. The former legal state in the form of an employment contract’s termination had been interpreted as a shortage of work, held to be an acceptable reason to a termination. The transferor had had a right to an employment contract’s termination preceding a transfer.2374

In the present Swedish labour law a transfer of an undertaking as a legal concept covers different kinds of transactions, among the others mergers, transactions referred to in the directive on Transfers of Undertakings as legal transfers, lease contracts, divisions and transfers based on inheritance. A sale of shares is, however, excluded.2375

In assessing legal transactions’ character as a precondition is primarily required a direct community of interests in the legal sense, referring to a contract. A transfer of an undertaking may however be

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2374 SOU 1994:83 page 7. See Glavå 1999 page 685, denoting to the concept of shortage of work, being given a new interpretation.
assessed without this precondition’s fulfilment. There is not necessarily a direct contractual relationship between the transferor and the transferee.\textsuperscript{2376}

Outside mergers and other company law-based transactions, an assessment of a transfer of an undertaking especially with regards to a legal transfer is based on a general assessment, made by applying the Spijkers-criteria.\textsuperscript{2377} An entity has to be disposed of as a going concern, its activities and business continuing same or similar without disruptions, referring to an entity’s identity’s staying same or similar with same clients. In the assessment also assets’ or personnel’s taking over by the transferee have to be taken into account. Especially in contracting-out covering also the second-round contracting-out the assessment is complemented by criteria established in the case Sützen\textsuperscript{2378} \textsuperscript{2379}. Special emphasis is put on the facts of the transferee having or not having taken over workforce and assets,\textsuperscript{2380} the mere similarity of the tasks not being decisive. A direct contractual relationship is neither decisive\textsuperscript{2381} \textsuperscript{2382}

A transfer’s constituents are an employer and employees. An employee is a person performing work personally on a contractual basis for an employer’s benefit under his/her direction with his/her equipment in exchange of monetary compensation, a salary.\textsuperscript{2383} An employee is equal both socially and economically with an employer.\textsuperscript{2384} In the private sector an employer is interpreted to be a natural or judicial person with whom an employee has made an employment contract and for whose benefit the work is performed, in surroundings denoting to an employment relationship.\textsuperscript{2385}

\begin{footnotes}
\item[2377] See Case 24/85 Spijkers Summary and paragraphs 11-13 and 15.
\item[2378] See C-13 /95 Ayse Sützen Summary and paragraph 23.
\item[2379] Iseskog pp. 221 and 223; Bylund – Elmér – Viklund – Öhman pp. 92 and 94.
\item[2380] See AD 1998 number 144, the transfer of assets being assessed, in addition to the activity in question continuing without interruptions; Bylund – Elmér – Viklund – Öhman page 94.
\item[2381] See AD 2002 number 63.
\item[2382] Iseskog pp. 220-223; Iseskog 2003 pp. 14-15; Bylund – Elmér – Viklund – Öhman pp. 92-94; Glavå pp. 373-374, Nyström pp. 296-298. See AD 1998 number 146: a transfer of an undertaking was not assessed, the activity in question having been suspended for some weeks, AD 1995 number 163; AD 1996 number 49; AD 1997 number 67; AD 1998 number 144, AD 2002 number 63.
\item[2383] See SOU 2004:85 page 72, ACW § 1 and AD 1982 number 105; Glavå pp. 77-79.
\end{footnotes}
Transfer of an undertaking, a business or its part from an employer to another covers – into addition to the transferred entity itself – also employment contracts force at the transfer’s date, with their rights and obligations. The transferor and the transferee have a joint liability in obligations having arisen before the transfer. The rule is not applicable in an undertaking in liquidation, neither with regards to old age, invalidity and survivor’s pensions.

The transferred rights cover all the employment contract’s conditions, for example, salaries, earned holidays and the length of service at the former employer’s employ. Also employee representatives’ status and conditions relating to the term’s termination are transferred. Collective agreement binding the transferor is applicable with regards to the transferee to a relevant extent, if the transferee is not bound by any collective agreement with regards to the transferred employees. This collective agreement is applicable at the maximum for a year.

If an employee objects the transfer, an employment contract is not transferred. An employee may consider a stay at the transferor’s employ more advantageous compared with a transfer to the transferee’s employ. These evaluations may be affected by employment implications, due to transferor undertaking’s size or by the employment relationship’s length. In a merger the option to stay at the transferor’s employ, denoting to the company being under the acquisition process and ceasing its existence as the procedure’s end-result, has no practical significance due to the company’s existence’s ceasing.

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2388 AEP § 6b.2.
2389 AEP § 6b.3; Bylund – Elmér – Viklund – Öhman pp. 91-92, referring in page 92 to an exception with regards to pension insurances, being transferred and binding the transferee.
2390 AEP § 3.
2391 AER § 4.
2393 ACW § 28.1 and 28.3; SOU 1994:83 pp. 45 and 101; Bylund – Elmér – Viklund – Öhman page 91; Iseskog pp. 224-225; Iseskog 2003 pp. 30-34; Nyström pp. 293-294. Due to the implementation legislation the transferee’s obligation to apply the collective agreement binding the transferor was limited to a year, see SOU 1994:83 page 7.
2394 AEP § 6b.4; SOU 1994:83 page 45; Bylund – Elmér – Viklund – Öhman page 90; Iseskog 2003 page 43. Due to the implementation legislation employees were granted a right to choose to stay at the transferor’s employ or to transfer to the transferee’s employ, SOU 1994:83 page 7.
2395 SOU 1994:83 page 89; Nyström page 292.
2396 See Werlauff 2003 page 568.
2.3.1.1. Protection against Dismissals and Employment Contract’s Conditions’ Change?

A transfer of an undertaking, business or a part of a business is not in itself an acceptable ground for an employment contract’s termination. This does not however hinder dismissals based on economic, technical or organisational reasons entailing changes in the workforce.  

An employer’s right to make decisions on business’s scope and its reorganisation, including decisions on personnel’s number and tasks, is based on an employer’s management right. In restructuring dismissals are primarily grounded by economic or organisational reasons. Generally these grounds are referred to as shortage of work, interpreted to be acceptable reasons for employment contracts’ terminations.

Shortage of work does not hinder dismissals in profit-making companies. Shortage of work may actualise also due to changes in core business activities. In assessing shortage of work, the employer’s business and actions are evaluated as a whole. Shortage of work at the personal level is not taken into account.

Shortage of work may be assessed, although economic difficulties cannot in practise be assessed. Shortage of work is based on an employer’s own evaluation of the situation, based on the use of management right. A dismissal is grounded by an employer’s own evaluation on the activities’ economic character. Although the activities are considered profit-making, the level of profits is not considered to be high enough. The decisions may be based on economic, organisational and other similar factors, including a need of increased profit-making. All these factors outline the concept of shortage of work as a dismissal ground, being concretised in a decision there not being work to be offered to an employee. At the last stage the Swedish Labour Court makes an assessment on

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2398 Iseskog page 138; AD 1977 number 121.

2399 AEP § 7.1; See Bylund – Elmér – Viklund – Öhman pp. 95-96.


2401 Iseskog pp. 135-137 and 140, See also AD 1978 number 57 on dismissals based on changes in a construction work, held acceptable irrespective of the profitability of the company in question. The company didn’t have resources to expand in a planned manner.

employer’s decisions’ business economic groundings. However, it does not evaluate employer’s economic priorities.\textsuperscript{2403}

As far as dismissals are grounded by shortage of work in an undertaking to be transferred and a decision on the transfer has not yet been done, the transferor has powers to terminate an employment contract.\textsuperscript{2404} Dismissal is evaluated to be carried out irrespective of the transfer. The assessment is the opposite one, if the dismissal is carried out on the transferee’s behalf.\textsuperscript{2405}

A dismissal’s carrying out preconditions an assessment on an employee’s placing in other duties. In the assessment an employee’s competence has to be taken into account.\textsuperscript{2406}

Dismissals’ practical carrying out is based on a dismissal order. In brief the order says: last in, first out.\textsuperscript{2407} The dismissal order is first assessed on the basis of employer’s establishments; secondly another order is assessed, based on applicable collective agreements. If there are many establishments in one locality, one order is assessed by a request of a trade union. Also, employees’ length of service is taken into account, in addition to competence. Competence equalling, preference is granted to age. Negotiating parties may make derogations on the order.\textsuperscript{2408}

In a transfer’s context employment contracts to be transferred cover also those with the notice period still running.\textsuperscript{2409} If employees’ employment contracts are terminated due to economic, technical or organisational reasons entailing changes in the workforce, the employees have a right to re-employment at the transferee.\textsuperscript{2410} The right to re-employment preconditions employment contract having been in force at least twelve months in the preceding two years. The right to re-employment is in force for a nine month period, calculated from an employment contract’s actual termination.\textsuperscript{2411}

\textsuperscript{2403} Iseskog pp. 138-139; AD 1996 number 20.
\textsuperscript{2404} Bylund – Elmér – Viklund – Öhman page 130.
\textsuperscript{2405} Nyström page 293. On dismissals based on personal grounds see Iseskog pp. 164-202.
\textsuperscript{2406} AEP § 7.2; Bylund – Elmér – Viklund – Öhman pp. 133-135, Iseskog pp. 145 and 155.
\textsuperscript{2407} Iseskog pp. 142, 151 and 224.
\textsuperscript{2408} AEP § 22; Iseskog pp. 142-157; Bylund – Elmér – Viklund – Öhman pp. 179-180 and more in detail pp. 180-194, see also pp. 226-227; Bruun 2005 pp. 196-197.
\textsuperscript{2409} SOU 1994:83 page 87.
\textsuperscript{2410} AEP § 25; SOU 1994:83 pp. 66, 88 and 90; Bylund – Elmér – Viklund – Öhman pp. 129-130; Iseskog page 223; Nyström page 293.
\textsuperscript{2411} AEP § 25.1-2; Iseskog page 157; Bylund – Elmér – Viklund – Öhman pp. 198-199.
Terms changes of individual employment contracts are allowed on economic and production related grounds, the terms not being based on a collective agreement. The implementation of the changed conditions preconditions a dismissal.2412

In certain circumstances an employment contract’s termination by an employee is equalled with that by an employer. An employer has provoked a dismissal by acting against good practise or otherwise in a manner not to be held acceptable, leading to an employment contract’s termination by the employee himself/herself. This rule is applicable also in a terms change in an employment contract, carried out unilaterally by the employer, without valid reasons.2413

In the case of an unlawful dismissal an employee is entitled to damages due to economic loss and infringement in the form of indemnification. An employee may also require a dismissal’s declaring void by a court decision, the declaration not covering a dismissal order’s breach. If an employer refuses to acknowledge the court-decision on voidness, an employment contract is considered terminated, damages being paid to the employee. The level of the damages varies, depending on the service’s length, either from six up to 32 months’ salary, or in the case of employees over 60 years, from 24 to 48 months’ salaries.2414

2.3.2. INFORMATION AND CONSULTATION AND ALLEVIATING THE CONSEQUENCES OF WORKFORCE REDUCTIONS

The Swedish labour market system is based on a strong position held by trade unions with a collective agreement binding an employer in question. This system was affected by the Membership obligations. Due to the directive on Collective Redundancies the duty to inform and consult with employee representatives was extended to cover all the trade unions irrespective of collective agreement’s existence, as far as union members were affected by contemplated collective redundancies.2415

The Swedish legislation was renewed also with regards to an obligation to deliver certain information to employee representatives in writing in contemplated collective redundancies.2416 The

2412 AD 1993 number 61; SOU 1994:83 page 68.
obligation to inform Public Authority in advance of the contemplated collective redundancies
affected changes in relation to the County Labour Board.

The application of the Act on Co-determination in Working-life, defining the framework for
consultation’s carrying out, does not depend on the number of employed.

Employers are to inform continuously trade unions bound by a collective agreement on an
undertaking’s economic development and guidelines on personnel policy. The unions have a right
to examine an undertaking’s books, accounts and other business documents, if required in the union
members’ collective interests. The concept of informing continuously denotes to delivering
information as soon as possible. Information covers economic development’s past and present
and its probable development. The guidelines on personnel policy cover also information on
employment situation, its structure, probable development and any anticipatory measures
envisioned, in particular in a threat to employment.

An employer not bound by a collective agreement has to inform continuously trade unions with
members at the employer’s employ on an undertaking’s economic development and guidelines on
personnel policy. The provision is targeted to provide to all the trade unions, irrespective of being
bound by a collective agreement with the employer, an option to be informed in a way and on
matters defined in the directive on Informing and consulting employees, production development
included, in order to prepare for possible consultation. For receiving information employees’
representatives have been enacted a reasonable release from work. Provisions are binding in
character.

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2417 SOU 1994:83 page 9, Laulom page 129.
2418 See directive on Collective Redundancies Section II article 2.3. (b) and Section III article 3.1.
2419 van Peijpe page 97. Threshold provisions were not proposed, either enacted with regards to directive on Informing
and consulting employees, thought not to be compatible with the Swedish tradition, see SOU 2004:85 pp. 20 and 75.
Compare ACU 2007 § 1.2.
2420 ACW § 19.1; Bylund – Elmér – Viklund – Öhman page 223; Isekskog pp. 325-328; van Peijpe page 90. See SOU
2421 SOU 2004:85 pp. 80 and 83.
3.1.
2425 SOU 2004:85 pp. 21 and 106.
An employer’s consultation obligation refers to matters under an employer’s sole decision-making right, thus to matters under management right, resulting in the use of direction right. Before decision-making on an important change affecting business, an employer has to consult on his/her own initiative the union being bound with by a collective agreement. The Swedish legal theory defines this consultation obligation as the primary negotiation obligation. With regards to employees being members in a union, the employer not being bound with by a collective agreement, the consultation as the primary negotiation obligation has to be carried out with a union the employees are members of. If an employer is not at all bound by any collective agreement, the consultation on collective redundancies and a transfer of undertaking has to be carried out with all the employees’ organisations the employees are members of, referring to employees working in the establishment in question.

Swedish law on consultation does not cover decision-making on company matters themselves. It covers the procedure preceding an employer’s decision-making. Matters under consultation concern, for example, closures, extensions, transfers of undertakings and a sell of shares. Consultations have to be carried out on major changes in employment conditions or employment environment affecting a union member. Consultation is to grant to the employees’ organisations an option to affect employer decision-making, but with no guarantee this in practise is taking place.

Collective redundancies and a transfer of undertaking have to be consulted always. The basic issue to be consulted is the transaction’s actual carrying out, if and how it should be carried out. The consultation obligation concerns both the transferor and the transferee. The consultation has to be

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2427 Iseskog pp. 331-334.
2431 Iseskog 2003 pp. 48-51.
2432 Iseskog pp. 339-340; AD 1978 number 57; van Peijpe pp. 80-81; Bylund – Elmér – Viklund – Öhman page 222, See also SOU 2002:85 page 85. See ACU 2007 Chapter 6 on changes in business operations affecting the personnel and arrangement of work. Compare with directive on Transfers of Undertakings Chapter III Article 7.2.: When the transferee or the transferor envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement and directive on Collective Redundancies Section II Article 2.: Where an employer is contemplating collective redundancies, he shall begin consultations with the workers’ representatives in good time with a view to reaching an agreement.
2435 Iseskog page 373.
2436 van Peijpe page 98.
carried out before an employer makes a decision on the transfer. 2436 Decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the directives on Transfers of Undertakings, Collective Redundancies and Informing and consulting employees,2437 are covered by the primary negotiation obligation.2438

Consultation is to be carried out when matters are still under contemplation. In the case of an employment threat, the consultation is to take place when the first indicators of the threat have been discerned, even before an employer has made any decisions on different options on handling the situation. The consultation is to cover especially, what should and could be done to increase employees’ employability both outside and inside the undertaking, by the use of training and education.2439

Before having made a decision on contemplated collective redundancies, an employer has to provide a grounded proposal for negotiations and in good time in writing information on redundancies’ reasons, number of employees affected and their categories, number of employees regularly employed into addition to their categories and time during which the redundancies are affected.2440

An employer has a duty to inform in writing the County Labour Board2441 on collective redundancies affecting at least five employees. The rule on informing is applicable also in collective redundancies taking place within 90 days, affecting at least ten employees.2442 All the relevant information on the contemplated redundancies has to be delivered. Included are especially reasons for redundancies, number of affected employees and their categories, number of employees regularly employed and their categories and time during which the redundancies and dismissals are to be affected.2443 Equal information is to be delivered also to a party representing employees in consultation on collective redundancies.2444

2437 Directive on Informing and consulting employees Article 4 2.(c).
2441 Laulom page 126.
2444 ACW § 15.3; Bylund – Elmér – Viklund – Öhman page 226; Nyström page 293.
The consultation includes in practise two rounds of negotiations. The first round is focused on measures’ grounds, affected by the use of managerial right. The central issue has to do with the need of carrying out the contemplated transaction or redundancies. The consultation is based on an employer’s decision-making proposal. In the second round the procedure covers matters of practical character, among the others dismissal order and the contemplated dismissals’ timing. After the consultation has been carried out, an employer has powers to make a decision on the subject matter.2445

Special reasons affect an employer a right to make the decision and also implement it without carrying out consultation. The rule is be interpreted strictly.2446 It can be relied upon in cases with large economic interests at stake, an employer’s own careless planning however excluded. The rule does not free an employer from the consultation as a whole. It has to be carried out as soon as possible.2447

An employer providing to employees confidential material may require consultation on this material’s character. If an agreement is not reached, the issue may be decided by the Labour Court. In the assessment on confidentiality into account has to be taken, if the material’s publicity would cause remarkable damage to an employer or a third party. The assessment is based primarily on competitive reasons. The evaluation covers production methods, business and trade secrets and business agreements2448.2449 If a party bound to maintain secrecy has got the information on behalf of a local or central employees’ organisation, he/she may freely deliver this information to an organisation’s board member, this party becoming obliged to maintain secrecy, too2450.2451

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2447 Iseskog pp. 345-346.
2449 Iseskog pp. 336-337.
2450 ACW § 22; Iseskog pp. 337-338. Compare with Case C-384/02 Grønggaard, Bang Summary on a person receiving inside information in his capacity as an employee representative in a company’s board of directors or in his capacity as a member of the liaison committee of a group of undertakings, being precluded to disclose such information to the general secretary of the professional organisation organising those employees and which appointed that person as a member of the liaison committee, unless there is a close link between the disclosure and the exercise of his employment, profession or duties and the disclosure is strictly necessary for the exercise of that employment, profession or duties. The prohibition of disclosure of inside information must be interpreted strictly, taking into account that each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary on regulations on inside dealing and the sensivity of inside information, see Äimälä – Rautainen – Hollmén pp. 223-226.
Labour market parties, denoting to employers´ and employees´ organisations, may deviate from the enacted obligations on consultation in a collective agreement. It is also allowed to complement the enacted obligations.\footnote{ACW § 32; Iseskog pp. 323 and 373.} Labour market organisations have a right to make collective agreements on working conditions and employer/employee relationships.\footnote{ACW 23.1.} A collective agreement is possible, based on employees´ initiative, on dismissal reasons, direction and distribution of work and matters on business management.\footnote{ACW 32.1.} If there arises a disagreement on the interpretation of a collective agreement on co-determination, employees´ interpretation is valid until the disagreement´s settlement.\footnote{ACW § 33.1.}

Since the 1979s there has been in Sweden a collective agreement-based system targeted to alleviate collective redundancies´ consequences. In the first phase the system with its measures covered salaried employees, not being covered by the educational and training measures managed by public authorities. In the 2000s, the system has been enlarged to cover workers, too.\footnote{Bruun 2005 page 196.}

The Swedish model on alleviating collective redundancies´ consequences is financed by employer-funded foundations. In the case of redundancy the assets are used to support re-employment, re-training and re-education or starting of one´s own business. The model is based on individual actions plans, whose realisation is paid by the foundations. Employees and workers are granted a personal consultant immediately after a dismissal has taken place. The consultant is to support personal action plans´ realisation.\footnote{Bruun 2005 pp. 196-197.}

In Sweden, severance payments are covered by a confederation collective agreement since 2004. The agreement is made between the confederations representing salaried employees and employers.\footnote{Hellsten 2007 page 12.}
2.4. CONCLUSIVE EVALUATION ON EMPLOYEES’ PROTECTION AND STATUS IN SWEDEN

In Sweden, the Membership obligations led to a change in employees’ protection in a merger and a legal transfer, both of the concepts denoting to a transfer of an undertaking in the directive on Transfers of Undertakings’ meaning. The continuation of employment relationships with former rights and obligations was acknowledged, the legal state having been the opposite one before the Membership. In defining a transfer of an undertaking the model established in the Swedish labour law is based on the directive on the Transfers of Undertakings.

In Sweden, the board takes care of organising human resources, being suitable for business activities. The board and the managing director have to give yearly an account on the management, including important development trends among the others on personnel. The board has the main responsibility in making restructuring decisions. It takes care of company development in a long-time perspective.

Irrespective of the mandatory board membership, employees’ options to influence the procedure’s end-result is essentially weakened by them not having an enacted platform to channel their views into practise by an active participation in a merger’s adoption in a general meeting, as handled in this research, comparable to the minority shareholders’ rights, denoting to an active role in adopting or objecting, into addition to a right to demand handling in the general meeting.

In Sweden, the interpretations on the concept of a legal transfer and also borderline cases demanding further interpretation are built on the ECJ’s case-law. From the employees’ point of view the level of protection depends ultimately on an employer’s decisions on taking over workforce and/or assets, the decisions being based on the use of management right. The taken decisions may affect an employment contract’s termination, denoting to legal effects equalling with that of company’s dissolution, resulting even in a lack of protection.

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2459 See directive on Transfers of Undertakings Chapter I article 1 1. (a); SOU 1994:83 page 75; Bylund – Elmér – Viklund – Öhman page 92.
2460 See directive on Transfers of Undertakings Chapter II articles 3 and 4; SOU 1994:83 page 7.
2461 AYA § 7:31; Sandström pp. 95 and 211-213.
2462 Compare Toiviainen 2004 page 159.
2463 CA Committee 1992:32 page 316.
An employer’s management right in organising business is a wide one, comparable to the Finnish one. It is not a court matter to evaluate employer’s economic priorities in using management right, also this equalling with the Finnish interpretations. Dismissals based on economic, organisational or technical reasons entailing changes in the workforce are allowed. Organisational reorganisation also in profit-making companies is allowed. Employers’ have powers to change employment contracts’ conditions on economic and production-related grounds. Of importance is also the limitation to apply the predecessor’s collective agreement, extending up to one year, involving an option to changes in employment contracts’ conditions. The actual procedure to carry out dismissals is a more complicated one compared to Finland, due to provisions on a dismissal order. Of importance is also the level of damages in the case of unlawful dismissals, being affected by an employee’s age.

The Swedish labour market system is traditionally based on consultations between labour market parties bound by a collective agreement. Due to the established tradition, the implementation of information and consultation obligations affected by the Membership obligations as such in relation to parties bound by collective agreements cannot be evaluated having been a special challenge. The implementation has however affected changes in relation to trade unions not bound by a collective agreement with an employer. This may be evaluated even as a structural change, having led to the established system’s extension covering a wider scale of trade union stakeholders.

As a whole the research evaluations on the Swedish company and labour law denote however to a concept of an enterprise with a wide scope of stakeholders and goals with social connotations more strongly compared to Finland. In Sweden the employees’ participation in the board grants employees an option to affect strategic long-term company decision-making. Also employees’ representatives’ consultation before managerial decision-making on restructuring transactions’ carrying out is a proactive measure affecting employees’ status in this field, irrespective of the lack of guarantees with regards to employees’ point of views in practise being taken into account. There is consequently large difference between Sweden and Finland on the employees’ status in the research’s field. In Finland the employees can be interpreted to be participants in a national level merger’s and other restructuring transactions’ consequences, being affected by their status in the

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2465 See, however, Bruun 2005 pp. 196-197.
2466 See Sigeman 2006 page 110.
company law, and the way and timing of carrying out information and consultation procedures under the ACU 2007. The Swedish system’s weakness, being comparable to the Finnish one, lays in its insecure end-result from the employees’ perspective. An employer is not obliged to take into account employees’ views in the actual decision-making.\(^{2469}\) There is, however, in Sweden a tradition of always targeting to a negotiated end-result.\(^{2470}\) Also this aspect marks at least a cultural difference between Finland and Sweden, shown strongly in the survey on the experiences in Finland on the workability of the previous ACU 1978’s application.\(^{2471}\)

The Swedish labour law theory emphasises the ultimately unbinding nature of consultation. As regards measures in the form of an agreement based on consultations in the field of directives on Transfers of Undertakings, Collective Redundancies and Informing and consulting employees, the interpretations on the unbinding character of consultations may however well be questioned.\(^{2472}\)

The Swedish model on alleviating the consequences of collective redundancies with its strong emphasis on re-employment and individual measures supported by individual level consultation, denotes also to a model of an enterprise with large scale of stakeholders labelled by social connotations. The Swedish model, being based on employers’ financing, balances costs due to restructuring between the companies and the public power. The system is also apt to increase proactivity in carrying out business.

3 RESTRUCTURING LAW IN THE UNITED KINGDOM IN THE RESEARCH CONTEXT

3.1. LIMITED LIABILITY COMPANY FROM EMPLOYEES’ PERSPECTIVE

A crucial role in determining a limited liability company’s character in its modern form is played by the British Act on Joint Stock Companies 1844.\(^{2473}\) The case Salomon v. Salomon in the late 1800s established a complete separation between a company and those involved in its business.\(^{2474, 2475}\)

\(^{2469}\) See Iseskog page 373. Compare directive on Informing and consulting employees Preamble point (7) and article 1 3.

\(^{2470}\) Iseskog page 632.

\(^{2471}\) Kairinen – Uhmavaara – Finne pp. 19 and 34.

\(^{2472}\) See directives on Transfers of Undertakings Chapter III article 7 2., Collective Redundancies Section II article 2 1. and Informing and consulting employees article 4 2. (c) and 4 4. (e).

\(^{2473}\) Villiers 1998 page 119, Talbot on the development of modern company law in the United Kingdom pp. 11-12, Bourne pp. 10-11.


\(^{2475}\) See Toiviainen 2002 pp. 97-101 on the company law’s development in Great Britain since 1700s.
In the renewed British Companies Act a company denotes to a company formed and registered under the Companies Act 2006. A company’s formation is based on its registration. By registration a company is distinct from its members and the management, getting a separate legal personality. The British Companies Act is based on the concession theory: limited liability company’s actions are based on a concession granted by public power.

The concept of directors denotes to company management. In a private limited company there has to be at least one director. In a public company there has to be at least two directors, being natural persons. The British company law does not require directors to manage company business. The term is applicable to anybody exercising real power in company decision making.

Directors’ general duties are enacted in the Companies Act. The general duties are based on common law rules and equitable principles. The duties form a code of conduct on the expected directors’ behaviour. The rules on duties focus on stakeholders, on whose interest a company is run. The duties also make visible the borderlines of responsible business behaviour. The director owes the duties to the company.

A director has to act in accordance with company constitution. Powers have to be exercised for the conferred purposes. A director has to promote the success of the company. In good faith, he must act in a way that would most likely promote the success of the company for the benefit of its members as a whole. In this he must have regard, amongst other matters, to the likely consequences of any decision in the long term, the interests of the company’s employees, the need to foster the company’s business relationships with suppliers, customers and others, the impact of

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2477 CA 2006 BR Part 1, (1). See Talbot on company formation pp. 77-83. A division between private and public companies limited by shares depends on the amount of the minimum share capital, see Mayson – French – Ryan pp. 54-56.
2478 CA 2006 BR Part 2: Section 16; Explanatory notes page 10. On different company types see Bourne pp. 3-9. On company registration see Talbot pp. 78-79.
2479 See, however, Birds page 13 on the traditional contract law-based view.
2480 Explanatory notes page 10.
2481 CA 2006 Part 10 Chapter 1 154-155 (1) - (2); Explanatory notes page 42.
2482 Explanatory notes page 42. See Mayson – French – Ryan pp. 399-400.
2483 Talbot page 181.
2484 CA 2006 BR Part 10 Chapter 2 170 especially (1) and (3); Explanatory notes pp. 45 and 47.
2485 See Bourne pp. 50-72 on company constitution.
2486 CA 2006 BR Part 10 Chapter 171; Explanatory notes page 50; Talbot page 182.
2487 See CA 2006 Br Section 112 on a definition of a member, denoting in a limited company to a shareowner. See Mayson – French – Ryan pp. 352-353.
the company’s operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly between the company’s members.2488

The duty to promote the success of the company involves an obligation to act, in good faith, in a way that most likely promotes the company’s success, for its members’ benefit. In fulfilling the duty the listed factors have to be taken into account, reflecting expectations on responsible business behaviour. The duty enacts the principle of enlightened shareholder value.2489 The likely consequences refer to actions’ long and short term consequences.2490 Consideration of employee interests is not an independent task, as such. It is done only in the framework of benefiting the members.2491

Employees’ interests as a whole have not been high in priority in the British company law.2492 The model adopted under the enlightened shareholder value has given heed to criticism, when evaluated form the employees’ point of view. It has been criticised by primarily enhancing shareholder interest, not requiring structural changes and stakeholder pluralism. It has been evaluated weak in balancing powers between different stakeholders, not affecting company governance, board representation included. One aspect of criticism is linked with the need to develop company activities and culture in a socially responsible manner. The concept’s ability to affect a company’s activities’ development in a socially responsible manner, linked with business culture and its development has been doubted.2493

The renewed British Companies Act’s starting points deviate from the Finnish one, equalling themselves – at least to some, although a limited extent – with the duties of the board of directors in the Swedish Companies Act. The primary stakeholders in a British limited company are the members, referring to the shareholders, and directors, referring to the management. The British Companies Act does not acknowledge employees as a stakeholder group. This can be grounded by referring to the formulation of the provision on the enlightened shareholder value. Employees have, however, got an acknowledgement in the company context, in a framework of promoting the members’ interests.

2488 CA 2006 BR Part 10 Chapter 2 172.
2489 Explanatory notes page 50. See Bourne pp. 147-148 and 166.
2493 Talbot pp. 149-152, 182-183 and 191. See also Dine page 228.
As a part of accounting obligations a director has a duty to prepare a report for each financial year. A business review has to be included. It is to inform company’s members in assessing directors’ performance of the duty to promote the success of the company. The business review has to contain a fair review of the business and a description of risks and uncertainties facing the company. Required are a balanced and comprehensive analysis of the company’s development and performance during the ongoing financial year and the position of its business at the end of that year. The review must include key financial performance indicators. The review must include, where appropriate, also analysis using other key performance indicators. These include information on environment and employees. Every company has to circulate copies of annual accounts and reports among the others to every company member and to every person entitled to receive notice of a general meeting. From the employee perspective, the obligations covered by the yearly report with its business review are important, being another signal of acknowledging employees’ significance in the company context.

In the United Kingdom, there are not enacted provisions on employee representation in company management. Employee representation at the workplace was enacted on the statutory basis by the implementation of the directive on Informing and consulting employees since 2005.

### 3.2. MERGER UNDER THE COMPANIES ACT 2006

The 3rd directive on mergers is implemented by the Companies Act 2006’s merger provisions. Originally the implementation took place in 1987. The rules concern primarily only public limited companies. In the United Kingdom, private limited companies are the most popular

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2494 CA 2006 BR Part 15 Chapter 5 415.
2495 CA 2006 BR Part 15 Chapter 5 417 (1)-(2).
2496 CA 2006 BR Part 15 Chapter 5 417 (3)-(4) and (6); Explanatory notes page 106.
2498 I&C Regulations; Industrial Relations pp. 11 and 64.
2499 The provisions are applicable since April, 2008.
2500 CA 2006 BR Part 27 Chapter 2 904-918; Explanatory notes page 177; See Villiers 1998 pp. 142-143 on the original implementation and the court’s power to order a meeting to authorise a compromise or an arrangement, see further CA 2006 BR Part 27 Chapter 1 903.
2501 CA 2006 BR Part 27 Chapter 1 902 (1) (a) compared with CA 2006 BR Part 27 Chapter 2. 904 (1) (b) on the combination merger.
2502 The United Kingdom has implemented the directive 2005/56/EC by the Companies Regulations 2007. Its Section 2 concerns employee participation.
company form.\textsuperscript{2503} In the United Kingdom, the most common form of restructuring is a takeover, in the form of selling of shares.\textsuperscript{2504} Both of these facts minimise the provisions’ actual significance.

Merger provisions enact arrangements between a public company and its creditors and members, for the restructuring or amalgamation of two or more companies.\textsuperscript{2505} The requirement on the qualified majority of the members in approving a merger is 75 per cent in value, each class of members, present and voting.\textsuperscript{2506}

With regards to the employee status in a national level merger under the British Companies Act 2006, the evaluation on the employees’ status in a national level merger under the Finnish company law is valid also in relation to the United Kingdom, without further repetition.

3.3. BRITISH LABOUR LAW ON RESTRUCTURING IN THE RESEARCH CONTEXT

3.3.1. A TRANSFER OF AN UNDERTAKING, ITS CONSTITUENTS AND LEGAL EFFECTS

In common law, employer/employee relationships have been labelled by the principle of freedom of contract.\textsuperscript{2507} Originally common law held an employment contract an individual, independent unit, continuing in relation to only one employer. If an employee could be transferred to another employer’s employ in a transfer of an undertaking, this would make the employees comparable to property.\textsuperscript{2508}

The implementation of the directive on Transfers of Undertakings changed remarkably in the United Kingdom the former legal state. This is due to the directive’s focus on employee protection taking place in the form of an employment contract’s automatic transfer, denoting to an employment relationship’s continuance at the transferee’s.\textsuperscript{2509} The implementation process as a whole was and has been a challenge. The implementation as a whole has not been without

\textsuperscript{2503} Villiers 1998 page 120.
\textsuperscript{2504} Barnard page 636.
\textsuperscript{2505} CA 2006 BR Part 27 Chapter 1 902.
\textsuperscript{2506} CA 2006 BR Part 27 Chapter 2 907.
\textsuperscript{2507} Collins – Ewing – McColgan pp. 69-70 and 155.
\textsuperscript{2508} Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014; Bolwell v Redcliffe Homes Ltd [1999] IRLR; Bowers page 402, Selwyn page 246.
\textsuperscript{2509} Originally the implementation took place on the basis of TUPE 1981, coming into force 1.2.1982. See Smith – Thomas page 573.
problems. Further amendments have taken place later, due to failures in the process\textsuperscript{2510}.\textsuperscript{2511} The controversy around the directive and its proper implementation and application has continued up to these days. The last revision of the implementation legislation complemented the previous ones.\textsuperscript{2512}

The British rules on a transfer of an undertaking are applicable in a transfer of an undertaking, business, or a part of an undertaking or business situated immediately before the transfer in the United Kingdom.\textsuperscript{2513} A transfer may consist of any trade or business, operating for gain or not, and irrespective of its size. There has to be a change in the person, legal or natural one, responsible for carrying out the business. There has to be a transfer of an economic entity retaining its identity, to another party.\textsuperscript{2514} An economic entity means an organised grouping of resources having as its objective pursuing an economic activity, central or ancillary. There has to be an identifiable set of resources assigned to a transferred business or a part of it.\textsuperscript{2515}

A transfer of an undertaking may take place by a series of transactions.\textsuperscript{2516} It may consist of physical assets’ sale in the form of premises and machinery. The transaction does not necessarily need to consist of the transferor’s business as a whole. A transfer of an undertaking may consist of goodwill, stock and existing contracts, not covering premises, plant, machinery and taking over of workforce.\textsuperscript{2517} A transfer of an undertaking may be achieved by a sale or lease. It may consist of physical assets’ sale in the form of premises and machinery. Goodwill in the form of business reputation and present customer base is often the most valuable element. A transfer of an undertaking may be based on law, denoting to an involuntary transaction in the form of a merger, two companies ceasing to exist, combining to form a new one.\textsuperscript{2518} A transfer of an undertaking may be achieved by voluntary transactions in the form of gift or exchange. Required is a change in the identity of a person operating the economic entity. Change in the ownership of the entity is not

\textsuperscript{2510} CRTUPE 1995; See Barnard page 626 commenting the case C-382/92 Commission v UK, the focus being instead of a partial harmonisation on effective application of the Community law. See also van Peijpe pp. 85-86.

\textsuperscript{2511} Bowers pp. 402-403.

\textsuperscript{2512} See URN 05/926, TUPE 2006 guide page 5, Explanatory Memorandum No. 246 and Collins – Ewing – McColgan page 1036. See the last revision in summary TUPE 2006 guide page 6 and further an overview of the TUPE Regulations 2006 pp. 7-8.

\textsuperscript{2513} TUPE 2006 3 (1) (a), TUPE 2006 guide page 13, Selwyn page 247.

\textsuperscript{2514} Bowers page 404.

\textsuperscript{2515} TUPE 2006 guide pp. 9-10; Selwyn pp. 247-248 and 251; Smith – Thomas page 576. The concept of a transfer of an undertaking does not cover reorganisation of public administration, TUPE guide page 12, Selwyn page 251 and Smith – Thomas pp. 576-577.

\textsuperscript{2516} CRTUPE 1995 Regulations 5(3); Bowers pp. 404 and 414; Selwyn page 251; Smith – Thomas page 577.

\textsuperscript{2517} Kerry Foods Ltd v Creber [2000] IRLR 10 (EAT); Collins – Ewing – McColgan pp. 1051-1052.

\textsuperscript{2518} TUPE 2006 guide page 9.
required. Outside the scope of the concept is the sale of shares, the employer remaining the same, effecting no change in contracts and obligations.\footnote{Brookes v Borough Care Services [1998] IRLR 636.} 2519 \footnote{TUPE 2006 guide page 9, Selwyn pp. 251-252; Collins – Ewing – McColgan page 1035.} 2520

A sale of equipment alone is not a transfer of an undertaking,\footnote{Selwyn page 251.} 2521 employees not being affected. The sole fact of employees not being a part of the transfer does not in itself prevent the provisions’ application.\footnote{See EMC v Cox [1999] IRLR 559 and RCO Support Services v Unison [2002] EWCA Civ 464.} 2522 \footnote{TUPE 2006 guide page 9.} 2523

The British case-law has varied on taking into account the ECJ’s interpretations on transfers of undertakings. First the interpretations were narrow ones, not emphasising the models adopted by the ECJ.\footnote{Bowers page 215.} 2524 During 1993–1996 the British approach was modified according to the ECJ’s model.\footnote{Bowers page 408.} 2525 Later the UK courts have again become more unwilling to acknowledge factors adopted in the Sűzen, this being also largely the present case.\footnote{See Bowers pp. 410- 413.} 2526

Irrespective of the varying attitudes on applying ECJ case law in transfers of undertakings, certain principles had established themselves in the UK case law on a transfer of an undertaking already before the latest revision. The assessment should be based on a realistic view of the case’s facts. The situation should be viewed both before and after the transfer. Central is to evaluate, if there is an economic entity retaining its identity, transferred to another party. All the circumstances charactering the transaction should be taken into account. Instead of form, attention should be paid to the transaction’s substance. An activity’s ancillary character is not decisive. Goodwill not at all being transferred is interpreted as a negative factor. The transfer of assets is taken into account. A transfer may consist only of one transferred employee. An undertaking may consist only of one activity, for example, in the form of a right to provide services. An activity itself is not however interpreted as an entity. An entity consists of its workforce, management, staff, its way of being organised, its operating methods and operational resources. A transfer may include a dissolved company, the business itself being carried out by the main shareholders. Also the transferor’s and transferee’s own interpretation of the transaction’s character is important. Decisive is the factual situation at the transfer’s date, irrespective of the later calling off of the transaction.\footnote{Bowers pp. 413-414 with the case-references.} 2527
In the latest revision the scope of the concept of the transfer of an undertaking was amended to cover a wider range of service provision.\textsuperscript{2528} The area covers contracts between contractors and clients hiring the former’s services. As examples can be mentioned labour-intensive services, like office cleaning, catering at work, security services, refuse collection and machinery maintenance. Services may be carried out in contracting-out, reassignment to a new contractor resulting of re-tendering\textsuperscript{2529} and contracting-in or insourcing.\textsuperscript{2530} The provisions on a transfer of an undertaking are applicable, if the service involves an organised grouping of employees with a principal purpose of carrying out activities on a client’s behalf. Excluded are cases not involving an identifiable grouping of employees.\textsuperscript{2531} This may, however, consist of only one person. According to evaluations the revised legislation could prevent the use of outsourcing as a means to decrease the level of wages and other benefits.\textsuperscript{2532}

In a transfer of an undertaking its constituents are employees\textsuperscript{2533} and an employer. Central in defining an employment contract is change of work for wages, an employer directing the work and employees complying with the employer’s lawful orders.\textsuperscript{2534} An employee is a person entering into or working under an employment contract.\textsuperscript{2535} The definition of an employee depends basically upon the made contract’s definition, being a limiting factor. Common law has developed many tests for defining the concept of an employee. The tests are based on control, integration, business on one’s own account, economic reality or organisation and obligations’ mutuality. In the tests into account is taken, whether wages are paid in return for a promise to perform work personally. An employer has power to control the performance of work. In the assessment employee’s integration into the organisation and allocation of risks to an employee are also taken into account.\textsuperscript{2536} The term employee is a gateway to the enacted individual rights.\textsuperscript{2537} The term employee differs from the concept of a worker. A worker is an individual having entered into or works under any other contract, whether express or implied, where the individual undertakes to do or performs personally any work or services for another contract party whose status is not that of a client or

\textsuperscript{2528} TUPE 2006 Regulations 3 (4) (b).
\textsuperscript{2529} See TUPE 2006 guide page 11 on different forms of re-tendering.
\textsuperscript{2530} TUPE 2006 guide page 9.
\textsuperscript{2531} Selwyn page 250; Smith – Thomas pp. 588-589.
\textsuperscript{2532} Collins – Ewing – McColgan pp. 1058-1059.
\textsuperscript{2533} TUPE 2006 Regulations 2 (1).
\textsuperscript{2534} Collins – Ewing – McColgan pp. 71-72 and 75.
\textsuperscript{2535} ERA 1996 Section 230 (1)-(2); Bowers page 13.
\textsuperscript{2536} Collins - Ewing – McColgan page 173, Selwyn pp. 42-47, Neal page 505; On the tests more in detail see Bowers pp. 14-20.
\textsuperscript{2537} Neal page 505; Bowers pp. 13-14; Collins - Ewing – McColgan page 172, Selwyn page 49.
The concept of an employee in the context of a transfer of an undertaking is wider compared to the one used otherwise in defining an employee.

In the concepts of an employee and a worker is inherent a definition of a concept of an employer. An employer is the one, for whom the work is performed for wages, under his/her directions and lawful orders.

A relevant transfer is not to terminate an employment contract. Instead the transfer effects as if the employment contract had originally been made between the employee and the transferee, the employees employed immediately before the transfer automatically becoming the transferee’s employees. A continuous period of employment is thus not broken by the transfer. On the completion of a relevant transfer all the transferor’s rights, powers, duties and liabilities are transferred to the transferee. A transfer of an undertaking’s legal effects equal with those of a sell of shares, parties’ contracts and legal obligations remaining unaffected. Due to an option in the directive on Transfers of Undertakings outside the transfer are rights to occupational pension schemes, being protected by social security legislation and pension trust arrangements. Excluded are also criminal liabilities. In spite of the provisions, targeted to employment relationships’
continuance and employees’ protection, the rules’ application is in practise frequently ignored, the employees being left without the enacted protection.2550

Compared with the implementation of the directive on Transfers of Undertakings in Sweden, having led to its reception in practise, the implementation process has been a challenge in the United Kingdom. The influence of the common law with its established concepts2551 has been and is a strong one. It can even be claimed, that the EU-law law on transfers of undertakings with its protective starting point2552 is not law at all in the United Kingdom, the concept of law demanding as its precondition the rules’ practical application.2553

Another aspect linked with the poor reception has to do with restructuring transactions’ carrying out and governance in practise. Although mergers are rare in the United Kingdom, the rules on transfers of undertakings have significance in carrying out legal transfers. Restructuring transactions’ carrying out and governance, in order to achieve their goals, is based on trust.2554 Indifference in enacted provisions’ application is not apt to create trust,2555 affecting the end-results.

Where at the relevant transfer’s time there exists a collective agreement2556 made with the transferor by a trade union recognised by the transferor, this collective agreement is further applicable on the transferred employees.2557 The provision grants only a limited protection. If a collective agreement ceases to be in force, there are no guarantees on the continuation of the former level of employment terms and conditions.2558

2551 Compare Tuori pp. 171-173, 179 and 220.
2552 Directive on Transfers of Undertakings Preamble point (3).
2553 Fuller pp. 39 and 81.
2554 Vuorenmaa pp. 1-2, 13, 20, 57 and 96.
2555 Compare CA 2006 BR Part 10 Chapter 2 172 and Explanatory notes page 50 on enlightened shareholder value and I & C Regulations 2004 Part V21 on the duty of co-operation.
2556 See Kauppinen page 303 and Neal page 499 on the coverage of the collective agreements in the United Kingdom, only one-third of the employees being covered.
2557 TUPE 2006 Regulations 5; TUPE 2006 guide page 14; Bowers page 33; Collins – Ewing – McColgan page 1047, Selwyn page 260.
2558 Barnard page 659; See C-4/01 Serene Martin the ECJ’s ruling point 3.
The transferor is under a duty to inform the transferee of the rights and obligations on transferred employees under a duty of “employee liability information”.\textsuperscript{2559} Employee liability information covers matters commonly under due diligence. Information should be delivered at least two weeks before the transfer is completed.\textsuperscript{2560}

In the case of an employee refusing the transfer to the transferee’s employ, the position of law has been unclear.\textsuperscript{2561} An employment contract is interpreted to be terminated, with no protection under dismissal law.\textsuperscript{2562} In a legal transfer the transferor may take over the employee. Due to the refusal the employment relationship’s continuance is however broken, employment relationship’s terms and conditions being to be agreed upon freely.\textsuperscript{2563} With regards to the company being acquired, a merger affects its existence’s ceasing. Consequently, a refusal to be transferred affects an employment contract’s termination, with no protection under dismissal law.

3.3.1.1. Protection against Dismissals?

Common law has traditionally recognised management’s right to direct workforce, determine its size and act in any way which on its evaluation would serve best the shareholder interest.\textsuperscript{2564} In common law employment contracts have set some limits on the management’s right, however, within short notice periods.\textsuperscript{2565} At their root continental European ideas in the form of the directive on Transfers of Undertakings setting restrictions on the use of managerial rights in restructuring have caused in the United Kingdom serious tensions, even a shock, due to the strong emphasis on freedom in using managerial rights.\textsuperscript{2566}

A dismissal by a transferor or a transferee is automatically unfair, if its sole or principal reason is the transfer itself or a reason connected with it, not however being an economic, technical or organisational reason entailing changes in the workforce.\textsuperscript{2567} An economic, technical or

\textsuperscript{2559} TUPE 2006 Regulations 11; See Explanatory Memorandum No. 246 point 7.2 (c); Added with TUPE 2006 Regulations 12 on a remedy of a complaint on an employment tribunal.
\textsuperscript{2560} TUPE 2006 guide pp. 23-26; Selwyn page 259; Smith –Thomas pp. 589-590.
\textsuperscript{2561} Collins – Ewing – McColgan page 1049.
\textsuperscript{2562} Barnard page 622.
\textsuperscript{2563} TUPE 2006 guide page 16.
\textsuperscript{2564} Compare with CA 2006 BR Part 10 Chapter 2 172 on director’s duty to promote the success of the company for the benefit of its members having regard to the likely consequences of any decision in the long term and the interests of the company’s employees. Compare Valkonen 2006 page 804 and Tiitinen – Kröger 2003 page 42 and Iseskog page 138.
\textsuperscript{2565} Collins – Ewing – McColgan pp. 1069-1070.
\textsuperscript{2566} Collins – Ewing – McColgan page 1071.
\textsuperscript{2567} TUPE 2006 Regulations 7 (1); See Explanatory Memorandum No. 246 point 7.2. (b); TUPE 2006 guide page 20; Bowers pp. 422-423.
organisational reason entailing changes in the workforce has generally been interpreted narrowly.\textsuperscript{2568}

Dismissals taking place only shortly before and connected with the transaction are due to a reason connected with the transfer, being unfair. A transferor’s transaction in the transfer equals with that of a transferee. Principally also dismissals by the transferee immediately or only shortly after a transfer of an undertaking are due to a reason connected with the transfer, if the transferee cannot show an economic, technical or organisational reason entailing changes in the workforce.\textsuperscript{2569}

Economic, technical or organisational reasons denote to in character different kinds of dismissal reasons. Economic reasons have to do with the profitability or market performance of the transferee’s business. Technical reasons have to do with the nature of equipment or production procedures in the transferee’s company. Organisational reasons denote to management or organisational structure in the transferee’s business.\textsuperscript{2570} In spite of the reasons’ different character, the British case law has generally treated economic, technical or organisational reasons as a single concept, without distinguishing them to different categories.\textsuperscript{2571}

An economic reason is based on the transferee’s actions on conduct or running of the business as a going concern from the future perspective.\textsuperscript{2572} It covers an organisation’s slimming down in order to make it successfully operative. Redundancies targeted to facilitate an agreement’s obtaining are acceptable.\textsuperscript{2573} A dismissal is unfair, if carried out to increase target’s price. Flexibility and cost-cutting measures are not necessarily an economic reason, not involving in all cases changes in employees’ number or functions.\textsuperscript{2574} In assessing a dismissal reason employees’ rights and economic reasons are balanced between each other. In the end-result employees’ rights not to be

\textsuperscript{2568} Selwyn page 257.
\textsuperscript{2569} In Litster v Forth Dry Dock & Engineering Co Ltd [1989] ICR 341 (HL) the employees had been dismissed by the transferor in the day of the transfer an hour before it had taken place, the dismissals having been carried out on behalf of the transferee, being void; Collins – Ewing – McColgan pp. 1037-1040 and 1044-1045.
\textsuperscript{2570} TUPE 2006 guide page 18.
\textsuperscript{2571} TUPE 2006 guide page 20.
\textsuperscript{2572} Whitehouse v Charles A Blatchford & Sons Ltd [2000] ICR 542 (CA); Collins – Ewing – McColgan page 1037.
\textsuperscript{2573} Selwyn pp. 256-257.
\textsuperscript{2574} Wheeler v Patel and J. Golding Group of Companies [1987] IRLR 211; Bowers page 423; Collins – Ewing – McColgan pp. 1036-1037; Barnard page 665.
dismissed may be outweighed by economic reasons.\textsuperscript{2575} A change in the way of running the business may be an organisational reason, an employee not possessing the needed skills.\textsuperscript{2576}

The phrase “entailing changes in the workforce” denotes to changes in the employees’ number or functions performed by them. Functional change refers to new task requirements.\textsuperscript{2577}

In assessing a dismissal reason a test of fairness is applied.\textsuperscript{2578} In the case of economic, technical or organisational reasons the matter may have to do with redundancy.\textsuperscript{2579} In the case of redundancy, reasonableness requires the employer to consult the affected employees or their representatives, build a fair basis on selecting the employees to be dismissed\textsuperscript{2580} and try to avoid or minimise dismissals by redeployment within the organisation\textsuperscript{2581}.\textsuperscript{2582} In consulting employees or their representatives both of the parties’ interests have to be taken into account. The union has to be consulted as to the best means. Intended managerial goals’ are to be carried out with as little hardship to the employees as possible.\textsuperscript{2583} An employer has to set criteria for employees’ selection for redundancy. It has to be objectively checked. The criteria may do with attendance record, job efficiency, experience and length of service.\textsuperscript{2584} An employer has to take reasonable steps to seek alternative suitable employment available.\textsuperscript{2585} In a group context a whole group is covered.\textsuperscript{2586} A notice period is applied. It varies at the employer’s side from one to twelve weeks, before employment contract’s actual termination.\textsuperscript{2587}

An unfair dismissal is remedied by reinstatement, re-engagement or compensation.\textsuperscript{2588} If an employee is unfairly dismissed in a transfer’s context, the case has to be brought against the transferee.\textsuperscript{2589}

\textsuperscript{2575} Trafford v Sharpe & Fisher (Building Supplies) Ltd [1994] IRLR 325; Bowers page 423.
\textsuperscript{2576} Porter and Nanayakkara v Queen’s Medical Centre (Nottingham University Hospital) [1993] IRLR 486; Bowers page 424.
\textsuperscript{2577} TUPE 2006 guide pp. 18 and 21, Selwyn page 257.
\textsuperscript{2578} ERA 1996 Section 98 (1); Bowers pp. 424-426; Collins – Ewing – McColgan pp. 511-526 and on the scope of application covering only employees pp. 498-499, Selwyn page 411.
\textsuperscript{2580} Collins – Ewing – McColgan pp. 1019-1024.
\textsuperscript{2582} TUPE 2006 guide pp. 20 and 22.
\textsuperscript{2583} Selwyn pp. 461-462; Bowers pp. 326-327.
\textsuperscript{2584} Bowers pp. 325-326 and 375; Selwyn pp. 257 and 462-465.
\textsuperscript{2585} ERA 1996 Section 138 (1).
\textsuperscript{2586} Vokes Ltd v Bear [1974] IRLR 363; Bowers pp. 327-328.
\textsuperscript{2587} ERA 1996 Sections 86-88; Collins – Ewing – McColgan pp. 438-439.
\textsuperscript{2588} See ERA 1996 Part X; Explanatory Memorandum No. 246, the page being unnumbered; Bowers page 345.
Reinstatement nullifies the dismissal. The end-result is as if the employee had not at all been dismissed. In the re-engagement an employer returns to work, which does not necessarily have to be the earlier one with similar terms. The work offered has to be comparable and suitable. If an employer is not ready to comply with an order of reinstatement or re-engagement, an employee has to be compensated.

Unfair dismissal compensation is based on two parts. It consists of basic and compensatory award. The basic award is purported to compensate loss of job security and convey disapproval on an employer’s action. It is calculated on the basis of each year of continuous employment with the employer before the termination’s date. Compensatory award is purported to compensate the loss resulting from the dismissal, as far as it is due to an employer’s actions.

In a redundancy an employee is paid redundancy payment, its basic condition being a two years’ employment. Redundancy payment provisions’ power to restrict collective redundancies has been challenged, the emphasis having been on the use of managerial rights by reducing labour costs.

As regards an employer’s dismissal right in a transfer’s context and employees’ protection, the legal framework is very similar in all the three countries under research, in Finland, Sweden and the United Kingdom. This covers the definition of dismissal grounds extending to employees’ right to re-placement. An employer’s management right in reorganising business is a wide one in all these three countries. The employees’ protection point of view as a right to continued employment can be evaluated as a secondary one, affecting negatively the protection of employee economic rights in all the three countries under evaluation. From the employers’ perspective, this is a core
area in carrying out of business. Dismissals, even the threat of them, affect negatively on trust, affecting negatively on productivity.\(^{2599}\)

### 3.3.1.2. Stability in Employment Terms and Conditions?

A change in employment terms and conditions is automatically unfair, if its sole or principal reason is the transfer itself or a reason connected with the transfer, not being an economic, technical or organisational reason entailing changes in the workforce.\(^{2600}\) A transfer is considered the reason, if any extenuating circumstances are not to be presented as its ground. A change is connected with the transfer, if it is affected, for example, by a need to re-qualify the staff.\(^{2601}\)

The phrase “entailing changes in the workforce” denotes to changes in the employees’ number or functions performed by them. Functional change means new requirements. A person in a managerial position may be offered a non-managerial post. A functional change could cover a move from secretarial tasks to sales.\(^{2602}\)

A transferor or transferee have powers to vary employment contracts’ terms and conditions, if the variation’s sole or principal reason is unconnected with the transfer or is an economic, technical or organisational reason entailing changes in the workforce.\(^{2603}\) A reason unconnected with the transfer may be caused by an unexpected sudden loss of an expected order.\(^{2604}\) It may be caused by a general upturn in demand. It may be affected by a change in a key exchange rate.\(^{2605}\) Without this kind of a reason an employee may regard the proposal as a constructive dismissal, leading to a claim on constructive unfair dismissal.\(^{2606}\)

An employer cannot impose new terms and conditions unilaterally, without an agreement. The new terms and conditions have to be agreed by the employee or a union representative.\(^{2607}\) Unilateral change of employment terms and conditions by an employer without employee’s consent has in

\(^{2600}\) TUPE 2006 Regulations 4 (4); Explanatory Memorandum No. 246 point 7.2. (b); TUPE 2006 guide page 17.
\(^{2601}\) Selwyn page 255.
\(^{2602}\) TUPE 2006 guide page 17.
\(^{2603}\) TUPE 2006 guide page 18.
\(^{2604}\) Selwyn page 255.
\(^{2605}\) TUPE 2006 Regulations 4 (5).
\(^{2606}\) See Selwyn page 255.
\(^{2607}\) TUPE 2006 guide page 18.
\(^{2607}\) Explanatory Memorandum No. 246 point 7.2. (b); Collins – Ewing – McColgan pp. 1048-1049.
principle no legal effects, being automatically void.\textsuperscript{2608} Employee may regard the proposal as a constructive dismissal, leading to a claim on an unfair dismissal, the court using a reasonableness test to assess the presented dismissal reason’s adequacy.\textsuperscript{2609} The concept on constructive dismissal is fairly ineffective in protecting employees’ employment contracts and their terms and conditions. The concept can be mitigated by using flexibility clauses and reserve on wide managerial rights. In case-law an employee’s refusal to accept deteriorated terms and conditions have been interpreted a justification for a fair dismissal for some other substantial reason\textsuperscript{2610} \textsuperscript{2611}

A transfer itself is not an acceptable ground to harmonise an employment contract’s terms and conditions between the transferee’s former and the transferred employees. The freedom on varying employment contract’s terms and conditions on reasons connected with the transfer, being in character economic, technical or organisational reasons entailing changes in the workforce, cannot either be used to harmonise the level of employment contract’s terms and conditions.\textsuperscript{2612}

If there is a substantial change in working conditions resulting from the transfer, the employees have a right to terminate employment contracts and claim an unfair dismissal. The claim is based on an employer’s action, constituting in fact an employment contract’s termination.\textsuperscript{2613} A substantial change in the working conditions may be due to a workplace’s major relocation, making it difficult or much more expensive to transfer. A substantial change covers a withdrawal from a tenured post.\textsuperscript{2614} The employee’s right of termination due to a substantial change in the working conditions resulting from the transfer is an independent one. This right exists irrespective of common law right to claim constructive dismissal due to an employer’s repudiatory breach of employment contract.\textsuperscript{2615}

The practical outcomes of the implementation of the directive on Transfers of Undertakings on former employment contracts and continuation of terms are greatly affected in the United Kingdom by the common law established concepts on employee status and rights under an employment contract, being generally at a low level. Consequently, the employee’s protection point of view on

\begin{thebibliography}{9}
\bibitem{2608} TUPE 2006 guide page 17.
\bibitem{2610} See Collins – Ewing – McColgan pp. 1015-1018.
\bibitem{2611} Collins – Ewing – McColgan page 1070, Selwyn pp. 399-400.
\bibitem{2612} TUPE 2006 guide page 18.
\bibitem{2613} TUPE 2006 Regulations 4 (9).
\bibitem{2614} TUPE 2006 guide page 21.
\bibitem{2615} TUPE 2006 guide page 21.
\end{thebibliography}
former employment contract’s terms and conditions’ continuance cannot be evaluated high in priority in the British system.

3.3.2. INFORMATION AND CONSULTATION AND ALLEVIATING THE CONSEQUENCES OF WORKFORCE REDUCTIONS

In the United Kingdom, there has been a remarkable reluctance in delimiting managerial decision-making by enacted consultation obligations, at least if substantial in form.2616 A general attitude has been to keep strategic decisions confidential within the company management. Business reorganisation in its different forms has been evaluated to be management’s prerogative, reflecting a sharp distinction between public and private areas of responsibility.2617 The EU law on information and consultation – reflecting to some extent employees’ increased status in company context – has long been held foreign in the United Kingdom, due to traditional wide managerial autonomy.2618

Information and consultation cover in summary among the others the following: Individual employees are consulted on economic dismissals. This duty is based on case-law.2619 Employee representatives are consulted prior a transfer of an undertaking2620 and on collective redundancies2621 and on collective agreements’ provisions’ on handling collective redundancies,2622 and on decisions likely to lead to substantial changes in work organisation or in contractual relations.2623 Employers have to provide to recognised trade unions2624 information without which they would be impeded in collective bargaining to a material extent. This provision has not proved to be effective in practise.2625 Consultation on training is carried out with a recognised trade union, a collective bargaining method having been specified2626.2627

2616 Collins – Ewing – McColgan page 1061.
2617 Collins – Ewing – McColgan pp. 1064 and 1069.
2623 I&C Regulations Part IV 20 (c); Collins – Ewing – McColgan page 1061.
2624 On trade union recognition see TULR(C)A Schedule A1, Selwyn pp. 564-566.
2625 See TUL(C)RA and van Peijppe page 91.
2626 Collins – Ewing – McColgan page 822. See Grimshaw – Marchington page 519 on practical outcomes of training at work, being labelled by continued problems, due to lack of employer support. High share of jobs is marked by no or low skills demand. In large organisations a partial erosion of internal job ladders is to be seen. See further Grimshaw – Marchington pp. 529-531 on government reforms to tackle the skills problem in the 2000s.
2627 Selwyn pp. 566-567.
Both the transferor and transferee have to inform and consult employee representatives, who may be affected by a transfer or measures taken in connection with it. The sphere of affected employees may cover the transferred employees. It may cover the colleagues at the transferor’s employ. They are not necessarily transferred, but their jobs may be affected due to a transfer. New colleagues at the transferee’s employ are covered, their jobs possibly being affected by the transfer.

The information obligations equal with the obligations of the directive on Transfers of Undertakings, with one addition. Also the fact that a relevant transfer is to take place, is to be informed. The information procedure is to be carried out long before a relevant transfer, to enable the employer to consult with the employees’ representatives. When the employer envisages any measures in connection with the transfer, also the envisaged measures’ character has to be informed. If the transferor is required to deliver the information, it has to be disclosed, whether the transferee envisages any measures affecting employees. Information on envisaged measures is to contain any action, step or arrangement visualised or fore seen. The consultation is to be carried out with a view seeking an agreement with the employee representatives on the intended measures. An employer has to consider and respond to employee representatives’ proposals. If an employer rejects made proposals, the rejection’s reasons have to be stated.

An employer proposing collective redundancies is required to consult in advance – in good time – the affected employees’ representatives with a view to reaching an agreement. A collective redundancy denotes to a dismissal for a reason not related to an individual.

The British way of carrying out consultation rights has involved an inner paradox. In order to be consulted on statutory rights in enacted matters, a union had to have negotiating rights on other labour market issues. Recognised trade unions have had a status of priority compared to other trade unions. Recognition is still seldom granted. In 1998, 33 per cent of workplaces recognised one

2628 TUPE 2006 Regulations 13(2), Selwyn page 260.
2629 Collins – Ewing – McColgan page 1066.
2632 TUPE 2006 guide page 26, Selwyn page 260.
2633 Institution of Professional Civil Servants v Secretary of State for Defence [1987] IRLR 373; Bowers page 426.
2635 TULR(C)A 1992 Part IV; Redundancy consultation and notification – Guidance page 2.
2636 TULR(C)A 1992 Section 195; Bowers page 391.
or more trade unions as a party to negotiate pay or other conditions. In 2004, only 27 per cent of workplaces recognised one or more trade unions as parties to negotiate pay or other conditions.2638

Central in the case C-383/92 Commission v. UK was designating employee representatives in a case an employer not recognising a trade union. National rules not providing for a system for designating employees’ representatives in a case an employer opposing to recognise a trade union were not held permissible. There has to be mechanism to designate employees’ representatives irrespective of trade union recognition. The judgment led to law revisions in the United Kingdom.2639

In transfers of undertakings, an employer is to inform representatives elected by the employees.2640 If the employees affected by the transfer are represented by an independent trade union recognised for collective bargaining purposes,2641 an official representing this union has to be informed and consulted, for example, a shop steward. If employees are not represented by a recognised trade union, other appropriate employee representatives have to be informed and consulted. These representatives may be existing ones or elected for the enacted purpose. An employer has to ensure that election arrangements are reasonably practical to ensure election’s fairness. An employer determines representatives’ number. There are to be sufficient representatives to represent all the affected employees’ interest, taking into account employees’ number and classes. An employer makes a decision on the way of representation, if the employees are represented by representatives representing all the affected employees or particular classes.2642 The arrangements have to cover in an adequate way all the employees’ categories affected by the transfer. There has to be a reasonable balance between different groups’ interests.2643

In proposed collective redundancies a representative of an independent trade union recognised for collective bargaining purposes has always to be consulted. If employees are not represented by this kind of a union, an employer has to carry out information and consultation with other appropriate employee representatives. They may be existing representatives, or specially elected for the
consultation purpose. It may be appropriate to inform and consult also representatives elected or appointed on the basis of the I&C Regulations.\textsuperscript{2644} Also employees’ committees may be consulted. In a case of non-union representation, information may be provided to the employees themselves.\textsuperscript{2645}

The employer’s decision on \textit{proposed} collective redundancies should not be a definite one. During the consultation it should still be affected.\textsuperscript{2646} The term “proposed” is construed to be the same as the term “contemplating” in the directive on Collective Redundancies. There are also doubts on the rightness of the British legislation’s terminology compared with the demands of the directive on Collective Redundancies.\textsuperscript{2647}

Collective redundancies as a dismissal reason is a wider concept compared to concepts on unfair dismissals and redundancy, leading to redundancy payments. A collective redundancy demanding consultation arises, if an employer proposes to dismiss at one establishment\textsuperscript{2648} 20 or more employees within a period of 90 days or less.\textsuperscript{2649} Collective redundancies cover also situations, in which an employer intends to offer alternative employment. Regulations are applicable also in situations in which an employee has no real choice if to stay or leave, his/her decision-making being affected by an employer’s proposal’s framework.\textsuperscript{2650}

Consultation does not cover redundancies’ grounds or reasons, denoting to managerial decision-making and its scope.\textsuperscript{2651} Consultation has more to do with managerial decision-making’s consequences, carrying out of a redundancy programme though to be necessary by the management.\textsuperscript{2652} The employer has thus a view of the number of possible dismissals, into addition to their timing and other concrete arrangements.\textsuperscript{2653}

\textsuperscript{2644} See I&C Regulations Part IV 19.
\textsuperscript{2646} Redundancy consultation and notification – Guidance page 4.
\textsuperscript{2647} See directive on Collective Redundancies Section II Article 2 1.; Re Hartlebury Printers Ltd [1992] IRC 560; Bowers pp. 394-395; Collins – Ewing – McColgan pp. 826-827, Sellwyn page 469. See Griffin v South West Water Services Ltd (1995) IRLR 15 (HC) affirms consultation to take place only after the management has made a decision on collective dismissals, instead of being only an option; Collins – Ewing – McColgan page 1069.
\textsuperscript{2648} Bowers pp. 396-397, Selwyn page 469.
\textsuperscript{2649} Collins – Ewing – McColgan pp. 823-825, Selwyn page 468.
\textsuperscript{2650} See Redundancy consultation and notification – Guidance page 1 compared with directive on Collective Redundancies Section I article 1.2.
\textsuperscript{2651} Compare Iseskog pp. 321-323.
\textsuperscript{2652} Securicor Omega Express Ltd v GMB [2004] IRLR 9; Collins – Ewing – McColgan page 826.
\textsuperscript{2653} Bowers pp. 395-396.
Consultation covers ways of avoiding dismissals, reducing the number of affected and mitigating the consequences, with a view to reaching an agreement. Consultation should be genuine and meaningful in character, both of the parties working together to find common solutions. Consultation does not in practice mean an agreement, although it should be viewed as a target. The consultation is to be carried out when the proposals are at a formative stage. Consultation is to be based on adequate information, to be responded to in an adequate time. Consultation requires conscientious consideration by the employer on employees’ or their representative’s response.

Consultation is preceded by an employer’s information in writing on the proposal’s reasons, number of the possibly dismissed, total number of employed, proposed selection method, method on dismissals’ carrying out including the period over which they are to take effect and proposed method of calculating redundancy payments.

In the United Kingdom, there is not enacted or agreed between the labour market parties a system comparable to the Finnish and Swedish ones, targeted to speeding up re-employment or re-training in the case of redundancy. In the United Kingdom, there is in use a redundancy payment system. In the case of redundancy affected by an employer employees with at least two years’ employment are paid a redundancy payment, the amount of which is based on the length of service. The sums paid by the system are evaluated to be modest in size.

Consultation is to be carried out before issuing actual redundancy notices. It is to be carried out within the enacted time-limits from the date the first of the dismissals takes effect. The time-limits are either 30 days or 90 days, depending on the number of terminations. The time-limits are decisive in assessing a sanction in the breach of consultation obligation. At the maximum the protective award equals with 90 days’ pay.

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2654 TULR(C)A 1992 Section 188(2); Bowers page 397; Selwyn page 470.
2656 Redundancy consultation and notification – Guidance page 3; Collins – Ewing – McColgan pp. 827-829; Selwyn page 470. Compare Case C-383/92 Commission v United Kingdom Summary 3 and paragraphs 36 and 44.
2658 TULR(C)A 1992 Section 188(4); Redundancy consultation and notification – Guidance page 3; Bowers page 397; Selwyn page 470.
2659 Redundancy entitlement guide pp. 1-4.
2660 Redundancy consultation and notification – Guidance pp. 2-4; Selwyn pp. 470-471.
2661 TULR(C)A 1992 Section 189 (3); Redundancy consultation and notification – Guidance page 1; Bowers pp. 399-400.
An employer has to notify the projected redundancies in writing to the Department of Trade and Industry, being in character an authority’s technical informing. The notified information equals with the information delivered to the employees’ representatives. Authorities are notified before an employer has given notice in order to terminate employment relationships.

In the United Kingdom, it is a common practise, irrespective of the enacted forms of information and consultation, that these measures take place too late, evaluated from employees’ perspective in fact to affect an employer decision-making. This state of affairs has largely been advanced by case law emphasising managerial rights’ priority.

In established case-law employers are often granted powers to ignore collective agreements’ regulations on procedures and criteria for redundancy selection. One of these is known as “Polkey-deduction”. It is considered unfair not to consult an individual employee or a recognised trade union before a collective redundancy. Irrespective of this no compensation is awarded, if consultation would not have prevented a dismissal. Managerial decision-making’s grounds are outside court evaluation.

Restructuring transactions’ practical carrying out, referring to these procedures’ governance, is a central factor in achieving the transactions’ goals. Trust is one of the central factors in facilitating their success. The creation of trust is highly dependable on communication, referring to information and consultation. Indifference and negligence in information and consultation procedures’ practical carrying out increases distrust, affecting negatively on the transactions’ success, resulting in productivity.

2662 Laulom pp. 126 and 129. See Collins – Ewing – McColgan page 1064 compared with the directive on Collective Redundancies Section III article 4.1. on a time-frame of 30 days, this provision not being implemented in the British law.
2663 Redundancy consultation and notification – Guidance pp. 1 and 7; Selwyn page 473.
2665 Collins – Ewing – McColgan page 1069.
2666 On the background of this doctrine see Polkey v A.E. Dayton Services Ltd [1988] ICR 142 (HL) and Collins – Ewing – McColgan pp. 527-528.
2667 Compare Tiitinen page 85 and Iseskog pp. 138-139, AD 1996 number 20.
2668 Collins – Ewing – McColgan pp. 1069 and 1071; See also Gotthardt pp. 238-239: a failure to consult does not affect dismissals’ carrying out. Compare Tuori pp. 171-173, 179 and 220 and Fuller pp. 39 and 81.
2669 See Vuorenmaa pp. 82-83, 89 and 92-93.
As regards the directive on Informing and consulting employees, the British government tried actively to block its adoption at the EU-level. Due to the directive on Informing and consulting employees there has been enacted in the United Kingdom a minimalist legal framework on informing and consulting employees since 2005.

The provisions cover private or public undertakings carrying out economic activity and employing more than 50 employees. An employer has an option not to count certain part-time employees as whole-time ones. The provisions’ scope of application is consequently further minimised. According to an evaluation only a third of the British workforce is covered by the procedures, being applicable in a minority of companies. Of the UK’s 24 million employees, about 17 million are employed by companies employing over 50. Consequently, about seven million employees are not covered by the provisions.

The provisions do not require activity and initiative from an employer’s part to implement the framework in practise. Negotiations on a framework on an agreement on information and consultation are initiated only on employees’ initiative. The pre-existing arrangements may be kept in force, if based on employees’ request backed by 40 per cent of the employees, or after a ballot with a majority of those voting with 40 per cent of support. A pre-existing agreement has to cover provisions on information procedure on its actual carrying out. A pre-existing agreement does not necessarily denote to an agreement equalling with the provisions’ requirements on the standard information and consultation procedure. It may only require an employer seeking views, instead of consulting with a view to seeking an agreement.

The parties have a freedom to determine the scope of information and consultation procedures at the company level. This freedom covers subject matters, methods and frequency of information and

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2672 I & C Regulations Schedule 1 Regulation 3, Industrial Relations 2006 pp. 64 and 69, Barnard page 737. The implementation of the Regulations has taken place in stages, at the latest in April 2008, concerning undertakings with 50 or more employees.
2673 I &C Regulations Schedule 1 Regulation 3, Selwyn page 594; Smith – Thomas page 620.
2674 I &C Regulations Part II 4.
2676 I &C Regulations Part III 7 (1)- (3). A request by the employees themselves needs to be backed by employees representing at least 10 per cent of the employees, subject to a minimum of 15 and a maximum of 2,500 employees, Collins – Ewing – McColgan page 849.
2677 Collins – Ewing – McColgan pp. 849-850; Selwyn page 595; Smith – Thomas page 621.
2678 I &C Regulations Part III 8.
2679 Selwyn page 594.
2680 Industrial Relations 2006 page 69; Collins – Ewing – McColgan pp. 849-850; Smith – Thomas page 622.
consultation. Also a new agreement may be negotiated. If there is not a previous arrangement, negotiations on an agreement have to be started. An agreement has to be approved by a half of the employees. If no agreement has been reached within six months, the statutory scheme in the form of standard procedure becomes applicable Statutory scheme is applicable also if the parties so agree. If the standard procedure is applicable, an employer has to make arrangements to hold a ballot to elect information and consultation representatives before the procedure’s actual carrying out Employee representatives can have a trade-union or a non-trade-union background. The members in the general body on informing and consulting employees have to be employee representatives.

Information denotes to data transmitted by the employer to information and consultation representatives, or, in the case of a negotiated agreement, to employees, to examine and acquaint themselves with the subject matter. Consultation means the exchange of views and establishment of a dialogue between the representatives and the employer, or, in the case of a negotiated agreement, the employees.

Standard provisions on information and consultation cover information on the recent and probable development of undertaking’s activities and economic situation, the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking. It covers also decisions likely to lead to substantial changes in working conditions or in contractual relations, with a view to reaching an agreement on decisions within the scope of the employer’s powers. The provisions to inform and consult on transfers of undertakings and collective redundancies have priority compared with the standard procedure of the I&C Regulations.

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2682 I & C Regulations Part IV 18.
2683 I & C Regulations Part III 14; Industrial Relations 2006 page 69; Collins – Ewing – McColgan page 850; Selwyn page 595; Smith – Thomas page 622.
2684 I & C Regulations Part IV 19.
2685 Collins – Ewing – McColgan page 852; Selwyn page 596; Smith – Thomas page 623; I & C Regulations Part IV 19 (3): there are to be one representative for each 50 employees, the minimum being two and maximum 25 representatives.
2686 Industrial Relations 2006 page 64.
2687 I & C Regulations Part I 2; Smith – Thomas pp. 623-624.
2688 I & C Regulations Part IV 20.
2689 Collins – Ewing – McColgan pp. 853-854; Selwyn page 596.

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The parties have a duty of co-operation. They have to work in the spirit of co-operation and with
due regard for their reciprocal rights and obligations, taking into account both the undertaking´s and
the employees´ interests. The co-operation duty is applied in negotiations on an agreement, its
implementation and in implementing the standard information and consultation provisions.\textsuperscript{2690}

The implementation of the directive on Informing and consulting employees has been evaluated as a
significant difference in the United Kingdom, employees´ representation being arranged on a
statutory basis.\textsuperscript{2691} The enacted legislation has been evaluated to denote to employee
representatives’ consultation at an earlier stage compared with consultations on collective
redundancies.\textsuperscript{2692} Evaluated from the employees´ perspective, the new provisions on information
and consultation may have significance in restructuring context due to the emphasis on proactivity.
This is of significance especially with regards to employment implications, caused often by
restructuring. The practical outcomes depend however on many factors. The earlier history on
information and consultation in practise is not promising. Another matter of importance is the
procedures´ coverage. The enacted application thresholds, negotiated agreements´ coverage and an
option to deviate from the standard provisions\textsuperscript{2693} all denote to mitigating the provisions´ actual
significance.

\textbf{3.4. CONCLUSIVE EVALUATION ON EMPLOYEES´ PROTECTION AND STATUS IN
THE UNITED KINGDOM}

The United Kingdom, attitude towards the EU´s labour law on restructuring is generally labelled by
a strong apprehension. The reception of the EU-based provisions has been slow. The
implementation of the directive on Transfers of Undertakings has thus far taken almost 30 years.
This directive´s implementation has been seemingly challenging both at the legislative, court and
practical company level when compared with membership obligations´ fulfilment in Finland and
Sweden. The case law on transfers of undertakings has been divided in its interpretations. In times it
has been reluctant to follow the ECJ´s preliminary rulings. In the United Kingdom, mergers are
rarely used compared to takeovers. The takeovers are the most common form of restructuring, being
however outside of the provisions on a transfer of an undertaking.\textsuperscript{2694} In the United Kingdom,

\begin{flushright}
\textsuperscript{2690} I&C Regulations Part V 21.
\textsuperscript{2691} Industrial Relations 2006 pp. 11, 60 and 76.
\textsuperscript{2692} Collins – Ewing – McColgan page 1069.
\textsuperscript{2693} Collins – Ewing – McColgan pp. 848-850.
\textsuperscript{2694} Barnard page 636; Collins – Ewing – McColgan pp. 1066 and 1071.
\end{flushright}
employees are not involved in company management. Employees do not consequently have options to affect company decision-making inherent in takeovers.

Due to the membership obligations both in the United Kingdom and Sweden the principle on employment contracts’ transfer to the transferee and its continuation with former rights and obligations was acknowledged. Both in the United Kingdom and Sweden the concept of a transfer of an undertaking covers mergers and legal transfers. The concept of a transfer of an undertaking unifies the transactions’ purposes in the business economic sense, denoting to the economics of scale and scope, and consequences, equalling with the directive on Transfers of Undertakings.

Especially between the United Kingdom and Finland there is to be discerned a crucial difference in interpreting the employment relationship’s continuation principle’s practical significance. In Finland the principle is interpreted to be an advantage both for the employees and employers. In the United Kingdom, the principle is felt to be a restraint to the use of managerial rights.

The British system on information and especially on consultation involves an inner paradox. In the United Kingdom, the provisions on information and consultation are revised in many occasions due to the membership obligations. The carrying out of consultation obligations is in practise, however, labelled by a negligent attitude. Official guidelines are according to the acquis communitaire. In company practises the enacted provisions with the support of the case law are, however, largely mitigated. The established practises are not apt to affecting restructuring transactions’ successful carrying out. There is a danger of negative business results. As a whole consultation on collective redundancies has largely to do with carrying out of redundancy programme though necessary by the management. Affecting an employer’s decision-making by the employees does not still necessarily take place. When the British practises are evaluated by taking into account the importance of employees in a knowledge-based production, employer/employee relationships’ basis being commitment and continuous development of know-how, it is hard to fully understand the established practises’ final ratio, being in character largely the enacted provisions’ circumvention.

As regards employee representation in consultation, the former British rules not providing for a system for designating employee representatives in a case an employer opposed to recognise a trade

2697 Porter pp. 657 and 665.
union, led to law revisions. A mechanism to designate employee representatives irrespective of trade union recognition had to be created.

Great hopes\textsuperscript{2698} have been set on the new information and consultation procedures, emphasising proactiveness. To be carried out in practice they need employees’ initiative and may have a narrow coverage, depending on the framework. To get the procedures workable at the practical level may be a time-consuming process, due to the historic ballast.

There are good reasons to question generally the enacted rules’ practical significance in the United Kingdom, especially from the employees’ protection point of view. This state of affairs is not however an internal British matter only. Due to the reciprocal relationship between the EU-law and national law, the EU-law demanding national level application, the matter under evaluation has in core to do with the character of the EU-law. To be law it demands application in practice, referring to national level practices.\textsuperscript{2699}

The British tradition of advancing in business narrowly defined shareholder value is a strong one. Under the present Companies Act as a part of the management’s general duties a director has to promote the company’s success, for the benefit of its members, having regard to any decision’s likely consequences in the long term, and to the company’s employees’ interests. This reflects expectations on responsible business behaviour, enlightened shareholder value. As a part of accounting obligations a director has to prepare a report for each financial year, including a business review with a balanced and comprehensive analysis of the company’s development and performance. The review must include key financial performance indicators. It must include, where appropriate, also analysis using other key performance indicators, among the others information on employees. In spite of the employees’ present visibility in a limited company context due to the acknowledgement of their status in the enacted provisions, the business practises have, however, hardly been affected. There seems to be a similarity between Finland and the United Kingdom with regards to the employees’ status in a limited liability company.\textsuperscript{2700} In the United Kingdom, this is to be discerned in company practises, in Finland also at the legislative level, affecting consequently business practises. To change the present state of affairs crucial is to evaluate among the others the

\textsuperscript{2698} See Industrial Relations 2006 pp. 11, 60 and 76.
\textsuperscript{2699} Compare Fuller pp. 39 and 81.
\textsuperscript{2700} Compare Tuori pp. 181 and 205.
concepts on company purpose and its stakeholders. Both in the United Kingdom and Finland the employees can be evaluated to be participants in restructuring transactions’ consequences.

The British law under evaluation denotes at the moment to a concept of an enterprise with a wide scope of stakeholders and goals with social connotations largely in a weak form. The renewed British company law provisions should however not be evaluated only from the past’s perspective. They can have positive effects on employees’ status generally in a limited company context and in restructuring especially, due to employees’ importance in knowledge-based production. The directors’ duties have to be evaluated also in connection with the duty of co-operation in information and consultation.

In the British system the principle on freedom of contracts is well established. The principle of protecting workforce is a new one in the United Kingdom, being primarily imported by the EU-law. Historically, Finnish and Swedish labour law has reflected the principle of protecting workforce. In Finland and Sweden there is to be discerned a strong emphasis on the use of managerial rights in restructuring context. Also in this respect there seems to be a resemblance between the three countries under evaluation, Finland, Sweden and the United Kingdom, in spite of them representing two different legal systems, the Scandinavian one and the British Common Law, originally with different legal characteristics.

Wide managerial powers and their active use in restructuring can largely mitigate the principle on employees’ protection. In the United Kingdom, modest severance payments are used in alleviating the consequences of collective redundancies. There are not to be found models to increase proactively employees’ employability and speeding up re-employment in the case of workforce reductions affected by restructuring. The Finnish personnel plans with training and education objectives are proactive means in furthering employees’ employability. In Finland and Sweden, the models on action plans target to speed re-employment. The Swedish model, being financed by employers, is characterised by employer responsibility in alleviating the consequences of

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2701 See Ellsworth pp. Preface x, 1, 15, 19, 40, 45, 93-94, 95, 125, 221 and 225 and Elkington page 300.
2702 Elkington pp. 300 and 310 and Dine page 228.
2704 Ellsworth page 221.
2706 Compare Tuori pp. 181 and 205.
restructuring. The model balances the share of responsibilities between the public power and companies.
PART IV FINAL REMARKS AND THE SUMMARY

1. FINAL REMARKS

The roots of the research are firmly in the history. The concept of the modern state is central in the research context. The modern state’s development is influenced and guided by legislation. This denotes to predictability in the form of legal security. At the present the community of the modern states meets anew challenges equalling with those posed by the industrialisation. The core issue has to do with the legislation’s role as guiding societal change. In the research context central is the legislation’s ability to create predictability with regards to the employees’ economic rights’ protection in and due to restructuring.

The EU is based on an ideology to enhance free markets and competition, a policy of continuous growth based especially on economies of scale and scope and accelerating of economic development. In spite of the EU’s strong emphasis on economic values, its actions are not solely economic in character due to the actions’ consequences, having social effects. The EU represents a form of supranational co-operation among its Member States, delimiting freedom of action at the national level in an agreed framework. Irrespective of the Union’s regional character, its actions have effects at a global, national and local level. At the global level this is due to its size as one of the largest actors in the world trade. At the national and local levels this is due to effect of its policies. They are linked with the effects of individual economic actors’ activities. The EU’s actions and law-making in restructuring cannot be evaluated without taking into account the provisions’ adoption and practical application at the Member State level. In the EU’s policies’ practical carrying out people are needed as consumers and employees. At the individual level macro- and micro-levels are unified. Form an individual’s point of view, this has to do with governing of one’s life, denoting to legal security in the form of predictability.

One of the central company law outcomes of the present research has to do with the difference in employees’ and shareholders’ status in a limited liability company. This is discernable in a national level merger procedure. The shareholders have a genuinely participatory role as stakeholders. They can be evaluated to be even in a privileged position. They have rights but hardly obligations. This is due to ownership rights’ priority in a limited liability company, compared to the employees’ inputs. In the agreement-based national level merger the share ownership’s continuance labelled by

2707 Compare Villiers page 194.
stability and continuance are highlighted. Company law on a national level merger contains no provisions targeted to employees’ protection. Employees are wholly outsiders in the company law procedure, except in Sweden. In Sweden, this is due to the mandatory board membership. In Sweden, the board takes care of organising human resources, being suitable for business activities. The board and the managing director have to give yearly an account on the management, including important development trends among the others on personnel. The board has the main responsibility in making restructuring decisions. It takes care of company development in a long-time perspective.2708 The British provisions on directors’ duties have features to increase employees’ status in company actions, restructuring included.

Implementation of the directive on Transfers of Undertakings changed the legal state in Sweden and the United Kingdom. Employment relationships’ transfer and continuation were acknowledged. As regards all the three countries under evaluation, the employment relationships’ continuation with former rights and obligations is now a rule in principle. Restructuring affects however generally workforce reductions.2709 Consequently, the continuation of employment relationships is not guaranteed in practise. The basic protective starting point is largely watered down by the means enacted in the directive. These means cover powers to affect changes in employment relationship’s terms and conditions and to carry out dismissals, based in each of the countries under evaluation on wide and largely unquestionable managerial rights, defined at the Member State level.2710 In carrying out legal transfers, employee legal protection is connected with determining a legal transfer. Its criteria are outside employees’ powers to define and affect. The end-result of the determination affects, however, the scope of the employee protection.

The directive on Collective Redundancies unifies the procedure on collective redundancies’ technical carrying in relation to employers and public authorities. The directive is void with regards to substantive safeguards related to collective redundancies’ prevention and consequences. This takes place at the Member State level with varying forms and methods. The matter is also linked with the directive on Transfers of Undertakings’ material contents. Provisions on collective redundancies affect at the company level personnel-related cost formation and at the Member State level public authorities’ cost formation, depending on the offered public services’ character and level. At the moment both of these vary considerably. The chosen model of harmonisation with

2708 AYA § 7:31; Sandström pp. 95 and 211-213.
2709 Lehto pp. 6, 31 and 46-47.
2710 See Tuori page 213 on the elements unifying different legal cultures. Compare Villiers 1998 page 63 on referring to a need to define directors’ duties in the context of the EU company law harmonisation programme, now lacking.
only procedural character has largely left untouched differing costs and responsibility in sharing obligations due to carrying out business, resulting in collective redundancies. This is apt to maintain competition between the Member States with regards to the establishment right, increased by the present considerable differences in production-related personnel costs between the old and the new Member States. The perceived differences are not necessarily apt to increase the EU’s policies’ legitimacy at the individual employee level and economic and social equality between the different Member States. These factors do not denote legislation’s coherence in the form of its predictability, legal security.

In a merger and a transfer of an undertaking there is inherent a general succession. In spite of this and the labour law’s protective starting point, the main labour law results of the research can be summarised in a claim that from the employees’ point of view restructuring law’s legal effects in practise largely equate with those taking place in company dissolution. The employers’ management right connected with the mechanisms of dismissing employees and affecting their employment terms’ and conditions’ level greatly mitigate the employees’ protection principle in the research context at all the levels under evaluation, making it in practice greatly an illusory one. The adopted model on general succession is a modified one. Taking also into account the nature and timing of the information and consultation procedures, employees may be evaluated to be participants in the company transactions’ consequences. As the only exception can be mentioned Sweden, due to the mandatory board membership and the consultation’s contents and timing.

With regards to information and consultation, into addition to the directives on Transfers of Undertakings and Collective Redundancies, the directive on Informing and consulting employees is based on a framework to be supplemented by national level solutions. The end-results differ even considerably. In Sweden, the law on informing and consulting employees is applicable without enacted numerical thresholds as a precondition to its application. This is not the case in Finland and the United Kingdom. In the United Kingdom, the setting up of the system demands employees’ initiative. Also the agreements’ acceptance requires a fulfilling of special thresholds. With regards to the substance of the framework on informing and consulting employees, the end-results between Sweden, the United Kingdom and Finland are different. In Sweden, the employees take part in consultation on a merger and a transfer of an undertaking even from the stage of planning. This is not the case in Finland and the United Kingdom. In the United Kingdom, pre-existtent and negotiated agreements may affect the standard procedure’s falling short of.
The directives on Transfers of Undertakings, Collective Redundancies and Informing and consulting employees lack a proactive perspective. They do not cover steering of change with substantive rules. The steering of change is linked with the employers’ role in business changes. The EU-law under evaluation as a whole lack enacted substantive means of proactive nature in facilitating employees’ coping with business changes. This denotes to a lack of shared responsibility and commitment on the basis of mutually shared goals.2711

Based on the Treaty Article 2, the EU promotes economic and social progress and a high level of employment and the achievement of balanced and sustainable development, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union. Based on the Treaty Article 136, the Community and the Member States have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Community and the Member States are to take measures which take into account of the diverse forms of national practises, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.2712 Evaluated on the basis of the research results many of the practical measures in restructuring seem to be and function in practise against these very goals of the Treaty. In this context can be referred to balanced and sustainable development through the strengthening of economic and social cohesion, promotion of employment, improved living and working conditions, proper social protection and the development of human resources with a view to lasting high employment. The differences in national law and practises further these notions. As regards employees’ protection in national level mergers and transfers of undertakings – being applicable also at large in restructuring – the present research results can be interpreted to reveal there to be an imbalance favouring free enterprise instead of employees’ protection.

With regards to the employees’ protection principle and their status in restructuring, on the basis of the research results some positive marks of change however are to be noted to.

As one of them can be mentioned in the directive on Informing and consulting employees the emphasis on promoting mutual trust to promote employee involvement in the operation and future

2711 Compare Elkington pp. 85, 272, 300, 311, 315, 327 and 331 on sustainable development in business.
2712 OJ C 321 E/11.
of the undertaking and to increase its competiveness, being followed by changes in the national implementation laws, emphasising co-operation. One mark of change is the Finnish model on personnel plans and training and education objectives, emphasising proactive skills development. As a mark of change can be mentioned the Finnish and Swedish models on alleviating workforce reductions’ consequences, emphasising re-employment. In the field of company law can be noted to the directors’ duties in the United Kingdom. In fostering the success of the company for the benefits of its members, denoting to the shareholders, into account has to be taken the interests of the company’s employees. In Sweden, there is a mandatory employee representation in a board. In the co-determination employee representatives participate from the stage of planning. In spite of these marks of positive change further legislative reconsiderations and measures are however still needed. In these needs to be unified corporate governance with the target of increasing restructuring transactions’ success.

The EU-law under evaluation is largely labelled by loose legislative frameworks, being supplemented by national level solutions. The present provisions do not reflect economic values involved in employment relationships in a knowledge-based production. In addition to strengthening the present restructuring law’s substantive safeguards, at the EU-level are needed substantive frameworks on employees’ proactive training and education and on alleviating the consequences of restructuring.

The content of the written merger material should be strengthened. It should cover the transaction’s practical carrying out, its effects on a company’s status in the product-markets and employee implications. Employees’ dismissal protection in restructuring needs strengthening. It can be done by setting limitations on dismissal right and by its monitoring.

The framework on employees’ training and education with genuine substantive safeguards is needed. The purpose is to increase employees’ employability in and due to business changes. The measures would be targeted to proactive life governance at the individual level. Special attention needs to be put on training’s and education’s length and quality. The framework should cover all employee groups.

2713 Directive 2001/14/EC point (7).
2718 CA 2006 BR part 10 Chapter 2 172.
In the former labour law research a European change security model has been proposed. The model in its proposed form is based on employers’ collective financing, covering all employees’ groups. The model is targeted to re-employment, using as its means also re-training, re-education and self-employment. Individual action plans’ carrying out is supported by constant individual-level consultation.2719 This proposal gives good ground in developing a European level framework on alleviating the consequences of restructuring. Special attention needs to be put on the share of responsibilities between employers and public power.

Changes in share-ownership structure2720 and ways of organising production, affecting the work-organisations’ character, and the increasing pace of restructuring make it necessary to redefine the employees’ status in a limited liability company anew. Developing employees’ shareholding and employees’ savings funds have been mentioned as means to stabilise the unequal power-balance at the corporate level.2721 The solutions require evaluations both in the company and labour law, having ultimately to do with a limited liability company’s role and tasks as a whole in the society.2722

The EU-law is based on the established legal systems and concepts prevalent in the Member States. They have not been challenged. In stating challenges posed by the present research one of the most important has to with defining used legal concepts. The concept of a limited liability company needs to be taken under reconsideration. This is connected with basic company law principles’ reconsideration. Reconsideration is needed especially on company purpose, stakeholders connected with the equality principle and management’s duties. Resulting from this reconsideration, employees’ status in a merger procedure could be re-evaluated. They could be granted rights equalling with those of the minority shareholders, covering a right to object a merger’s adoption and demand decision-making in a general meeting.

2721 Morin page 363.
2722 See Toiviainen 2002 page 222 and Toiviainen pp. 167-175, 249-250 and 545-546 presenting a limited liability company as a many-purpose organisation, having social responsibility and rights, denoting to a responsibility to take into account in business in addition to profit-maximisation also other, in character social aspects. See also Toiviainen page 166 on the role of public power in company matters, coordinating social interests as a whole.
Company law and actions should be based on a wide stakeholder concept. In Finland and the United Kingdom an employment relationship is based on dependency.\textsuperscript{2723} This denotes to the parties’ inequality. In Sweden, however, the employment contract’s parties are socially and economically equal.\textsuperscript{2724} Also in Sweden the equality is affected by the consultations’ character and wide managerial powers, both ultimately denoting to an employer’s decision-making, decreasing the stated power balance.

Employees’ status in a limited liability company should be based on equality. This is due to the shareholders’ and employees’ inputs equality. Employees should be perceived active participators in procedures affecting them. The principle on information transparency with regards to employees\textsuperscript{2725} should be acknowledged, comparable to the one applied in relation to share- and securities holders.

As a part of stakeholders’ definition shareholders’ rights and obligations need to be re-defined. From employees’ perspective the shareholders’ present status can be evaluated even as a free-rider problem. It is largely labelled by a short-time commitment and a lack of interest in long-time company development.\textsuperscript{2726}

In all the countries under evaluation shareholders have rights but not obligations in relation to a company and its other stakeholders.\textsuperscript{2727} The duties of care and loyalty principle are not applicable in the shareholder/company relationship, neither in shareholders’ relationships with the employees. The shareholder/company relationship and shareholder/employee relationship should be taken under consideration. This can take place by extending the duty of care and loyalty principle also to these relationships. This can be grounded by changes having taken place in ownership structures, being largely dispersed in nature.\textsuperscript{2728} This can be grounded by the employees’ increased significance in knowledge-based production,\textsuperscript{2729} emphasising the need to protect employees as the most valuable company assets, extending to their economic rights’ protection.\textsuperscript{2730} It can be

\textsuperscript{2723} See also Morin page 359.
\textsuperscript{2724} See Bylund – Elmér - Viklund – Öhman page 19.
\textsuperscript{2725} See Morin page 367.
\textsuperscript{2726} Compare Porter pp. 164 and 664-665.
\textsuperscript{2727} Compare Immonen – Nuolimaa pp. 55-56 on the different meanings of the word “bond”.
\textsuperscript{2729} See Ellsworth page 221.
\textsuperscript{2730} Supiot page 518.
grounded also by the need to balance social responsibilities between the public power and companies.

The proposed model can be built on the one enacted in the Finnish ECA 2001 on employees’ general obligations. Employees are to avoid everything that conflicts with the actions reasonably required of in their position.\footnote{See ECA 2001 § 3:1.} The same model is known also in the United Kingdom, based on the case-law. There is a duty of cooperation between an employer and an employee. The employee must serve the employer and his interests faithfully, obeying all the employer’s lawful orders.\footnote{See ECA 2001 § 3:1.} The employee has to take reasonable care in the performance of the contract, and to act loyally towards the interests of the employer. An employer in his/her turn has to act in a manner not likely to destroy mutual trust and confidence.\footnote{See Elkington page 242 and Robbins - Judge pp. 444-445.} These established principles can be used in defining shareholders’ relationships with the company and its employees, increasing coherence in company matters between different actors.\footnote{Compare Elkington pp. 300, 311 and 345.}

Employees’ equal status with other stakeholders could lead to defining employees’ citizenship rights at work, based on an enterprise citizenship. The model would create more room for employees to impact enterprise activities. In the considerations into account has to be taken into addition the production models, also their impacts on society at large.\footnote{Compare Elkington pp. 300, 311 and 345.} Fostering of trust has to be acknowledged as the fundamental basis for production.\footnote{See Elkington page 242 and Robbins - Judge pp. 444-445.} Employee rights of autonomy and self-determination are means to humanise work. They are also social rights, impacting productivity but having also wider impacts outside the actual working environment. Into addition to an individual enterprise’s microeconomic environment efficiency covers a wider social reality surrounding an enterprise.\footnote{Compare Elkington pp. 300, 311 and 345.} Employment relationships’ character as economic relationships, having largely been neglected, gives heed for this re-evaluation. Because of the employees’ stakeholder-status\footnote{Compare Elkington pp. 300, 311 and 345.} the issue is linked with employees’ influence at the company level,\footnote{Compare Elkington pp. 300, 311 and 345.} extending to decision-making in company matters.\footnote{Compare Elkington pp. 300, 311 and 345.}
2. SUMMARY

The main goal of the research is to evaluate the principle on employee protection and employee status in a national level merger and a transfer of an undertaking.

The principle on employee protection has to do with the protection of employees’ economic rights, especially the protection against dismissals and changes in employment terms and conditions. It covers measures targeted to increase proactively employee employability. In the case of workforce reductions it covers measures to alleviate their consequences. Employee status is affected by employers’ management right. Employees’ status covers employee influence in company decision-making and information and consultation procedures.

Into addition to the relevant EU-company and labour law, the research is based on in the research context relevant laws of Finland, Sweden and the United Kingdom, representing different legal systems and cultures.

The research methods are legal sociology, legal interpretation in its prevalent and alternative forms and legal comparison. Also history, business economics and psychology are used.

The research is divided into four parts. The first part covers the research framework. The second and the third parts cover the relevant EU and national laws with their evaluation and conclusions. The fourth part covers final remarks on conclusions and the summary.

In EU-company law the research is based on the 3rd directive on mergers. In labour law it is based on the directives on Transfers of Undertakings, Collective Redundancies and Informing and consulting employees. The directives and the effects caused by implementation at the Member State level are evaluated. Also evaluated are the effects of Treaty Articles 2 and 136, which are purported to further coherence, sustainable development and employment, having relevance in the research context.

Eighty per cent of M&A transactions take place at the national level. They generally lead to workforce reductions. Over 50 per cent, even over 70 per cent of the transactions fail. The research
is to answer what can be done at the legislative level to increase the success of these transactions, affecting the scope of employee economic protection and employees’ status.

The research is a part of the discussion on corporate governance, having to do with directing and managing companies. Corporate governance is linked with company purpose, general company law principles and management’s duties. In the present research, relevant is the employees’ role in company management.

The company law based national level merger procedure has in core to do with the status of the shareholders. They have in the procedure a genuine stakeholders’ status. They participate actively in the adoption of the merger agreement targeted to guarantee their economic rights’ continuation as such. The procedure is guaranteed by decision-making in a general meeting. The company law based national level merger law contains no provisions targeted to employee protection. Employees are outsiders in the procedure, except in Sweden, due to the mandatory board membership. The British provisions on directors’ duties involve however characteristics having applicability in increasing employees’ status in company actions, restructuring included.

In the labour law the starting point of the employees’ protection is the continuation of the former employment agreement with its former rights and obligations, taking place by a transfer to the new employer. In Sweden and the United Kingdom, the implementation of the directive on Transfers of the Undertakings, covering mergers, changed the former legal state by acknowledging this transfer and the former employment relationship’s continuation. In the United Kingdom, the practical application has been a challenge. This is due to the common law’s former effects. The implementation has thus far taken about 30 years.

Dismissals due to the merger or a legal transfer are forbidden. Dismissals are, however, allowed on economic, technical or organisational reasons entailing changes in the workforce. There is acknowledged a right to affect employment contracts’ conditions’ changes if not substantial in character, into addition to changes taking place in the national framework outside a transfer of an undertaking. Collective agreements in force at the transfer date are transferred; however, not being necessarily applicable after their term has elapsed or a year after the transfer.

In all the countries under evaluation employees are affected in restructuring in practise unquestionable management right, affecting the enacted legal protection. With regards to legal transfers, employees’ legal protection is also affected by legal transfer’s criteria. Its determination is
outside employees’ powers to affect, the determination’s end-results affecting however the scope of
the employees’ protection. Taking also into account the nature and timing of the information and
consultation procedures, in Finland and the United Kingdom employees may be evaluated to be
participants in restructuring transactions’ consequences.

In spite of the general succession inherent in a merger and a transfer of an undertaking and labour
law’s protective starting point, the main labour law results of the research can be summarised in
core in a claim that from the employees’ point of view restructuring law’s legal effects often in fact
equate with those taking place in a company dissolution. The adopted model on general succession
is a modified one. The management right connected with the mechanisms of dismissing employees
and affecting their level of employment terms and conditions greatly mitigate the employees’
protection principle in the research context at all the levels under evaluation, making it in practice
greatly an illusory one. When compared to shareholders in a national level merger, in a share
ownership comparable essential changes are equated with legal effects taking place in company’s
dissolution.

Irrespective of the strong tradition of information and consultation in Finland the practical results in
furthering mutual interaction between the labour market parties at the company level have not thus
far been convincing. The Swedish labour market culture is strongly labelled by information and
consultation practises. The implementation of the EU-provisions on information and consultation
enlarged the circle of the affected labour market parties in Sweden. In the United Kingdom, the
practical application of the information and consultation obligations have been a challenge, largely
unapplied.

The central principle of the modern state, its development being guided by legislation, denoting to
predictability in the form of legal security, can be evaluated to be largely watered down in areas
under research, when evaluated from the perspective of employee protection.

On the basis of the research material some positive marks of change are, however, to be noted. The
directive on Informing and consulting employees emphasises promoting of mutual trust to promote
employee involvement in the operation and future of the undertaking and to increase its
competitiveness, being followed by an emphasis on co-operation in the national implementation
laws. As a mark of change can be mentioned the Finnish model on personnel plans and training and
education objectives, emphasising proactive skills development. As a mark of change can be
mentioned the Finnish and Swedish models on alleviating the consequences of workforce
reductions, emphasising re-employment. The Swedish model is based on companies’ financing, being apt to increase long-term planning in carrying out business. From the company law can be mentioned the directors’ duties in the United Kingdom. In fostering the success of the company for the benefits of its members, denoting to shareholders, into account has to be taken the interests of the company’s employees. In Sweden, there is a mandatory employee representation in a board. Employee representatives participate in co-determination from the stage of planning.

Further legislative revisions are still however needed. They unify the corporate governance aspect and the need to increase the success of restructuring transactions.

The EU-law and national laws under evaluation are highly reactive in character. Legislation’s proactivity should be increased by emphasising employers’ role and responsibility in steering change, not only unilateral employees’ adaptation.

The content of the written merger material should be strengthened. It should cover the transaction’s practical carrying out, its effects on a company’s status in the product-markets and employee implications. Employees’ dismissal protection in restructuring needs strengthening. It can be done by setting limitations on dismissal right and by its monitoring.

A proposal done in the former labour law on the principle on information transparency with regards to employees should be acknowledged, comparable to the one applied to share and securities holders.

At the EU-level is needed a legislative framework targeted proactively increase employees’ employability in a life-long perspective. The framework should cover all employee groups. At the EU-level is also needed a framework equalling with the Finnish and Swedish models on action plans in furthering re-employment. Special attention needs to be put on the system’s financing and the share of responsibilities between the companies and public power.

Employees’ increased status in a knowledge-based production and their inputs’ equality with the shareholders should be acknowledged. Employees’ equality with other company stakeholders needs to be acknowledged. Shareholders’ obligations with regards to a limited company and its other stakeholders, especially the employees, need to be defined. The basic company law principles need redefinition, also at the EU-level. Especially important is defining of company purpose, its stakeholders, equality principle and management’s duties. Resulting from this reconsideration,
employees’ status in a merger procedure could be re-evaluated. They could be granted rights equalling with those of the minority shareholders, covering a right to object a merger’s adoption and demand decision-making in a general meeting.
Helena Lamponen

THE PRINCIPLE ON EMPLOYEE PROTECTION IN A MERGER AND A TRANSFER OF AN UNDERTAKING

Supplements:

RESEARCH MATERIAL

6 ABBREVIATIONS

Directive on employee protection in employer insolvency


Footnotes 771, 1019 and 1179:

Directive 2008/94/EC on employee protection in employer insolvency
OJ L 283/36-42, 28.10.2008