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The Transfer of Undertakings and the Importance of Taking Over Personnel – A Vicious Circle

Abstract: In this paper I contend that the EU Acquired Rights Directive, as interpreted by the European Court of Justice, has adverse effects on the market for outsourcing services. The Court should change its position on the decisive importance of either taking over personnel or taking over intangible assets, since the emphasis on those two factors is ‘counterintuitive’ to the social partners. The resulting legal uncertainty leads to legislation that is not in keeping with general notions of market competition, as the British TUPE Draft Revised Regulations prove. Instead of focusing on the sector in which a transfer takes place, more emphasis should be placed on the economic context in which transfers take place, especially those resulting from a mere change of service provider.

1. PRINCIPLES OF COUNCIL DIRECTIVE 2001/23/EC

The basic principle underlying the directive on transfers of undertakings (Council Directive 2001/23/EC¹), dating from 1977 and amended in 1998, is that employees are protected against the possible negative consequences of transfer of the undertaking in which they are employed. The retention of rights and obligations under the employment contract² (including those resulting from collective agreements) forms the core of the protection offered by the directive.³ This protection has certain gaps, and ambiguities occasionally arise with regard to the level of this protec-

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1 OJ L 82 of 22 March 2001, p. 16.

2 The directive protects any person who is protected as an employee under national employment law (Article 2(1)(d) of the directive).

3 Chapter 2 of the directive.

tion. These gaps and ambiguities may be of either an international or a national nature. Some are due to the fact that the scope of a provision of a directive is unclear – for example, even after 29 years and many judgments of the European Court of Justice (hereinafter: Court of Justice) there is still no clear definition of ‘undertaking’ – and some are due to the fact that the regulations in the national legal systems are insufficiently in keeping with the provisions of the directive.

As mentioned above, some terms used in the directive give rise to questions. The largest lacuna in employee protection legislation is probably the fact that, despite a flood of case law and a definition in the current directive, the term ‘undertaking’⁴ is still unclear. I will elaborate on this point in the following sections. The term ‘agreement’⁵ as defined in the directive seems clear. According to the Court of Justice, the term should be deemed to mean more or less the same as ‘legally binding transaction’, and a transfer on the basis of a unilateral legally binding transaction (such as the termination of a lease, a privatisation or a transfer in two or three stages) therefore also falls within the scope of the directive.

Another ambiguity relates to an employee’s protection against dismissal. An employee may not be dismissed purely as a result of the transfer of the undertaking (Article 4(1) of the directive). But dismissal is possible if there are ‘economic, technical or organisational reasons’ (‘ETO reasons’). How is a case to be decided on the basis of an ETO reason that is rooted in the situation caused by the transfer in the first place? Unfortunately, the Court of Justice has never been asked to give its opinion on the scope of these reasons. As I will argue below, this fact, in combination with the uncertainty about the scope of the term ‘undertaking’, often leads to the idea that a transferee is obliged to take over the transferor’s entire workforce, thereby deterring potential transferees from entering into negotiations.

2. UNDERTAKING

In the *Spijkers* case (1986),⁶ the Court of Justice clarified under what conditions a transfer of *undertaking*, as defined by the directive, takes place. As stated above, that qualification is important because it automat-

4 Article 1(1)(c) of the directive.

5 Article 1(1)(a) of the directive.

6 Case 24/85, Judgment of the Court (Fifth Chamber) of 18 March 1986 (*Spijkers*), ECR 1986, p. 1119.

ically results in the transfer of all the undertaking's employees. Moreover, those employees retain their rights and obligations under their individual or collective employment contracts. In that case collective negotiation on the conditions on which the transfer takes place is less urgent.

The term 'transfer of undertaking' can be used only if the undertaking retains its identity. In the opinion of the Court of Justice that is the case only if a going concern has been transferred. According to the Court of Justice, the national court must consider all the facts that characterise the transaction in question, including:

1. the type of undertaking or business;
2. whether or not the business's tangible assets, such as buildings and movable property, are transferred;
3. the value of its intangible assets at the time of the transfer;
4. whether or not the majority of employees are taken over by the new employer;
5. whether or not its customers are transferred;
6. the degree of similarity between the business carried on before and after the transfer; and
7. the duration of any interruptions in that business.

It should be noted, however, that all these circumstances are merely individual factors in the overall assessment to be made and therefore cannot be considered in isolation. In the *Spijkers* case, the transfer of a slaughterhouse, the site and a few buildings, and the hiring of almost the entire workforce (except for Mr Spijkers and one of his colleagues) by the transferee constituted a transfer of undertaking, despite the fact that the business was interrupted for a few weeks.

Since 1986, the Court of Justice has repeated the seven factors that jointly determine whether a going concern has been transferred in a relatively large number of judgments, without any change occurring in those factors, apart from a little fine-tuning. But that has not yet smoothed the ruffled term 'undertaking'. The value to be attached to these factors both individually and in conjunction remains obscure to many litigants and lawyers. That obscurity is an unavoidable result of the almost total lack of guidelines for weighing the various factors, which renders such weighing extremely subjective. It is possible, for instance, for two judges to rule differently on the same factual information in answering the question whether a transfer of undertaking has taken place.⁷ It is virtually impossible to present that subjectivity to a European

⁷ This has occurred in Dutch cases; see District Court of Utrecht 14 May 1997, *JAR* 1997/223 and District Court of Dordrecht 20 August 1997, *JAR* 1997/209.

court, since the weighing of the *Spijkers* factors is a question of fact-finding rather than a legal exercise. Moreover, it must be established beforehand whether the undertaking will retain its identity after the transfer. In theory, this allows the transferor and the transferee to organise the transfer in such a way that, depending on their wishes, it will or will not constitute a transfer of undertaking. The transfer could be effected, for instance, in several parts over a relatively long period of time, in order to justify the conclusion that no transfer of undertaking has taken place because no going concern has been transferred. In my opinion, the transferor's and transferee's objective (did they intend a transfer of undertaking?) plays no or only a marginal part. The transfer of an undertaking therefore cannot be controlled to such an extent that the transferor can avoid the application of Articles 7:662 *et seq.* of the Dutch Civil Code by arguing that it did not intend to effect a transfer of undertaking. The question is to what extent that opinion is in keeping with Article 1(1)(b) of the directive, which appears to include the requirement of intent.⁸ In my opinion, that intent, if and insofar as even relevant according to the Court of Justice, should be objectifiable. The question to be answered should therefore be: can it justifiably be argued that the transferor and the transferee intended a transfer of undertaking in the light of their actions and the content of their agreement? Lack of familiarity with the legal effects will be of no avail to the transferee, nor will a statement that it does not wish to take over all the personnel, since only the (objectifiable) intention to take over the undertaking and its operations is legally relevant.⁹

In the first years after the directive entered into force it was assumed that in any event tangible assets (the second factor referred to above) must have been transferred for a transfer of an undertaking to have taken place. That assumption, based on what I consider a wise postulation,¹⁰ disappeared after the *Schmidt* judgment, in which the Court of Justice ruled as follows on this point: 'The fact that in its case-law the Court

8 Article 1(1)(b) of the directive reads as follows: 'Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive when there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

9 Another argument in favour of a limited interpretation of this provision is that it was intended to codify the case law of the Court of Justice: it was not intended to differ from that case law. To the best of my knowledge, however, the Court of Justice has never issued a ruling in the terms used in Article 1(1)(b) of the directive.

10 Ask any person what associations the term 'undertaking' brings up and they will usually first and primarily mention certain tangible assets. General usage is not by definition a standard for a legal definition, but in my opinion the law should primarily follow general opinion, which is expressed in general usage.

includes the transfer of such assets among the various factors to be taken into account by a national court to enable it, when assessing a complex transaction as a whole, to decide whether an undertaking has in fact been transferred does not support the conclusion that the absence of these factors precludes the existence of a transfer. The safeguarding of employees' rights, which constitutes the subject-matter of the directive, as is clear from its actual title, cannot depend exclusively on consideration of a factor which the Court has in any event already held not to be decisive on its own.¹¹ In sum: the transfer of tangible assets is only one of many factors and, entirely in accordance with the *Spijkers* judgment, that factor should be equal to other factors in terms of its relevance. Nevertheless, that conclusion has proven incorrect.

3. ALL FACTORS ARE EQUAL, BUT SOME ARE MORE EQUAL THAN OTHERS

In some situations, certain factors seem more important – or less important – than others. That is largely due to the first factor mentioned by the Court of Justice: the nature of the undertaking. Relatively many of the cases handled by the Court of Justice (and by the national court) involved a service contract change in the cleaning sector, in which the transferee – whether or not obligated to do so by a collective employment agreement – had taken over ‘a major part of the workforce’.¹² The Court of Justice each time noted that in that sector the workforce rather than the tangible assets is the main production factor. This makes another factor – whether almost all the employees were taken over by the transferee (the fourth factor in the *Spijkers* judgment) – more important; if it is concluded that the undertaking in question consists primarily of personnel and if at least a major part of that personnel is taken over, a transfer of undertaking is likely to be assumed, as a result of which *all* the personnel will pass to the transferee.

In other sectors the workforce is not the main production factor; the tangible assets are more important. In that case the second factor in the *Spijkers* judgment – have tangible assets being transferred? – becomes more important. A good example is the judgment on the Finnish coach

11 Case C-292/92, Judgment of the Court (Fifth Chamber) of 14 April 1994 (*Schmidt*), ECR 1994, page I-1311.

12 By way of example, in addition to the *Schmidt* judgment cited above: the *Temco* (Case C-51/00, Judgment of the Court of 24 January 2002, ECR 2002, page I-00969) and *Süzen* (Case C-13/95, Judgment of the Court of 11 March 1997, ECR 1997, page I-1259) judgments.

companies,¹³ which, briefly stated, related to the question whether the transfer of a transport concession for bus transport in the municipality of Helsinki, without the buses being included in the transfer, had resulted in a transfer of undertaking. The case in question did not involve a transfer of undertaking because the main question was not so much whether the transferee had taken over a major part of the workforce (which it had), but rather whether it had taken over the buses (which it had not). It is apparent, incidentally, from other judgments of the Court of Justice, in particular the *Süzen* judgment,¹⁴ that the transferee need not have taken over all the buses to effect a transfer of undertaking. It suffices that in that situation 'significant tangible assets' were taken over: a fine-tuning of the second factor in the *Spijkers* judgment.

A tentative conclusion that can be drawn from this case law is that the first *Spijkers* factor – the nature of the undertaking – determines what importance must be attached to the transfer of tangible assets. It can be concluded from the *Schmidt* and *Süzen* judgments on the one hand and the judgment on the Finnish bus companies on the other hand that it may be relevant whether the transferred activity in question is or is not labour-intensive. A labour-intensive undertaking can exist without any tangible assets (*Schmidt* and *Süzen* judgments). But if the presence of tangible assets is characteristic of an undertaking by its nature, that undertaking cannot maintain its identity if it is transferred without those assets (or in any event such part of those assets as may be qualified as 'significant'). In other words: in that case no going concern has been transferred. Whereas in the *Schmidt* and *Süzen* cases there could be an undertaking that consists primarily or even exclusively of personnel, the buses were essential in the case of the Finnish bus companies.

The question of the sector in which a transfer takes place is then essential in practice. If the sector can be regarded as labour-intensive, the transfer of a small number of employees will usually not result in a transfer of undertaking. In that case it is important for employee representatives to regulate the corporate takeover as carefully as possible; the consequences for the staff must in any event be carefully regulated. Conversely, the takeover of an insignificant part of the tangible assets in a non-labour intensive sector is an important indicator that no transfer of undertaking has taken place. In that case, in principle, the fact that the transferee has taken over almost all the personnel is of no avail to the per-

13 Case C-172/99, Judgment of the Court (Sixth Chamber) of 25 January 2001 (*Oy Liikenne*), ECR 2001, page I-0745.

14 See e.g. Case C-13/95, Judgment of the Court of 11 March 1997 (*Süzen*), ECR 1997, page I-1259.

sonnel that have not been taken over. The employee representatives have a part to play in this respect also. The distinction between labour-intensive and non-labour intensive is not easy to make, however. In view of the casuistic nature of the available case law, I consider it a pointless exercise to draw up a list of sectors in which the personnel are the main production factor and a list of sectors in which they are not, since the main production factor may be different for each undertaking within a sector. One cleaning company, for instance, might operate on a market where most of the cleaning is done using simple tools, such as a bucket and mop, whereas another might use advanced machines for cleaning swimming pools. In the latter case the personnel are less likely to be deemed the main production factor. Apart from the differences between various undertakings within one and the same sector, it cannot even be established beforehand whether or not some sectors and undertakings are labour-intensive. How should that distinction be made in respect of a garage, a flower exporter or a caterer? With regard to catering, the Court of Justice ruled in November 2003 in respect of the catering activities at a hospital that they did not belong to the labour-intensive sector.¹⁵ The Court of Justice stated that catering required ‘a great deal of equipment’ – in the case in question premises, water, power and kitchen equipment. The transferee had taken over those goods and the Court of Justice concluded that a transfer of undertaking had taken place. The Court of Justice’s approach in the *Abler* judgment, in which it emphasised the transfer of tangible assets, seems very ‘one-dimensional’. The *Abler* judgment was by no means predictable. A line of reasoning is conceivable that could lead to the conclusion that the workforce was indeed the main factor; they had to have special knowledge of diets, for instance. It could be an important factor whether or not the staff had that special knowledge and it may be tempting in general to assume that the employees’ level of training is highly relevant in qualifying an undertaking as labour-intensive or non-labour-intensive: the higher the employees’ level of training, the greater their importance as a production factor – but only on the face of it. In my opinion the high level of training of an airline’s pilots, for instance, is not decisive; I consider the aircraft and slots equally important. Conversely, the relatively low level of training required for most cleaning work does not stand in the way of regarding the workforce as the main production factor, particularly in situations in which relatively few assets are used.

15 Case C-340/01, Judgment of the Court (Sixth Chamber) of 6 November 2003 (*Abler*).

4. THE OVERLOOKED FACTORS

The title of this section is in line with my conclusion that too much emphasis is sometimes placed on the question whether or not a transfer has taken place in a labour-intensive sector. That renders the other factors – whether or not the client base has been transferred, to what extent the undertaking's activities before and after the transfer are the same, and whether those activities have been interrupted – of secondary importance, or in any event it is not apparent from the Court's judgment that it has weighed all the factors; it addresses only the question whether the transferee has taken over a major part of the workforce or important assets. I am of course unfamiliar with the national case law of the other 24 Member States, but my supposition is all the more conclusive if based only on the Court of Justice and Dutch case law.

There are a number of possible reasons why such emphasis is placed on the sector in which the transfer takes place. The first is that many of the judgments passed have related to sectors in which the staff perform their work without a great many assets, such as the cleaning, health care and security sectors. Moreover, service provider changes were involved: the activities of the transferor and the transferee were performed for one and the same customer and those activities (which were exactly the same) were therefore performed at one and the same location.¹⁶ In that case indeed little remains of the *Spijkers* factors other than the question whether or not the transferee has taken over a major part of the workforce. It is not advisable to conclude on that ground that a transfer of undertaking has taken place. But that restriction need not apply to a transfer in a different sector, in which case the other factors in the *Spijkers* judgment become more important. In my opinion, however, it is important not to attribute too much weight to the transfer of a major part of the tangible assets if the workforce is not the main production factor. As the Court of Justice ruled in the *Schmidt* case, the transfer of assets is only one of the relevant factors in the overall assessment to be made by the court.

A second reason could be the following. In the *Süzen* judgment, the Court of Justice concluded that there is no transfer of undertaking if the contractor does not take over *a major part of the workforce, in terms of*

16 If a transfer takes place by means of the customer awarding the contract to the transferor and subsequently withdrawing the contract and granting it to the transferee (*i.e.* in fact in two phases), that does not stand in the way of assuming that a transfer of an undertaking has taken place. The transferor and the transferee need not even have entered into an agreement; see e.g. Case 324/86, Judgment of the Court (Third Chamber) of 10 February 1988 (*Daddy's Dance Hall*), ECR 1988, page 2559.

their numbers and skills that the former employer had engaged specifically for that cleaning contract¹⁷, and no significant assets of that former employer pass to the contractor. Since the *Süzen* judgment, the Court of Justice has always taken the position that in any event no transfer of undertaking has taken place if neither a major part of the workforce nor any significant tangible assets have been taken over. It is up to the court to decide when a 'major part' or 'significant assets' have been taken over. Those two factors in the *Spijkers* judgment have thereby not only been fine-tuned, but have also been given special weight.

5. TAKING OVER PERSONNEL – THE ROLE OF THE TRANSFEREE

As stated above, the fact that the transferee takes over a major part of the workforce is an indication that a transfer of undertaking has taken place; an indication that is particularly important in transfers of undertakings in the labour-intensive sector. A disadvantage inherent in this factor is that it leads to circular reasoning. Moreover, the reasoning that if an undertaking is transferred, its personnel are also transferred, is reversed: if the personnel are transferred (or a major part of the workforce is transferred), the undertaking is transferred, and hence the *entire* workforce is transferred. A transferee that operates in the labour-intensive sector is thereby given a certain power. In order to avoid a transfer of undertaking, a transferee could choose not to take over a major part of the workforce. Employee representatives will of course insist that it should indeed do so.

Generalisations should be avoided. I can imagine situations, for instance, in which the takeover of less than a major part of the workforce within a labour-intensive sector nevertheless gives rise to a transfer of undertaking. The following relatively simple example may clarify my argument. A transferor, Company X, decides to drastically downsize its business, without there being any economic necessity. It incorporates Company Y, in which almost all the operations are continued. It takes over 45 per cent¹⁸ of the personnel from Company X; the other employ-

17 An employee who is employed by the transferor but does not work in the transferred division does not pass to the transferee (Case C-186/83, Judgment of the Court of 7 February 1985 (*Botzen*), ECR 1985, page 0519. The same applies if the employee originally did work in that division but was transferred before the transfer of undertaking, for instance on the grounds of poor performance. For such a case see the decision of the Dutch Supreme Court of 11 February 2005, *JAR* 2005/67.

18 For the sake of convenience I will assume that 'a major part of the workforce' is at least 50 per cent of the personnel; see the *Temco* case, in which the takeover of 42 of the 80 employees constituted a transfer of undertaking.

ees of Company X are dismissed. It could now be argued that, even though the transferee has not taken over a major part of the workforce, a transfer of undertaking has nevertheless taken place. The other factors in the *Spijkers* judgment carry such weight in this case that the takeover of a major part of the workforce is not decisive.

It is conceivable that the transferee is forced to take over all the personnel in a situation that neither the contracting parties nor the employee representatives have foreseen. Some collective employment agreements, for instance, provide that the transferee must hire a certain percentage of the transferor's personnel, possibly subject to certain conditions. This applies to personnel working on a certain contract, a contract the transferor has lost in the context of the service provider change and the transferee has acquired – a situation that regularly occurs in case law, as stated above. If that percentage is equal to or greater than 'a major part of the workforce'¹⁹ and if the transfer takes place in a labour-intensive sector, a transfer of undertaking has almost definitely arisen for the transferee, as a result of which all the personnel will enter into its employment. Whereas the social partners have considered it reasonable in the consultations on collective labour agreements for the transferee not to be landed with all the personnel in the event of a service provider change, case law provides otherwise, on the grounds of the directive. Provisions in collective employment agreements that refer to an obligation to take over e.g. 60 per cent, two-thirds or 75 per cent of the employees act as a trigger, as it were, for the takeover of the entire workforce rather than the specified percentage. The question is whether that obligation to take over the personnel also in the event of a service provider change does not disrupt the market too greatly. The transferee that secured the contract might have been able to operate more cheaply because its wage costs were lower than those of the transferor which lost the contract precisely for that reason. If the transferee is then suddenly obliged to take over the entire workforce, that might prevent it from competing for the contract. Again: in many of these cases the social partners themselves consider it reasonable for the transferee not to take over the entire workforce. Why should Member States be prohibited from providing that this protection may be infringed? Are the trade unions considered too weak? Or should this problem be solved by allowing the dismissal of employees for economic, technical or organisational (ETO) reasons? If so, we will have to know what exactly those reasons are.

19 Cf. the terminology used in the *Süzen* judgment: it is important whether or not the transferee takes over a major part of the workforce, in terms of their numbers and skills, that the former employer specifically assigned to the cleaning contract.

6. ETO REASONS

It is not impossible to dismiss employees in the event of the transfer of an undertaking for a reason related to the transfer. Article 4(1) of the directive provides that dismissal for economic, technical or organisational reasons resulting in a change in the number of jobs are permitted. I referred to those reasons above as 'ETO reasons'. If the employer – who may be either the transferor or the transferee²⁰ – can prove that the employee was dismissed for an ETO reason, the dismissal is valid. It is impossible to indicate beforehand what situations constitute an ETO reason. The Member States have a certain freedom in this respect. Obviously, the closer the date of dismissal to the date of transfer, the more critically the reason stated by the employer must be scrutinised. In my opinion, dismissal by the transferor on the grounds of a reorganisation in order to make the undertaking easier to sell may not be regarded as an ETO reason, since such a dismissal is precisely the focus of the ban on termination in Article 4(1). Acceptance of such collective dismissals by trade unions does not make it any less void. The Court of Justice has ruled on several occasions that the protection that the directive provides relates to public order: employees or their representatives cannot waive its application.²¹

That circumstance alone renders the provision unattractive to many. In my opinion an ETO reason can exist only if the proposed dismissals can be defended on the basis of a situation that exists irrespective of the upcoming transfer. In other words: in answering the question whether or not there is an ETO reason, the dismissal should be assessed as if no transfer of undertaking is involved. This implies, for instance, that the situation at the transferee should not be taken into account in assessing a dismissal at the transferor. It is irrelevant whether or not the transferee has room for the employees who are redundant at the transferor. Moreover, the notion that the transferor may not dismiss employees if the transferee has room for them gives rise to problems of evidence. How can it be proven that the transferor knew at the date at which it dismissed employees for a valid reason that the undertaking would be transferred to the transferee and that the transferee had room for those employees at that time?

If the transferee has too many personnel after the transfer, it should be allowed to dismiss employees despite the fact that such dismissal is

20 Case C-319/94, Judgment of the Court of 12 March 1998 (*Dethier Équipement*), ECR 1998, page I-1061.

21 See e.g. the *Daddy's Dance Hall* judgment.

due to the transfer of the undertaking. In that case the employees are dismissed not only because of the transfer, but also because there are too many employees after the transfer. Such dismissal after the transfer is often not the most desirable option. The transferee will want to be certain before the transfer that it will not be landed with the entire workforce. That certainty can rarely be given, and in the Netherlands such dismissals, if any, therefore usually take place after the transfer. If there have been negotiations between the transferor and the transferee, the resulting costs are taken into account in the takeover price paid for the undertaking. That is rarely the case in service provider changes, however: the party that secured the contract need not even be aware of the existence of the transferor – the party that lost the contract – but may nevertheless be forced to take over its personnel. In that case it will usually try to pass on the costs involved in the takeover (such as severance pay for redundant employees) to its principals. Partly due to the lack of European case law defining the term ‘ETO reasons’, those reasons do not give the parties and their representatives the desired means in the event of a transfer of undertaking of moderating the directive’s disruptive effect on service provider changes.

7. SUGGESTIONS FOR CHANGE

The case law of the Court of Justice is characterised, as has been demonstrated above, by a very broad interpretation of the terms ‘undertaking’ and ‘agreement’. This means that, in principle, all service provider changes may fall within the scope of the directive, even in situations in which neither of the parties wishes all the employees to be taken over. Various measures are conceivable in order to avoid that consequence, or in any event to create clarity for all the parties involved.

7.1. *The British Solution*

To avoid uncertainty for all the parties involved and to do away with the fruitless search for an answer to the question what elements a court might consider relevant in the context of a transfer of an undertaking, the United Kingdom has chosen a rigorous solution: the legislature has opted – for the present – to provide that any service provider change constitutes a transfer of undertaking within the meaning of the directive. The legislature has provided as follows: ‘In most cases, service provision changes fall within the scope of the Directive and of the existing Regulations in any event. In some cases, however, uncertainty arises, leading to unnecessary disputes and litigation. The rationale for the new measure is that it

will reduce such uncertainty in practice by establishing a position in which, in the UK, service provision changes will (...) be comprehensively covered by the legislation. (...) The Government's intention is to ensure a 'level playing field' for contractors bidding for service contracts, so that tendering decisions are taken on commercial merit rather than on differing views as to the employment rights of employees, and so that transaction risks and costs are reduced.' See TUPE Draft Revised Regulations – Public Consultations, March 2005, p. 15.

The British solution has the advantage of providing clarity and thereby legal certainty. But is it also the desired solution? It could be argued that in this context the compulsory takeover of the entire workforce forms part of the normal risk run by traders. That conclusion is correct insofar as the operation of a company is actually taken over within the meaning of company law. In that case the transferee makes a cost-benefit analysis of the undertaking to be taken over and the takeover price is determined e.g. on the basis of past performance and the compulsory takeover of the staff. The same occurs in the case of contracts that run for a long time and are awarded through official invitations to tender. However, where services are contracted out, the award of a contract for a relatively short period is central and in that respect the compulsory takeover of the staff cannot, in my opinion, be regarded as a normal commercial risk.²²

7.2. *The Committee's Solution*

In 1994 already, the European Commission attempted to limit the directive's effect. On 8 September 1994, the European Commission submitted a proposal to amend the directive on the transfer of undertakings.²³ Article(1)(1) reads as follows: 'The transfer of only an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly, does not in itself constitute a transfer within the meaning of the directive.' This would seem to limit the case law of the Court of Justice, but that remains to be seen, since the recitals include: 'Whereas the considerations of legal security and transparency also demand, in the light of the case-law of the Court of Justice, that a clear distinction be made between transfers of undertaking, businesses or parts of businesses and the transfer of only an activity of an undertaking;

²² See also Advocate General Geelhoed in his opinion on the *Temco* judgment.

²³ Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, *OJ EC* 1994, L 274/10 of 1 October 1994. See Appendix III.

whereas cases where the transfer of only an activity is not accompanied by the transfer of an economic entity which retains its identity after the said transfer should be excluded from the scope of the directive.’ The last sentence unfortunately nullifies the intended limitation, since the Court of Justice has stated numerous times – also before this change was proposed - that a simple activity in itself may constitute an economic entity which retains its identity. It was therefore not clear what the Commission had in mind with this addition. Disagreement on that provision was ultimately the reason why the entire proposal was withdrawn on 15 February 1996. The directive that replaced the original (Directive 98/50/EC) contained many of the provisions of the 1994 proposal, but not the aforesaid amendment. The term ‘undertaking’ therefore remained unchanged. I believe that the Commission’s proposal was indeed too vague and too ‘rough’ to serve as a practicable criterion. However, other means of limiting the scope of the directive are conceivable.

7.3. *Two Alternatives*

7.3.1. *A Minimum Number of Relevant Factors*

It might be argued that where there are not enough *Spijkers* factors to take into account, no transfer of undertaking can take place. If there is therefore merely a change in the company that will clean another company’s premises, the fact that the new contractor takes over only a major part of the former contractor’s workforce cannot in itself constitute a transfer of undertaking, since in that case there seems to be only one of the *Spijkers* factors that can be taken into account. The fact that the activities carried out before and after the transfer are the same is indeed also a factor that should be weighed (the sixth *Spijkers* factor), but the existence of this factor is so inherent to any transfer that takes place within one and the same sector that its weight should be ignored entirely, as the Dutch Supreme Court ruled in 2004.²⁴ If this factor were taken into account, an argument would fall into the lap of an employee who wishes to be transferred to the new contractor. Such elimination of certain factors in certain situations is, however, not in keeping with the case law of the Court of Justice, particularly with regard to the takeover of personnel.

24 Hoge Raad 10 December 2004, *JAR* 2005/13.

7.3.2. *Taking Economic Factors into Account*

Advocate General Geelhoed made an interesting proposal in his conclusion on the *Temco* judgment, a case involving the contracting of cleaning work, which deserves more attention. He pointed towards the economic context within which the transfer in question takes place and on that basis arrived at the conclusion that the scope of the directive must be restricted. It is a fact that many companies contract out tasks that do not form part of their core activities to companies specialised in providing ancillary services under contract. Mr Geelhoed mentions cleaning operations, surveillance services, catering activities, customer service, education and training, hardware and software provision, and product development. In reality, the list is much longer. The service providers often operate on a local level and on a small scale, carrying on their activities on the premises of the company awarding the contract. Essentially, particular blocks of economic activities are engaged on these service markets for a specific period. This period can range from one day for the provision of catering at a specific event, for example, to a number of years in the case of cleaning operations. Once the contract expires, the service provider competes again for the favour of the contract awarder who will select a competitor if it offers better conditions and services. In these examples, labour generally constitutes a major cost item. Since the contracts between undertakings contracting out and service providers are usually concluded for a relatively limited period, staffing in this sector is characterised by an appreciable rate of turnover. I mentioned this already when I tried to find a reason for the emphasis on the taking over of personnel.

These situations differ significantly from contracts offered on markets on which there are a relatively limited number of providers and customers, such as the markets in rail transport and radio and television frequencies. On these markets the selection of a particular trader by the contract awarder has a significant influence on the market position of the competitors and the loss of a contract can in itself jeopardise the service provider's continued existence. In the case of the contracting out of cleaning services, for example, a service provider that loses a contract will, generally speaking, go in search of new customers.

I believe there are reasons for the Court to be reticent in regard to the application of the directive in the case of contract changes resulting from a company's wish to outsource 'functions' that it does not wish to carry out itself – whatever the reason. As Mr Geelhoed has already stated, the dynamics of the market might be disrupted if the existence of a transfer within the meaning of the directive were assumed too readily. Again, the obligation to respect the rights of all the members of staff of a company solely on the basis of the takeover of a contract and the takeover of a pro-

portion of existing staff will give a potential new contractor less incentive to pick up the contract. Taking over part of the staff usually implies taking over all the staff, since labour generally constitutes a major cost item and is therefore the most important of the *Spijkers* factors. Undertakings might be deterred from competing for the contract, which leads to the ossification of markets. In this respect, the directive also sits uneasily with Article 94 of the EC Treaty. Considerations relating to the market and competition must be taken into consideration. In a market that is characterised by specialisms, short-term contracts between undertakings contracting out and service providers, and considerable turnover of staff, employee protection might be better served by conventional employment law than by employment protection relating to the takeover of undertakings. This involves letting the social partners sort out how the employees' interests might best be served. One might even argue that the type of undertaking or business – the first factor of the *Spijkers* case – implies in these cases that no undertaking is transferred.

An exception may be made for the situation in which the (service) contract change takes place within a group. If, for instance, the parent company decides that it will no longer take over certain services from subsidiary A but prefers subsidiary B, it should be possible for such a service provision change to result in a transfer of undertaking, since in such a situation employee rights are barely safeguarded and the risk control offered by the group may be used to the employees' detriment. The Netherlands has good experiences with such exceptions. Temporary employment contracts, for instance, which offer employees less protection than ordinary employment contracts, do not apply in a situation in which the temping agency and the hiring party belong to one and the same group.²⁵ In the light of existing case law of the Court of Justice, the above proposal is not really in keeping with the current system. The directive itself should be amended.²⁶

25 Article 7:691(6) of the Dutch Civil Code.

26 For instance by including the following provision: 'The directive does not apply in a situation involving the contracting out (or re-contracting out) or the subsequent insourcing of activities that by their nature can be performed by several service providers and that relate to contractual concessions that by their nature or by contractual agreement are granted for a maximum period of one year. This exception does not apply to intra-group transfers. For the purposes of this Article a group is defined as an economic unit in which legal persons and partnerships are united in one organisation. Group companies are legal entities and partnerships that are united in one group.'

8. CONCLUDING REMARKS

The EU Acquired Rights Directive has greatly improved the legal position of employees in case of a transfer of undertaking. However, the interpretation by the European Court of Justice of particularly the term 'undertaking, business or part of a business' has led to the Directive being – fully – applicable in situations that were not foreseen by its creators. The focus of the Court of Justice on the sector in which a transfer takes place, and the subsequent focus on whether personnel (in labour-intensive sectors) or intangible assets (in non labour-intensive sectors) are transferred, has adverse consequences, especially for the market for outsourcing services, in which basically a mere change of contract occurs. In general, but particularly in that market, more emphasis should be placed on the economic context in which the transfer takes place. A stricter definition of 'undertaking', along the lines of the attempt made in 1994, could prevent the dynamics of the market being disrupted.