The Double Purpose of Dir. 2001/23/EC: Labour Protection and Balancing of Rights

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Sammendrag Directive 2001/23/EC aims to safeguard employees' rights in the event of transfers of undertakings, businesses, or parts of businesses. This Directive is implemented in Norwegian law through Chapter 16 of the Working Environment Act. While the Directive explicitly aims to protect employees during changes of employer, this article explores whether worker protection is its sole purpose. The article delves into the legal basis, origin, and history of the Directive, and considers the implications of the EU Charter of Fundamental Rights on its interpretation. Additionally, the author analyses case law from the European Court of Justice (ECJ), the EFTA Court, and the Norwegian Supreme Court. The conclusion drawn is that the Directive serves a dual purpose: protecting employees and balancing the rights of employers and that this has been acknowledged by the ECJ and the EFTA Court. The author suggests that the Norwegian Supreme Court should also acknowledge this dual purpose, aligning more closely with EU law and ECJ case law.

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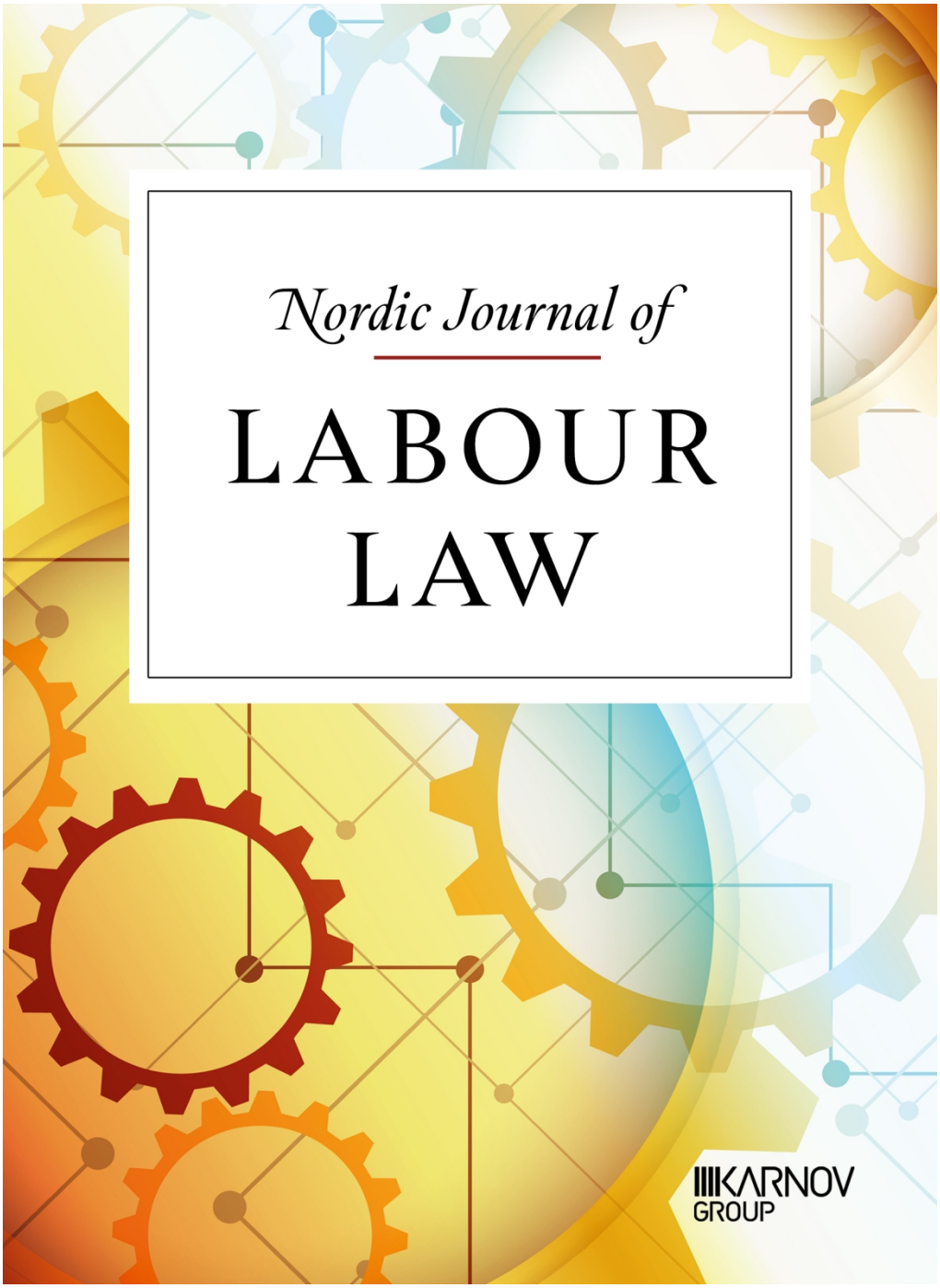

1. Introduction[1]

1.1 Transfer of undertaking – conditions and consequences

Norwegian law contains separate rules on employees' rights in the event of a transfer of an undertaking in Chapter 16 of the Working Environment Act («WEA» or «the Act»).[2] These rules are based on the EU Directive on the transfer of undertakings (the «Directive»),[3] and were implemented in Norwegian law when the EEA Agreement entered into force on 1 January 1994.

> With effect from 1 August 2019, the Ship Labour Act also implemented rules on the transfer of undertakings, which are based on Directive 2001/23/EC.[4] This came as a result of amendments to Directive 2001/23/EC, whereby it was no longer possible to exempt seafarers from the protection provided by the Directive.[5] The Ship Labour Act has thus been given a new Chapter 5A, which is mainly based on the rules in the Working Environment Act.[6]

The concept of a «transfer» within the meaning of WEA section 16-1, is defined as follows:

> «This chapter applies to the transfer of an enterprise or part of an enterprise to another employer. Transfer means the transfer of an independent entity that retains its identity after the transfer.»

According to the wording of the provision, the assessment of whether there is a transfer of an undertaking is based on three conditions: (1) that there exists an independent economic entity, (2) that has been subject to a transfer, and (3) that the distinct identity of the transferred entity is retained after the transfer.[7] This assessment is often referred to as a three-criteria method, to underline that it is not a question of a comprehensive discretionary assessment.[8]

If there is a transfer within the meaning of WEA section 16-1, all the other provisions in Chapter 16 will apply with regard to the safeguarding of the individual employee's rights. On the one hand, there are pure protective rules, such as the prohibition against dismissal (section 16-4) and the requirements for the continuation of pay and working conditions (section 16-2), and on the other hand, there are rules concerning involvement of shop stewards and employees, such as requirements for information and discussion with employees and shop stewards and the requirements for representation (sections 16-5 to 16-7).

1.2 Research question and methodology

In this article I will discuss what purpose is served by the Directive and the subsequent Norwegian implementation of the Directive. As a point of departure, it is obvious that the Directive is adopted to safeguard the employees. This is explicitly stated in the preamble of the Directive, in point (3), which reads:

> «It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.»

The question I am addressing pertains to whether the protection of employees is the sole purpose of the Directive. This enquiry arises from the consistent stance taken by the Norwegian Supreme Court, which emphasises a «purpose-driven interpretation in favour of the employee» when determining if a given situation qualifies as a transfer within the scope of the WEA. Although the Norwegian Supreme Court has not issued many rulings concerning the protection of individual rights in cases involving transfers, there have been some. The Court has consistently highlighted the protective nature of the rules or emphasised their protective intentions when examining the practical implications of these rules. Notably, in the case HR-2020-1339-A *ISS**, the Court deliberated on whether certain wages and working conditions were safeguarded under the provisions outlined in section 16-2 of the WEA. Before delving into the specific factual assessment of the case, the Court emphasised the underlying purpose of the rules. Paragraph (44) of the judgment states:

> «As is clear from the title and preamble of the Directive, the purpose of the Directive is to protect employees when enterprises change ownership, and Article 8 stipulates that the Directive does not prevent states from laying down rules that are more favourable to employees.»

However, considering the legislative history of the Directive and the case law of the European Court of Justice («ECJ»), it becomes apparent that the Directive serves a dual purpose. This dual purpose should apply when determining if a particular situation qualifies as a transfer within the scope of the Directive, as well as when evaluating the effects of such a transfer. The European approach emphasises a balanced interpretation of the rules pertaining to the transfer of business, although it does not seem to have significantly influenced the Norwegian interpretation of these rules.

In this article, I will address two research questions. First, I will examine whether the Norwegian implementation of the rules serves a distinct Norwegian purpose, potentially making it more favourable to employees than the Directive itself. The Directive does allow Member States to enact laws, regulations, or administrative provisions that are more beneficial to employees, as indicated in Article 8, suggesting that a unique Norwegian approach is feasible.

Second, I will explore both the legislative history of the Directive and relevant case law from the ECJ. It appears that there has been a differing evolution in how the conditions and consequences of the Directive have been interpreted. Initially, case law regarding the conditions was quite favourable to employees; however, a significant shift has occurred, culminating in an amended Directive that now emphasises the need to consider employer interests as well. Conversely, there have been no legislative initiatives regarding the consequences. Nonetheless, the ECJ's case law has consistently highlighted the Directive's aim to balance the interests of both employees and employers. Recently, the ECJ has begun to adopt similarly balanced language in its rulings concerning the conditions. Thus, it seems that the evolution of these rules is converging.

I will base my discussion on ordinary Norwegian legal methodology. A particularly important question is how the Norwegian law is to be interpreted, when it is based on the implementation of an EU Directive but enshrined as a separate chapter in the WEA. It is noteworthy that section 1 of the WEA regulates the purposes of the Act, without explicitly mentioning interests or considerations related to the employer, companies, or businesses. The WEA is often described as an Act that has protection of the employee as its main feature. For good order's sake, I would also like to emphasise that I have for many years been employed as a lawyer and subsequently as head of the legal services of the Confederation of Norwegian Enterprises (Næringslivets Hovedorganisasjon, «NHO»).[9] The confederation is Norway's largest employers' association, and I have litigated some of the cases that I am going to discuss in this article. The cases where I have represented the NHO and/ or the employer in question I have marked with this sign: (*), for instance HR-2020-1339-A *ISS**.

In this article, my objective is to delve into the purpose of the Directive, examine the Norwegian implementation of the rules, and assess whether there is a foundation for the Norwegian Supreme Court's assertion that the rules pertaining to the transfer of undertakings solely revolve around employee protection. By analyzing the legislative framework and relevant case law, I aim to shed light on the broader objectives and implications of these rules beyond purely safeguarding employee interests.

1.3 Structure of this article

To address the research questions I have outlined above, I will begin by providing a concise introduction to the legal basis, origin, and history of the Directive. I will also contextualise it with the adoption of the EU Charter of Fundamental Rights in Chapter 2. Subsequently, I will shift the perspective to Norwegian law and summarise the various stages of implementing the Directive into Norwegian legislation in Chapter 3. In Chapter 4, I will delve into the evolution of the concept of transfer and demonstrate the reciprocal influence between case law and legislature. Chapter 5 will primarily focus on the rules that safeguard the rights of employees. Its main objective is to analyse the case law of the ECJ and highlight key instances where the purpose of these regulations has been explicitly defined. Lastly, in Chapter 6, I will consolidate my findings and provide a comprehensive summary of the research conducted so far.

2. Directive on the transfer of undertakings

2.1 Introduction

The Directive on the Transfer of Undertakings has gradually reached maturity. From the adoption in 1977,[10] via adjustment and clarification in 1998,[11] to a consolidated version in 2001,[12] 48 years have passed. In other words, the Directive is in its prime.

There is no doubt that the Directive has employee protection as a key purpose. The protection of workers, enshrined in the Directive, can be categorised into the following groups:

- *First,* through the very conditions under which a transaction can be characterised as a «transfer of undertakings» within the meaning of the Directive. These are the three criteria mentioned above, namely that there must be an independent economic entity that has been the subject of a transfer and that has retained its identity.
- *Second,* there are detailed regulations addressing the safeguard of the individual employees being subject to a transfer of an undertaking. Here we have, among other things, rules on automatic continuation of employment, regulation of pay and working conditions, joint and several liability for old and new

employers, etc. On this point, there is no harmonisation of the rules on an EU-level. The Directive only requires that the national rules that specify the level of protection in the member state must also apply in the event of a transfer of an undertaking.

- *Third,* there are the rules on information and consultation for union representatives and employees. The Directive sets out requirements for information and discussion prior to a transfer of an undertaking.

It is also important to point out that the Directive is a minimum directive that is only based on partial harmonisation. This is evident from paragraph 1 of the preamble, which emphasises that it is a question of «approximation», i.e. an approximation of legislation. The Directive thus sets a minimum target for what the member states must implement, while at the same time the member states have the opportunity to do more. It is expressly stated in Article 8 of the Directive that the Directive may be departed from in favour of the employee. Furthermore, there are no equal substantive protection rules in the EU/EEA for the safeguarding of individual rights after a transfer. In other words, the Directive ensures that the employee has the same level of protection against the new employer as he had against the old employer. The fact that there is a transfer of business should not add anything – but neither should it detract anything.

This latter is particularly relevant to the issue I will be discussing in this article. My question is whether employee protection is the sole or dominant purpose of the Directive, or whether there are other purposes that are relevant as well.

The interpretation of EU directives is not quite like the interpretation of other Norwegian sources of law.[13] *Arnesen et al*. bluntly states that «Norwegian legal methodology is not viable for interpreting EEA rules».[14] *Bergo* correctly points out that 30 years' import of EU law «has dramatically changed the relevant Norwegian sources of law».[15] The Supreme Court itself has pointed out that when interpreting rules that originate in EU/EEA law, the rules must apply in accordance with the Directive, as interpreted by the European Court of Justice and the EFTA Court.[16] Three particular points are important to highlight here. First, that directives must be interpreted on a purpose-based basis. The wording is important, but it must be read in the context of the purpose and prehistory. Second, the judgments of the European Court of Justice are of great importance for the interpretation of directives. Third, the EU cooperation is dynamic in nature. As mentioned, the consolidated directive was adopted in 2001, but the EU has since developed and deepened its cooperation through the adoption of new treaties. The EU Charter of Fundamental Rights adopted in 2009 is particularly important in this context.[17]

2.2 Legal basis, origin and history of the Directive

For the Directive on the Transfer of Undertakings, it follows directly from the preamble that employee protection is its central purpose, cf. paragraph 3 of the preamble. It states:

> «(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.»

Although it is not as clear from the preamble that other purposes are relevant as well, it is nevertheless clear enough. The first indication can be found in the legal basis of the Directive. The second in the Directive's regulatory history.

As regards legal basis, an important starting point is that the EU – or EC as it was called at the time – was an economic cooperation. The Directive is based on – or has been adopted on the basis of – provisions that are intended to realise the internal market. The provision in question in this article is Article 115 TFEU, which refers to the then Article 94 TEC. The provision states:

> «Article 115 (ex Article 94 TEC)
>
> Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.»[18]

When the Directive was adopted in 1977, there was no competence for the Commission to propose labour law legislation. If the Directive had been adopted today, it would presumably have been adopted on the basis of

Title X of the TFEU on social policy. However, the legal basis is naturally important when a directive is to be interpreted.

The purpose of the Directive is thus to achieve the completion of the internal market. The internal market – i.e. the right to free movement of goods, services, capital, and persons – was to be realised by means of, among other things, the Directive. Or as *Bob Hepple* put it in an article from 1987:

> «.. the faith of the founders in the economic functioning of the Common Market as the automatic guarantee of improvements in living and working conditions. Approximation of municipal laws was described as an objective but only to the extent necessary to the functioning of the activities of the Common Market.»[19]

Catherine Barnard echoes this perception in 2012, when summing up the legislative history of the Social Action Program from the 1970s, which included the Directive:

> «Since these Directives were drafted to facilitate the restructuring of enterprise with a view to make them more competitive and efficient, they did not question the managerial prerogative either to undertake the restructuring or to dismiss employees. Instead, the Directives aimed to address the social consequences of these managerial decisions and mitigate their effects.»[20]

As regards the history of the legislation, I have pointed out above the three interventions from the EU legislator: the adoption of the directive in 1977, the revision in 1998 and the consolidation in 2001. All three of these steps are significant in terms of understanding the purpose of the Directive. The history can be read from points 6 to 8 of the preamble. It appears that the Directive was established to facilitate harmonisation of national rules on employee protection, that the Directive was amended in 1998 to take account of national legislation aimed at rescuing companies in financial difficulty, and that the provisions were amended to take account of the case law of the ECJ. Finally, the last sentence of paragraph 8 of the preamble states:

> «(8)... Such clarification has not altered the scope of Directive 77/187/EEC as interpreted by the [European] Court of Justice.»

The Directive thus has – still – a legal basis in the internal market.

2.3 The importance of the EU Charter of Fundamental Rights when interpreting directives

From 1 December 2009, the EU's Charter of Fundamental Rights («the Charter») came into force in the EU. The Charter is a mixture of human rights, freedoms and principles.[21] Since the Charter is legally binding as primary law in the same way as the other treaties in the EU, cf. Article 6 TFEU, the rights in the Charter will be an important factor when interpreting directives.

However, the Charter is not part of the EEA Agreement. A right that is enshrined in the Charter – which does not necessarily have its natural counterpart in Norwegian legislation in general – is the freedom to conduct a business. Article 16 of the Charter states:

> «The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.»

The freedom to conduct a business – or freedom to establish and run a business – if you like – has a central place in labour law. By virtue of the managerial prerogative, the employer has the right to organise, manage, control and distribute the work, as is often expressed in case law and legal literature.[22] The right of the employer to decide whether he or she wants a collective agreement – or what pay and working conditions should apply in the company – falls within the scope of the managerial prerogative. But the managerial prerogative is not absolute according to Norwegian law. The employer can, among other things, be met with a demand for a collective agreement from a trade union, which can be followed up using collective action.

Nor is the freedom to conduct business according to Article 16 of the Charter an absolute right. However, since EU law has enshrined the freedom to conduct a business as a principle – and such a corresponding principle does not follow from EEA law – a situation may arise where the ECJ, when interpreting directives that are relevant to the EEA, such as the Directive on the transfer of undertakings, takes into account the freedom to conduct a business, as they did in *Alemo-Herron,*[23] which I will return to below.

> The question is then what significance such a judgment will have when interpreted in an EEA law context. This is a complex and partly controversial question, which I will not explore in detail here. In a summary of the discussion, Fredriksen and Mathiesen point out that this question of the significance of the Charter when interpreting EEA law cannot be answered in general, while at the same time arguing that the principle of homogeneity strongly suggests that the protection of fundamental rights cannot be weaker in the EEA than in the EU.[24]

However, this question was raised in a case before the EFTA Court in 2014,[25] where the question was whether the Directive should be read in light of Article 16 of Charter. The EFTA Court did not directly base its judgment on the Charter, but stated in paragraph (64):

> «The Court finds no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices.»

The fundamental point for the EFTA Court seems to be that the EEA Agreement has created a market – the Agreement has linked the EEA countries to the EU countries and vice versa. The basic contents of this market are the free movement of goods, services, capital and people, a general prohibition of discrimination, common competition rules, common state aid rules, and common procurement rules. Although the freedom to conduct a business is not expressly enshrined as such in the EEA Agreement, the freedom to conduct a business is a cornerstone of the entire agreement.

As mentioned above, the «freedom to conduct a business» as formulated in the Charter does not have a natural counterpart in Norwegian legislation. However, it is worth mentioning that Article 101 of the Norwegian Constitution from 1814 to 2014 read as follows: «New and permanent restrictions on the freedom of trade should not be allowed to anyone for the future» (my interpretation). According to its wording, the provision was an expression of a principle, which can be said to have a certain affinity with the basic principles of EU law.[26] When the provision was adopted in 1814, there were significant discussions among the founding fathers, especially in relation to the existing business privileges (licenses, permits and etc.). The final wording of the provision only applied to future restrictions and the provision has not been applied in any noticeable cases.[27] When revising the Constitution in 2014 – in connection with the 200th anniversary of the Constitution – the preparatory committee (the «Lønning Committee») assumed that the provision was superfluous, because it proposed to establish a general principle of equality in the Constitution.[28] The principle of equality was already enshrined in the Constitution in Section 98. However, the Lønning Committee did not wish to completely abolish the reference to industry and proposed that section 110 be clarified so that it expressly covered commercial activity. According to Section 110 of the Constitution, it is currently stated that the authorities shall facilitate the conditions for «every person capable of working to earn a living through work or business» (my interpretation). This provision does not imply any unrestricted right to conduct business as he or she sees fit, but a duty for the authorities to enable everyone to earn an income through work in their own business. How the facilitation is to take place, including the conditions to be set for the exercise of the business, is left to political decision-making processes.[29]

3. Transposition of the Directive into Norwegian Law

3.1 A chapter of its own; Chapter 16 of the Working Environment Act

The Norwegian implementation of the Directive is reflected in Chapter 16 of the WEA. Given that these provisions are integrated into the WEA, one might assume that the interpretation of these rules should be guided by the purpose of the Act, as articulated in section 1-1. The Act aims to safeguard and promote various commendable objectives, but consideration for companies or businesses is not explicitly mentioned as one of the stated purposes. Therefore, it can be argued that the emphasis of the Act lies primarily in protecting and promoting the interests of employees, rather than accommodating the concerns of companies or businesses.

However, it is reason to mention that when the centre-right Bondevik IIgovernment submitted a proposal for a (new) Working Environment Act in 2005, a purpose clause was proposed that would contribute to an inclusive

working life that in the best possible way would safeguard «the needs of employees, businesses and society.»[30] In the proposition, the Government advocated for flexibility and adaptability in a constantly changing working life and society «naturally [must] be taken into account.»[31] The law was adopted by the Parliament before the general election in 2005, but was subject to reversal by the subsequent red-green Stoltenberg II government. In its reversal bill, the new Government argued that the purpose clause represented something «fundamentally new», since it emphasised consideration for the businesses and society as part of the Act's stated purpose. The Stoltenberg II government therefore proposed that this new purpose be removed from the law.[32] Thus, the current law does not have consideration for the employer or businesses as one of its explicitly mentioned purposes.

On the other hand, case law has assumed that consideration for the employer's interests is relevant in the interpretation of the WEA. In HR-2021-2554-A *Aker Solutions**, the Supreme Court stated this explicitly. The case concerned a procedural issue relating to the start date for calculating the time limit for filing a lawsuit in the event of a transfer of business. In establishing the rule, the Supreme Court referred to the purpose of the WEA being to ensure safe employment conditions and equal treatment in working life. However, the Supreme Court also said the following in paragraph (63):

> «At the same time, it must be taken into account that the employer's interests are also relevant in the interpretation of the Working Environment Act.»

However, the rules on the transfer of undertakings should not be interpreted in the light of the general-purpose provision of the WEA – regardless of the factors that are relevant therein. The Supreme Court has repeatedly stated that the rules in Chapter 16 of the WEA must be interpreted «in accordance with the Directive, as interpreted by the European Court of Justice and the EFTA Court», cf. e.g. HR-2017-2277-A *Aleris* para. 42. It is thus the purpose of the Directive – regardless of the purpose of the Act – that governs the interpretation.[33]

3.2 The slogan of 1994: we do what we have to do

One crucial aspect that needs further examination is whether Norway has implemented more favourable rules than those outlined in the Directive. It is important to note that the Directive is a minimum requirement directive, which allows Member States to adopt additional worker-friendly regulations. If Norway has indeed established more advantageous rules in this regard, it would imply that we are operating beyond the scope of the Directive. Consequently, the general-purpose provision of the WEA would apply instead.

This highlights the significance of assessing whether Norway has introduced any provisions that surpass the minimum requirements of the Directive, which would consequently shape the interpretation and application of the rules on the transfer of undertakings.

When the Directive was implemented into Norwegian law in 1994, the slogan from the legislator was that we should do what we had to do to be in compliance with EU law.[34] Norway chose to implement the minimum protection required under the Directive and thus only to make the changes to Norwegian law that were necessary to meet the requirements that followed from the Directive. The preparatory works state:

> «In some respects, the Directive provides better protection of employees in the event of transfers of undertakings than current Norwegian law. The Directive has several rules that do not exist in Norway. It also has a more extensive scope of application; in that it applies in more transfer situations than the current Norwegian rules. The Directive is also of general application to working life. To bring Norwegian law into line with EC law in this area, adaptations are necessary. These are discussed in more detail below.
>
> The aim of the bill is to make the changes to Norwegian law that are necessary to ensure that the requirements of the Directive are met in Norwegian law.»[35]

3.3 The slogan of 2005: we still do what we have to do, with a few exceptions

When the Working Environment Act of 2005 was introduced, the guiding principle was still to maintain consistency between EU law and Norwegian law.[36] As mentioned previously, the proposition presented by the centre-right Bondevik II Government discussed the possibility of including a separate purpose clause

specifically related to the rules on the transfer of undertakings. However, this proposition was ultimately rejected.[37]

In a few areas, however, Norwegian law has better rights than what follows from the minimum level of rules under the EU Directive. Although a comprehensive examination of the Norwegian additional protections is beyond the scope of this article, it is essential to provide a brief overview of these rules.

One of the areas where Norwegian law provides additional protection is the non-statutory right to maintain employment with the transferor, commonly known as «valgrett» in Norwegian. The starting point is that the employee has the right to refuse to be transferred to the new employer, cf. section 16-3 of the Act. This right to refuse to be employed by the new employer does not follow from the wording of the Directive, but from the case law of the ECJ.[38]

An important question that arises when an employee exercises their right to refuse transfer is whether they still have the right to maintain their employment relationship with the transferor, i.e., their old employer. Conceptually, it may be challenging to understand such a right, as the purpose of the rules on the transfer of undertakings is to transfer the employment relationship to a new employer. In many cases, there might not be a physical workplace or entity remaining with the old employer for the employee to retain their employment.

The right to maintain the employment with the transferor has been the subject of several decisions by the Norwegian Supreme Court,[39] and the legislator has considered the legislate the right on several occasions.[40] In the most recent judgment from the Supreme Court, the conditions for exercising the right to maintain the employment relationship are defined in paragraph (43). Here it is stated:

> «... the legislators have decided to continue to rely on the case law as regards the right to maintain the employment relationship. Thus, a discretionary assessment must be made of whether the employee has the right to maintain the employment relationship, and several factors may be of importance. The necessity of restructuring in the business sector has led to the continuation of the case law based special rule, rather than a general principle enshrined in law.» (My interpretation).

The point in this context is that the right to maintain the employment relationship and the conditions for this right must be determined according to the ordinary Norwegian legal methodology. EU law is not relevant for determining whether or not a right exists for maintaining the employment.

Second, there is the so-called *pension exemption* in section 16-2 (3) of the WEA. Here, the Norwegian legislator has provided more favourable rules than what follows from the Directive. In HR-2021-61-A *Læringsverkstedet,* the Supreme Court found that the Norwegian rules expressly deviated from the Directive and that in such cases the general Norwegian legal methodology had to be applied. In paragraph (33), the Supreme Court expressly states that:

«In its argument, Læringsverkstedet has referred to the European Court of Justice's case law on Directive 2001/23/EC. However, when the law expressly deviates from the scheme in the Directive, I cannot see that this practice is relevant to our case.»

3.4 Summary: We still follow EU law, with a few notable exceptions

The first research question I raised was whether the Norwegian implementation of the rules served a distinct Norwegian purpose of worker's protection, or whether the Norwegian implementation of the Directive should be in line with the minimum requirements of EU law.

My examination above demonstrates that the situation in Norway – with regard to the overwhelming majority of rules on transfer of undertakings – complies with the minimum requirements of EU law. Both the legislator and the Supreme Court have repeatedly established that in this area there must be harmony and consistency between Norwegian law and EU law. When this is the situation, it is of great interest to examine more closely what follows from EU law, with regard to the purpose of the Directive.

The only areas where there are more favourable rules as regards transfer of business, are connected to maintaining the working relationship with the old employer, and when it comes to the scope of the pension exemption. When it comes to these two issues, a normal Norwegian – non-EU – perspective must be adopted when interpreting the rules.

4. The concept of «transfer» – Legislation and Case law of the Court of justice of the European Union

4.1 Introduction

As mentioned above, the assessment of whether there is a transfer of an undertaking depends on three conditions: (1) that there exists an independent economic entity, (2) that has been subject to a transfer, and (3) that the distinct identity of the transferred entity is retained after the transfer.[41]

The ECJ and the EFTA Court have handled numerous cases addressing the question of whether a particular situation constitutes a transfer within the scope of the Directive. Initially, the ECJ adopted a broad interpretation of the rules, particularly with regard to the criterion of an independent entity, making it relatively easy to establish the existence of a transfer of an undertaking. This approach received criticism, leading the ECJ to gradually adopt a stricter interpretation of the criterion.

In response to these legal developments, the EU legislator amended the Directive in 1998, incorporating a more stringent definition of a «transfer» that was based on the case law of the ECJ. However, it is important to note that legal evolution has not ceased with the introduction of the amending Directive. The interpretation and application of the rules on the transfer of undertakings continue to evolve through ongoing case law and legal developments. As such, it is crucial to consider the most recent interpretations and judgments from the ECJ and EFTA Court, when analysing the purpose and scope of the Directive.

In subsequent judgments, the ECJ has indeed underscored that consideration for the employer is also encompassed by the purposes of the rules on the transfer of undertakings. The Court now employs similar language with regard to the objective of the rules, emphasising both the safeguarding of employees' rights after a transfer and the recognition of the interests of the employer. This recognition of the employer's interests signifies a more balanced approach, acknowledging that the rules should not be unduly burden or disadvantage the employer involved in the transfer of an undertaking. By acknowledging the multifaceted objectives of the rules, the ECJ aims to strike a fair balance between protecting employees' rights and considering the legitimate interests of the employer.

4.2 The formative years: from Schmidt (1992) to Süzen (1997) and subsequent amendment to the wording of the Directive (1998)

It is often said that Christel Schmidt is Europe's most famous cleaner.[42] In any case, the case where she figured attracted a great deal of attention[43] and eventually led to an amendment or clarification of the Directive.

Schmidt was employed as a cleaner in a German bank, and she was the only cleaner in the bank. The bank decided to outsource the cleaning work to a cleaning company. The cleaning company awarded the contract had the necessary equipment to conduct the cleaning tasks independently, meaning that no equipment or assets were transferred from the bank. Essentially, the only aspect «transferred» was the actual work or cleaning tasks. Schmidt was offered employment by the cleaning company; however, the terms of the employment were less favourable than those of her previous employment with the bank.

The question before the ECJ was whether the transfer of work or cleaning tasks was sufficient for there to be a transfer of an undertaking within the meaning of the Directive. The ECJ answered in the affirmative, stating in its conclusion that there was a transfer when:

> «.. an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee.»

In other words: the fact that the tasks themselves were transferred from one employer to another employer was sufficient for there to be a transfer of business. This interpretation, which focused on the transfer of tasks or activities rather than assets, was met with controversy and criticism. Critics argued that this interpretation set minimal requirements for what qualifies as a transfer of a business.[44]

The ECJ was probably not indifferent to the criticism. Over the years the ECJ changed course through several subsequent judgments,[45] but the ultimate change came with the Grand Chamber decision in *Süzen* in 1998.[46] In this judgment, the ECJ ruled, among other things, that it is a requirement that there to exist an independent economic entity on the part of the divesting enterprise. In other words, it had to be an organised entity of persons and assets that would make it possible to carry out economic activities with an independent purpose.[47] It was also expressly stated that the fact that the activity was the same before and after the transfer was not sufficient for there to be a transfer of business.[48] Similarly, the Court expressed the view that the loss of a contract to a competitor was also not sufficient to constitute a «transfer» within the Directive.[49]

Thus, the judgment establishes a distinction between an activity, on the one hand, and an independent economic unit, on the other hand. An activity is, for example, an assignment, a contract or a work task, while an economic activity is the resources the employer possesses in the form of labour and/or assets to perform the work task.

This changed approach to the conditions for constituting a transfer of business was also confirmed by the legislator in the amending of the Directive in 1998.[50] Article 1 (1) (b) of the Directive was then supplemented as follows:

> «... there is a transfer within the meaning of this Directive where 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.»

The amendment was also implemented in Norwegian law in section 16-1 of the WEA, which was supplemented with the following sentence:

> «Transfer means the transfer of an independent entity that retains its identity after the transfer».[51]

4.3 The European Court of Justice follows up – balancing employee protection and freedom of business

The legal development on the concept of a transfer has not come to a halt with the amended Directive. In recent case law, the ECJ has underlined that consideration for the employer is among the purposes of the rules.

The case in question concerned a project manager who was employed by ISS and who was responsible for maintenance and cleaning at some municipal buildings.[52] The contract with the municipality was divided into three separate parts and the project manager was overseeing all of them. However, when ISS lost the tender for the contract, two of the three parts were awarded to Atalian (representing 85% of the position), while one part was awarded to Cleaning Masters (representing 15% of the position).[53] ISS believed that there had been a transfer of business to Atalian, since they obtained the majority of the contract's scope. However, the employee in question objected to this interpretation.

The issue before the ECJ in this case was whether it was possible to transfer one full-time position with the transferor to two different acquirers and thus create two (or more) part-time positions. The question at hand raises concerns about the possibility of splitting a full-time position among multiple employers following a transfer of business.

The ECJ first noted that the wording of article 3 (1) does not in principle appear to take into account a situation where there were several acquirers.[54] The Court then pointed out that the purpose of the Directive was to protect the employee in cases of change of employer, while at the same time the Directive could not be invoked to improve pay and working conditions or other working conditions.[55] The improvement the Court seems to point to here is that in that case it is a question of transferring an entire position, but only a proportion of the work tasks. [56]

Then comes a sentence that is now well known from the Court's practice as regards cases concerning the safeguarding of employees' rights, cf. chapter 5 below. In paragraph (26), the Court states:

> «In addition, it must be stated that although, in accordance with the objective of that directive, the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his business, cannot be disregarded (see, to that effect, judgment of 9 March 2006, Werhof, C499/04, EU:C:2006:168, paragraph 31). Directive 2001/23 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those

> employees, on the one hand, and those of the transferee, on the other (see, to that effect, judgment of 18 July 2013, Alemo-Herron and Others, C-426/11, EU:C:2013:521, paragraph 25).»

This statement was probably in reality aimed at ISS's claim that the employment relationship should be transferred to Atalian, which thus represented the main parts of the position. The ECJ therefore held that an enterprise could, in principle, be transferred from one transferor to one or more acquirers.[57]

A transfer of employment to two acquirers can be complicated for the employee as well. It is not necessarily an advantage because the employee would then have to deal with two new employers. The ECJ therefore added that the national court had to assess the practical implications of this fragmentation of the employment contract, and whether it was consistent with the employee objective on which the Directive is also based.[58] The Court therefore suggested that the employee might be able to invoke the provision in article 4 (1) of the Directive as a basis for a claim against the transferors.[59]

The provision pointed out by the Court has been implemented in section 16-4 (2) of the WEA. It states that in cases where the employment relationship is terminated because the change of employer has resulted in «significant changes in the terms of employment to the detriment of the employee», the termination shall be regarded as a consequence of the employer's circumstances. Such a provision is not easily placed in general Norwegian rules on job protection.

The starting point must be that the employee can resign from his or her position due to significantly worsened conditions, and demand that the dismissal is unfair to the acquirer. Such a rule raises many procedural and substantive questions under Norwegian law, which I will not pursue further here.[60]

5. The rules safeguarding the rights of the employees – case law of the European Court of Justice

5.1 Long-term and consistent line in case law

The European Court of Justice and the EFTA Court have considered a number of cases concerning the Directive. In the cases concerning the rules safeguarding the employees' rights, there is a consistent and long-standing line that the purpose of the Directive is twofold. Employee protection is central, but one cannot ignore the employer's interests.

There are six judgments relevant to further investigation. Three of the judgments concern the importance of so-called dynamic referral clauses in individual employment contracts, two judgments concern the so-called continued effect of a collective agreement, while the most recent judgment concerns the importance of seniority as a basis for calculating severance pay. The judgments can be analysed chronologically or thematically. I have found that it is appropriate to carry out the analysis thematically, because it highlights nuances in the balancing of rights.

Below, I will start with a review of the trilogy of dynamic referral clauses, before moving on to the duo on the collective agreement's continued effect. Finally, there is the case about seniority as a basis for calculating severance pay. Taken together, the judgments constitute a hexagon – where the ECJ gives instructions on how the purpose influences the interpretation of the rules in the Directive.

5.2 The Trilogy of Dynamic Referral Clauses (Werhof, Alemo Herron, and Asklepios)[61]

5.2.1 Introduction

By dynamic reference clauses, I am referring to provisions in individual employment contracts which typically state that a condition shall be in accordance with «the collective agreement in force at any given time», or similar. This is a fairly typical employment contract mechanism, which means that you do not have to update the individual employment contract every time new collective agreements are concluded or revised. In

Norwegian law, collective agreements typically apply for two years at a time, so such a dynamic referral clause is both an effective and unbureaucratic way of regulating wage and other working conditions.

The question in this context is to what extent the new employer will be bound by such a dynamic referral clause after a transfer of business. In other words: when a collective agreement is renegotiated after the transfer – will the new employer be bound by the new negotiation result? This issue has been the subject of a trilogy of judgments from the ECJ.

5.2.2 Werhof – balancing between worker protection and the negative freedom of association

The starting point can be taken in *the Werhof* case from 2006,[62] which concerned a dynamic referral clause in an individual employment contract. The employment relationship was transferred from an employer who was bound by an organizational collective agreement to an employer who was not a member of any employers' association and was not bound by any collective agreement. The question in the case was whether changes to the collective agreement – after the transfer had taken place – should have an impact on the interpretation of the individual contract. The submission was that the new employer had to respect changes in a collective agreement to which he himself was not a party.

The ECJ rejected such an interpretation of Article 3 (1) of the Directive. The ECJ highlighted two fundamental considerations that spoke against such an interpretation. First, the Court referred to the consideration of the employer against such a dynamic interpretation. In paragraph (31), the Court stated that the purpose of the Directive was to protect employees, but that the interests of the acquiring employer, who had to be able to make such changes and adaptations as were necessary to be able to continue their business, could not be disregarded. In the ECJ's own words:

«In addition, although in accordance with the objective of the Directive the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his operations, cannot be disregarded.»

In other words: the ECJ emphasised that the interpretation of the Directive does not only have the protection of the employee as a relevant consideration, but also the consideration of the employer. However, the Court's expression in this judgment from 2006 is more reserved about how weighty the consideration for the employer is, than it will be later in 2013, cf. just below. However, in my opinion, there is no doubt that the Court's opinion is closely in line with the legal basis and history of the Directive.

However, there was another weighty employer consideration that prevailed in the case, and which spoke against a dynamic interpretation of the referral provision. In paragraph (33), the Court pointed out that the employer's freedom of association – in this context the negative freedom of association, the right to remain outside an organised employers' organisation – was a fundamental right under Article 11 of the European Convention of Human Rights (ECHR). And the rights enshrined in the ECHR is also constituted fundamental rights under EU law.

If the acquiring employer were to be bound by future amendments to a collective agreement (that is, a dynamic interpretation), the ECJ assumed that the negative freedom of association would be violated, cf. paragraph (34). On the other hand, a static interpretation of the clause – i.e. that only the rights that applied at the time of the transfer of the undertaking were transferred to the new employer – would not infringe the negative freedom of association.

5.2.3 Alemo Herron – balancing worker protection and freedom of enterprise

The next judgment is *Alemo Herron* from 2013.[63] This case, too, concerned a dynamic referral clause in an individual employment contract. The facts of this case concerned the transfer of an enterprise from the public sector to the private sector. The ECJ assumed that the transfer from the public sector to the private sector would require major changes and adjustments in pay and working conditions.[64]

In this judgment, the description of the objectives of the Directive is somewhat more elaborate than in *Werhof*. The Court expressly states that the Directive does not only have employee protection as its purpose, but that the

Directive seeks to create a «fair balance» between employee protection and consideration for the acquiring employer. The consideration for the acquiring employer concerns the possibility of making adjustments and changes to salary and working conditions that are necessary to continue the business. The key paragraph is paragraph (25), which states:

> «However, Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, Werhof, paragraph 31).»

In paragraph (28), the ECJ assumes that a dynamic interpretation of a reference clause that refers to a collective agreement adapted to the public sector will considerably limit the room for manoeuvre for a private employer to make adjustments and amendments. The fact that the room for manoeuvre is so limited could undermine the consideration of «fair balance».[65] So far, the judgment is in line with *Werhof*, although the consideration of fair balance is more clearly communicated than in *Werhof*.

As mentioned above, consideration for the negative freedom of association was central to *Werhof*. This consideration was not a relevant issue in *Alemo Herron,*[66] since the national court had expressly pointed out that there was no question of negative freedom of association in its reference.

However, the ECJ pointed out that there were also other fundamental rights in the Charter that were relevant to consider when interpretating the Directive. In particular, the ECJ pointed out that the right to continue to observe the terms and conditions of a collective agreement after transfer of an undertaking (Article 3 of the Directive) had to be considered in accordance with «the freedom to conduct a business», cf. Article 16 of the Charter.[67]

What does the freedom to conduct business mean in relation to the duty to continue to observe the terms and conditions of a collective agreement after a transfer? The Court elaborated on this in paragraph (33). It states that if the acquiring employer's freedom of business is to be respected, it is a prerequisite that the employer can assert its interests in a negotiation process on future pay and working conditions, which are important for the employer's future economic activity. An obvious starting point in this respect is that the employer itself must be a participant or at least represented in this negotiation process. In plain English the Court stated:

> «In the light of Article 3 of Directive 2001/23, it is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.»

In other words: the Directive does not provide any perpetual protection for pay and working conditions. After the transfer, the new employer must also be able to make changes to salary and working conditions that were transferred because of the transfer.

As regards the specific circumstances in *Alemo-Herron*, they are discussed in more detail in paragraphs (34) and (35). The ECJ first points out that the acquiring employer could not be or participate in the negotiations on the new collective agreement in the public sector. This situation is quite similar to industrial relations in Norway. If an enterprise is spun off from the state or municipality to a private actor, the (then) private enterprise cannot participate in the wage settlement process in the state or municipality in the next round. In such a situation – the ECJ says – the new employer can neither assert its interests in the negotiation process, nor negotiate the pay and working conditions for its own employees that are important for the company's future economic activity.[68] Such a situation restricts the new employer's freedom of contract to such an extent that it affects the very essence of the freedom to conduct business.[69]

In other words: employee protection does not go so far that it can interfere with the very essence of the freedom to conduct business. It is therefore a question of balancing two competing interests. In summary, the ECJ states in paragraph (36):

> «Article 3 of Directive 2001/23, read in conjunction with Article 8 of that directive, cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business (see, by analogy, Case C-544/10 Deutsches Weintor [2012] ECR, paragraphs 54 and 58).»

This judgment has met with quite strong criticism in legal literature – I think we can even say insurrection, especially from academics who work with employment law – but also from others.[70] Other authors have argued that the ECJ has taken into account the criticism that has previously been raised that the Court has been too one-sidedly focused on employee protection.[71] I will not give a detailed account of the criticism and discussion here. For the purposes of this article, it is sufficient to point out that the ECJ has not deviated from the line that started with *Werhof*, which continued with *Alemo-Herron* and which still applies.

5.2.4 Asklepios – balancing worker protection and freedom of enterprise

The most recent judgment in the trilogy is *Asklepios* from 2017, where the ECJ's starting point is that the Directive only protects rights and obligations that exist on the day of the transfer of business.[72] The question then arises as to how EU law should deal with a dynamic referral clause. Such a clause is based on the premise that the normative content of the employment contract – typically the salary – must be adjusted at regular intervals in line with an external norm – typically a collective agreement. Is it then the case that a dynamic referral clause is transformed into a static clause in the event of a business transfer, or does the new employer remain bound by the dynamic clause – and thus also by subsequent adjustments?

It is a general principle of contract law that agreements that the parties have voluntarily entered into must be respected. The ECJ therefore notes that it is not correct to interpret the Directive in such a way that it aims to avoid a dynamic referral provision being given effect in all circumstances.[73] The consequence is, of course, that if the parties have voluntarily entered into an agreement with a dynamic referral clause, then it is an obligation that in principle is transferred to the acquiring business.[74] So far, the verdict can be read as a clarification of *Alemo-Herron*.

The ECJ then repeats its criticised line from *Werhof* and *Alemo-Herron*. In paragraph (22), the Court again states that the purpose of the Directive is not only to protect employees, but also to ensure a fair balance between the employer and the employees. The ECJ also clearly states what is needed for there to be a fair balance:

> «More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations...»

After the ECJ has pointed out fair balance, the freedom to conduct business is also highlighted in the interpretation of the Directive. Section (23) states:

> «More specifically, Article 3 of Directive 2001/23, read in the light of the freedom to conduct a business, requires that the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity (see, to that effect, judgment of 18 July 2013, AlemoHerron and Others, C426/11, EU:C:2013:521, paragraph 33).»

Asklepios thus clarifies that a dynamic referral clause can, in principle, be transferred to the acquiring business in the event of a transfer of business. At the same time, the Court says that consideration for the employer means that the acquirer must have the opportunity to make changes regarding its future economic activity. The Directive thus states that perpetual protection of individual terms and conditions will be contrary to the rules.

Under German law – and the facts of the case were governed by German law – there exists a legal concept called the «Änderungskündigung».[75] This concept has certain similarities with what we in Norwegian often refer to as termination of employment in combination with an offer of continued employment on changed terms. In Norwegian law, such a dismissal presupposes «objective grounds» pursuant to section 15-7 of the Working Environment Act, although the threshold for dismissal can be said to be somewhat lower than in the case of an ordinary dismissal.[76] According to German law, such a dismissal can be given if it is «necessary for economic or urgent operational reasons».[77]

Whether such a right to change is sufficient to meet the employer's need for change under the Directive can be debated. *Schinz* seems to assume that the right to change is sufficient, while *Riesenhubner* is more reserved.[78] *Evju,* for his part, assumes that dynamic referral clauses are compatible with the Directive, provided national law allows for the possibility of changes – «either in the employment contract (are adaptable), reciprocal (by agreement), or unilaterally on the part of the transferee.»[79]

5.3 The duo on the position of the collective agreements in the event of a transfer of business (Österreichischer Gewerkschaftsbund and Devici)

5.3.1 Introduction

The next question is what happens to a collective agreement in the event of a business transfer. This is a very real issue in Norway, due to the fact that pay and working conditions are often regulated through a collective agreement, if the company is bound by one.[80] What happens to the collective agreement after the transfer may therefore be of great importance to the employees and the acquiring enterprise.

Before discussing the two relevant judgments on this point, it is necessary to discuss the statutory rules on the position of the collective agreement in the event of a transfer.

5.3.2 Extraordinary right to terminate a collective agreement; but rules on the continuation of individual pay and working conditions

A transfer of business gives the transferee a reservation right as regards the transferor's collective agreement. The new employer may unilaterally choose not to be bound by the collective agreement that has governed the employees that are subject to the transfer. In reality, it is thus an extraordinary right to terminate a collective agreement, which does not follow the general rules on termination of collective agreements, cf. section 5 of the Labour Disputes Act. However, even if the transferee terminates the collective agreement, the Directive provides time-limited protection for individual pay and working conditions that follow from the transferor's collective agreement.

The position of the collective agreement in the event of a transfer of an undertaking is further regulated in the first sentence of Article 3 (3) of the Directive, which states:

> «... the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.»

The implementation in Norwegian law is somewhat more extensive. Section 16-2 (2) of the WEA states:

> «(2) The new employer will be bound by a collective agreement to which the previous employer was bound. This does not apply if, no later than three weeks after the date of the transfer, the new employer declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees are nevertheless entitled to retain the individual terms of employment that follow from the collective agreement to which the former employer was bound. This applies until this collective agreement expires or until a new collective agreement is entered into that is binding on the new employer and the transferred employees.»

The Norwegian implementation sets out two alternative rules for the fate of the collective agreement in the event of a transfer of business – either that the collective agreement is transferred to the acquirer as such, or that the individual terms and conditions that follow from the collective agreement are transferred to a given period.

In a formal sense, the main rule is that the new employer is bound by the collective agreement by which the previous employer was bound. In other words, it is a rule enforcing/imposing the automatic transfer of the binding effect of a collective agreement as such. The new employer takes the place of the old employer.

However, it is probably the alternative rule that is, in reality, the main rule. According to the second sentence of the provision, the new employer may choose not to be bound by the collective agreement that has governed the employees who are subject to the transfer. Subject to a rather short minimum deadline of three weeks, the new employer may send a written declaration to the trade union in question unilaterally terminating the collective agreement.[81]

Such a termination right of a collective agreement is not in accordance with the declaratory provisions on dismissals of collective agreements, cf. Labour Disputes Act section 5. But the regulation is, as mentioned, declaratory and the regulation in the WEA's rule is considered to be lex specialis. If the new employer makes use of this right of termination, the rules establish material protection for the individual terms and conditions that followed from the collective agreement for a given period.

The first alternative expiry date is that the old collective agreement «expires». This means that the individual terms and conditions will continue until the next ordinary expiry date of the old collective agreement. Normally, collective agreements are concluded for two years at a time. If the transfer of business takes place early in a collective agreement period, individual terms can thus continue to live for up to two years thereafter.

In this connection, it must also be mentioned that the Directive allows Member States to limit the period of time for which the old pay and working conditions must be respected by the acquiring undertaking. The second sentence of Article 3 (3) states that:

> «Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.»

The Directive thus only sets out time-limited protection for pay and working conditions. In my opinion, it is reasonable to assume that the provision is precisely a result of the consideration of the acquirer's right to make changes after the transfer. However, as the Directive is drafted, there is no obligation for Member States to limit the duration. The time limit of one year has not been implemented in Norwegian law. In the preparatory works, the Ministry pointed out that individual rights under collective agreements were in any case not perpetual, as a reason for not introducing an explicit time limit:[82]

> «On the basis of comments made in the round of consultations, the Ministry has concluded, among other things, that it is not necessary to limit the individual rights that follow from a collective agreement to a period of one year. The vast majority of collective agreements are entered into for 2 years. If no new agreement is entered into between the parties, rights under the collective agreement can thus be claimed to be maintained for a maximum of 2 years. The Ministry assumes that this contractual time limit is sufficient.»[83] (My translation).

The other alternative expiry date for individual rights is the conclusion of a «new collective agreement», which is binding on the new employer and the transferred employees. According to the preparatory works, a «form of activity» is required.[84] A first observation is that there are linguistic differences between the Norwegian law and the assumptions in the preparatory works on the one hand, and the wording of the directive, on the other hand. The wording of the Directive is «the entry into force or application of another collective agreement.» In my opinion, the Norwegian wording here cannot be understood verbatim.[85] According to general Norwegian collective labour law, an already existing collective agreement will be binding on the parties and all their members within the general scope of the agreement directly and immediately – and thus without any need for a «new agreement» having to be entered into or any further form of activity or action being required.[86] If the new employer already has a collective agreement – which covers the transferred employees within its scope – this collective agreement applies fully and completely without further ado.

An amendment to the Ship Labour Act in June 2019 testifies to the fact that the wording of the rule in the WEA is not entirely fortunate. At that time, the Ship Labour Act introduced rules on the transfer of undertakings, and the position of the collective agreement was then regulated in section 5A-3 (2). This provision reads as follows:

> «The new employer must maintain the individual terms and conditions of employment that follow from a collective agreement to which the former employer was bound until the collective agreement expires, or another collective agreement enters or comes into force« (My translation. Emphasis added).

The wording of the rule in the Ship Labour Act is in accordance with the wording of the Directive and, in my opinion, correctly expresses the applicable rule in Norwegian law.

Further on, I will discuss what can be deduced from the judgments of the ECJ and the EFTA Court on the after-effects of collective agreements.

5.3.3 Österreichischer Gewerkschaftsbund – balancing worker protection and freedom to conduct business

The case concerned a transfer of business within a group in the aviation industry, where the parent company transferred part of its business to a subsidiary. Both the parent company and the subsidiary were bound by a collective agreement, but the transfer entailed a significant reduction in the remuneration of the employees affected by the transfer of business.[87] In connection with the transfer, the parent company's collective agreement was terminated.

As a reaction to this procedure, the trade union terminated the subsidiary's (less favourable) collective agreement with effect from the same day as the termination of the parent company's collective agreement. The trade union then demanded that the parent company's collective agreement be after-effect, pursuant to a rule on after-effect according to Austrian law.[88] The Austrian rule states that the legal effect of a collective agreement shall continue for employment relationships even after termination of the collective agreement, unless a new collective agreement is applied or new individual employment contracts are entered into with the relevant employees.[89]

The question from the Austrian court to the ECJ was thus whether a national rule on after-effect was covered by Article 3 (3) of the Directive.[90]

The ECJ correctly pointed out that the rule on the after-effect of a collective agreement is intended to protect employees against a sudden breach of the collective agreement regime that has regulated the employment relationship.[91] Such a purpose of a national rule is entirely consistent with the purpose of the Directive. However, the Court also underlines the need for fair balance. In paragraph (29) of the judgment, the Court states:

> «In addition, that interpretation complies with the objective of Directive 2001/23, which is to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other, and from which it is clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, judgment in Alemo-Herron and Others, C426/11, EU:C:2013:521, paragraph 25).»

In other words, consideration for the employer indicates that there must also be a right for the new employer to make the necessary changes after the transfer. In its specific assessment of the after-effect rule, the Court states that it has limited effect, because it only applies until a new collective agreement comes into force or until new individual employment contracts are entered into.[92] In such a case, the employer has the necessary right to change the terms and conditions. In its conclusion, the Court states:

> «(30)... In those circumstances, it does not appear that such a rule hinders the transferee’s ability to make the adjustments and changes necessary to carry on its operations.»

5.3.4 Deveci – balancing worker protection and freedom to conduct business, but with an EEA twist

The Deveci case also concerned an intra-group business transfer, this time within the aviation SAS Group. At the time of the transfer, a collective agreement (a special agreement) was terminated pursuant to Section 16-2 (2) of the WEA. The transferred employees were then covered by the acquiring company's collective agreement (special agreement), whose scope covered the work and personnel in question. The new collective agreement was financially less favourable than the previous agreement, since under its terms the employees earned between 4 and 8 per cent less than before.[93] The dispute was then whether it was compatible with the Directive for the new collective agreement to provide lower wages when the old collective agreement had expired.

The question then arose as to whether the collective agreement that had been terminated pursuant to Section 16-2 (2) of the WEA had an after- effect under Norwegian law, and whether this after-effect did not mean that the old wage level should be continued.

Of course, the EFTA Court did not rule on the question of whether the collective agreement had aftereffect under Norwegian law. Naturally, this is a question for national courts to decide.[94] I will return to this question

below. However, the EFTA Court emphasised that if the collective agreement had after-effect, the question of the continuation of wage terms would have to be examined further.[95]

In paragraph (63), the EFTA Court held that a national after-effect rule safeguarded the interests of the employees in connection with a transfer of an undertaking. However, in such a case, the Court had to assess whether that rule was consistent with the purpose of the Directive. The Court also pointed out that the purpose was to ensure a fair balance between the interests of the employees and the employers. Referring to *Alemo Herron*, the Court emphasised that the employer had to be able to make the necessary changes to be able to continue its business.

As regards how long time an individual after-effect could last, the EFTA Court concluded in the paragraph:

> «(...) Since continued effects applicable after the expiration of a collective agreement limit the freedom of action of the transferee, such a national rule must be limited in its duration. Otherwise, it would bind the transferee indefinitely.»

In other words: in a business transfer situation, the individual after-effect cannot last forever. Such a perpetual effect would clash with the other consideration that applies under the Directive – namely, the consideration of companies' ability to make changes. This is quite close to the formulation of the freedom to conduct a business in Article 16 of the Charter. However, as mentioned above, the Charter is not binding under EEA law. The EFTA Court did not directly take a position on the significance of the Charter in interpreting the Directive, but pointed out that the freedom to conduct a business was at the core of the EEA and thus had to be recognised in accordance with EEA law. The relevant paragraph (64) states:

> «The Court finds no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices.»

5.3.5 The great post-effect debate in Norwegian law and the question of whether it applies to individual repercussions under the rules on transfer of undertakings

As mentioned above, the EFTA Court did not rule on whether the collective agreement had after-effect under Norwegian law. That was, of course, a question for the national court. In the *Deveci* case, however, this issue was not resolved by the Norwegian courts, because the case was settled after the judgment from the EFTA Court was delivered.

However, the question of individual after-effect of collective agreements came to dominate the discussion in Norwegian collective labour law in the wake of *the Grefsenhjemmet* complex, which started with a judgment in the Labour Court a few years after *Deveci*.[96] However, it should be mentioned that *Grefsenhjemmet* concerned a change of organisational affiliation for the employer, with a change of collective agreement as a result. The issue was then whether some employees could still claim a «stabilisation supplement», which was part of the old collective agreement, continued under the new collective agreement. In other words, it was not a transfer of business situation that was under consideration, but the judgment is of interest in such cases as well. While the case was pending before the courts, a comprehensive discussion in legal theory unfolded at the same time, as a kind of ongoing commentary on the decisions of the various instances.

> *Julie Piil Lorentzen*, Virksomhetsoverdragelse og tariffavtale Lønns- og arbeidsvilkår, Arbeidsrett 2017 nr. 2, s. 137-180. *Jan Fougner*, Norsk arbeidsrett. Styringsrett, samarbeid og arbeidstakerbeskyttelse, 2019 s. 596-601, *Alexander Næss Skjønberg*, Hovedregelen om tariffavtalers ettervirkning, Arbeidsrett nr. 1, 2019, s. 18-38. *Stein Evju*, Ettervirkning, bundethet og endringsadgang. Randbemerkninger til arbeidstvistloven § 8 tredje ledd og arbeidsmiljøloven § 16-2 første og annet ledd, Arbeidsrett nr. 1, 2019, s. 39-69. *Tarjei Thorkildsen*, Teorier om tariffavtalens ettervirkning, Arbeidsrett nr. 2, 2019 s. 261-288, *Stein Evju*, Tariffavtaler og ettervirkninger, Arbeidsrett nr. 2, 2019, s. 289-305, *Alexander Næss Skjønberg*, Ettervirkning – grunnlag, virkeområde og betydning, Arbeidsrett nr. 1, 2020, s. 76-100, *Alexander Næss Skjønberg*, Tariffavtalens ufravikelighet og ettervirkning – en komparativ og rettsgenetisk studie, KARNOV 2021, *Jan Fougner*, Arbeidsavtalens stilling ved tariffavtaleovergang og Høyesteretts dom i Grefsenhjemmet-saken, Ekspertkommentar Juridika Innsikt, 2022, *Alexander Næss Skjønberg*, Etter hundre år var visst ikke alt glemt likevel – Høyesteretts dom i HR-2021-1193-A Grefsenhjemmet II, i: Kollektiv arbeidsrett – en artikkelsamling, 2022, s. 171-198, *Stein Evju*, Eftervirkning, rettskilder og metode. Sluttbemerkninger til Tarjei Thorkildsen, Arbeidsrett nr. 1, 2021, s. 55-66.

When the case was finally decided in the Supreme Court, it was established that collective agreements that have become part of the individual employment contract do not lapse as a direct consequence of the termination of the collective agreement, but have individual repercussions on the basis of the individual employment contract.[97] As mentioned, the case did not concern a case of transfer of undertakings, but the Supreme Court's formulation of the norm is quite general. In paragraph (112), the Supreme Court states:

> «... Provisions in the collective agreement that have become part of the individual employment contract do not lapse as a direct consequence of the termination of the collective agreement but have individual retrospective effect on the basis of the individual employment contract. However, as mentioned, the provisions may lapse on various other legal grounds.» (My interpretation).

In the extensive discussion of individual after-effect mentioned above, no one has discussed the situation in detail in relation to a business transfer. However, *Skjønberg* states that the question of after-effect may be relevant «when the protection pursuant to Section 16-2, second paragraph, fourth sentence of the WEA has expired.»[98] However, he does not discuss this question. Likewise, *Evju* does not take a position on whether individual rights are conceivable after a reservation against a collective agreement in the event of a transfer of business.[99]

It is the second sentence quoted, in the Supreme Court's decision referred above, that is of particular interest in this context. Even if a benefit stemming from a collective agreement has individual repercussions, these effects may thus lapse on other legal bases. Such legal bases may, for example, be an agreement between the parties on changed terms, a new collective agreement that prevents «old» terms, or a transfer of business.

After the Supreme Court had delivered its judgment in Grefsenhjemmet, the case went back to the Labour Court, where the question was whether the new collective agreement that had been made applicable at the nursing home prevented the continuation of the old conditions. In AR-2023-36 *Grefsenhjemmet II,* the Labour Court concluded, after a concrete assessment, that the supplementary pay in question was not in conflict with the new collective agreement.[100] This result, however, is of no interest to the question I am going to discuss here.

The issue that neither the Supreme Court, nor the Labour Court, have decided on is whether such individual terms can continue to live on – in principle in perpetuity – when there is a transfer of business. The EFTA Court's opinion in *Deveci* indicates that such a perpetual repercussion would be contrary to the Directive. In *Deveci,* the EFTA Court stated:

> «In the interest of the employees, a national rule may give continued effects to a collective agreement in order to avoid a rupture of the framework governing the employment relationship. In that case, it must be assessed whether such a rule complies with the main objective of the Directive. That objective is to ensure a fair balance between the interests of the employees and those of the transferee. The transferee must be in a position to make adjustments and changes necessary to carry on its operations (compare, to that effect, Alemo-Herron and Others, cited above, paragraph 25). Since continued effects applicable after the expiration of a collective agreement limit the freedom of action of the transferee, such a national rule must be limited in its duration. Otherwise, it would bind the transferee indefinitely.»[101]

In my opinion, the EFTA Court's opinion is quite clear that a rule on after-effects is in the interests of the employees, because it maintains the framework that regulates the employment relationship. However, the question before the Court is whether such a protective rule is consistent with the main objective of the Directive. And this main objective, according to the EFTA Court, is to ensure a reasonable balance between the interests of the employees and the acquirer. The EFTA Court then refers to *Alemo-Herron* and the acquirer's need for change. The last two sentences of paragraph (63) expressly state that a rule on after-effect – in cases of transfer of business – cannot last forever. Such a rule must be limited in time – otherwise, the acquirer is bound in perpetuity.

The question then is to what extent the court-created rule on individual repercussions that was established by the Supreme Court in *Grefsenhjemmet* applies. As mentioned above, the wording of the legal rule is general and wide-ranging, while at the same time it must be emphasised that the factual basis for the decision did not concern a transfer of undertakings. In my opinion, it must be stated that under EU and EEA law, there is a requirement that the employer must have a right to change after the transfer of an undertaking. The freedom to

conduct a business under EU and EEA law means that the employer cannot be bound by the transferor's terms and conditions in perpetuity.

The question then becomes whether the Norwegian rule of termination of employment in combination with an offer of continued employment on changed terms is sufficient as a basis for the acquirer's right to change. A rather similar discussion can be found in German law in relation to the «Änderungskündigung»,[102] as discussed in point 5.2.4 above. In this context, I must limit my comments to an analysis of whether a reduction of salary terms in connection with the transfer of an undertaking would be appropriate, pursuant to Section 15-7 of the Working Environment Act. Under Norwegian law, such an assessment will be fairly complex and concrete, while the courts will probably traditionally set strict conditions for salary reductions.[103] However, there is no judgment so far that takes up the guidelines from EU law.

5.4 Length of service (seniority) as a criterion for determining an economic benefit (Union)

5.4.1 Introduction

The case concerned dismissal due to the downsizing of four employees who had previously been subject to a transfer of business. According to the two collective agreements applicable, employees were entitled to an extended period of notice if they met the qualifying conditions regarding length of service and age. The special circumstance in this case was that the dismissals took place more than one year after the transfers took place. In other words, after the expiry of the special protection period of one year set out in the last sentence of Directive article 3 (3), which has been implemented in Swedish law.[104]

The question before the ECJ was whether the length of service with the divesting enterprise should be included in the assessment of whether the employees were entitled to an extended period of notice.

5.4.2 Assessment pursuant to both the first and third paragraphs of Article 3 – and in both cases, balancing of rights is relevant

The facts of the case were not fully clarified before the ECJ, which led the Court to consider the question under both article 3 (1) on individual rights and under article 3 (3) on individual rights arising from a collective agreement.

The Court started by establishing what has gradually become a recurring tone in the line of judgments regarding transfer of business:

> «(19) With regard to Article 3 of Directive 2001/23, the Court has stated that the objective of that directive is also to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other. It follows from this, inter alia, that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, judgment of 11 September 2014, Österreichischer Gewerkschaftsbund, C 328/13, EU:C:2014:2197, paragraph 29 and the case-law cited).»

The ECJ then ruled that the length of service as a criterion for determining the length of the notice period was a right of an economic nature, which the transferee had to respect pursuant to article 3 (1).[105] This is not a surprising statement and is in accordance with previous case law from the Court.[106] However, the Court had to decide if the situation was the same, and if the facts were assessed pursuant to article 3 (2). In this connection, too, the Court states that the rules are based on a fair balance between competing interests:

> «(27) As was pointed out in paragraph 19 above, in order to ensure a fair balance between, on the one hand, the employees' interests and, on the other, those of the transferee, the transferee may, on a ground other than the transfer of undertakings and in so far as national law so allows, make the adjustment and changes necessary to carry on its operations.»

The Court then noted that Swedish law had implemented the time-limited protection rule of one year.[107] ISS was therefore entitled – in the Court's opinion – to change its pay and working conditions after the end of the

protection period.[108] However, it was neither clear from the documents in the case whether ISS had actually changed the pay and working conditions after the end of the protection period, nor whether the old collective agreement had been terminated or renegotiated.[109] This led the Court to conclude that it was not possible to change the pay and working conditions after one year – since the collective agreement had not been terminated or renegotiated.[110]

5.4.3 Aftermath in Swedish courts

As mentioned, the facts were not sufficiently clarified for the ECJ. After the Court's ruling, the case was taken up for further consideration by the Swedish Labour Court. In AD 2018 no. 35, the Labour Court found that the transferors' collective agreements had been replaced by the terms of the acquiring company's collective agreement. The Labour Court therefore found that the judgment of the Court of Justice of the European Union had to be understood as meaning that:

> «... It is not contrary to the Transfer of Undertakings Directive to apply the provision in the current cleaning and security agreement on extended notice period according to its meaning. This means that an extended period of notice requires, among other things, ten years of continuous employment with the employer in question, ISS, despite the fact that such a different and new collective agreement provision entails a shorter period of notice for the employees taken over compared to the situation immediately before the transfer, if they have then been dismissed due to a lack of work.» (Official translation of the Swedish Labour Court).

In other words: After the expiry of the one-year period, the protective rule set out in the EU directive, the employments were fully regulated by the acquirer's new collective agreement. That collective agreement required continuous employment with the «relevant employer, ISS» in order to qualify for an extended notice period. This is not so surprising perhaps, since this followed from general Swedish collective labour law. And the Labour Court emphasised precisely this point in its judgment:

> «It may be added that this conclusion is well in line with the starting point in Swedish labour law that questions about the terms of employment to be applied after a collective agreement has expired are a matter of interest that can be resolved by the social partners through collective agreements, after negotiations and ultimately under threat of industrial action. It is also consistent with the fact that the Directive is not intended to prevent changes to the Conditions of Employment which could have been made under national law in cases other than the transfer of activities (see, for example, judgment in Collino, C-343/98, EU:C:2000:441).»

The case was then subject to further judicial review in the Swedish Supreme Court, after the union claimed that the Labour Court's ruling was «manifestly inconsistent».[111] However, the appeal was dismissed by the Supreme Court, which found that the Labour Court had a correct factual basis for its judgment and that the judgment was therefore correct.

5.5 Summary

Above, I have shown that the ECJ, through a series of judgments that apply over a period of 11 years, has established that the Directive does not only have employee protection as a purpose. In *Werhof* from 2006, the Court ruled that the Directive must also take into account the acquirer's interests in making necessary changes to its business. Already in *Werhof*, there is an indication of the need for the right to change on the part of the acquirer in the event of a transfer of business.

From *Alemo-Herron* in 2013 onwards, the statement of purpose and balancing of rights becomes clearer: the Court states that the Directive is based on a fair balance between competing interests, before stating that the acquirer must be in a position to make the changes to terms necessary to continue its business.

The rationale for the consideration of the internal market and the ability of companies to adapt is more clearly stated in the Advocate General's opinion in *Alemo- Herron*. Here it says:

> «Of course, the right to acquire a particular undertaking does not form part of the freedom recognised under Article 16 of the Charter. Nevertheless, to make acquisitions subject to such draconian requirements that, in practice, they are a strong disincentive to the acquisition or take-over of

undertakings, may result in an infringement of this article. The fact that the employer may be indefinitely bound, in the event of the transfer of an undertaking, by terms and conditions of employment to which it did not agree, starts to resemble a restriction on the freedom of contract, which is one of the component parts of the freedom to conduct a business, according to the explanations of Article 16 of the Charter.»[112]

6. The face of Janus: The directive has a double purpose

6.1 First research question

The first research question I raised was whether the Norwegian implementation of the rules served a distinct Norwegian purpose of workers' protection, or whether the Norwegian implementation of the Directive should be in line with the minimum requirements of EU law. My examination of the Norwegian implementation of the rules – with a few notable exceptions – is based on the premises of harmony and consistency between Norwegian law and EU law. Thus, when interpreting the concept of a transfer and assessing the vast majority of the rules set out to safeguard employees in the event of a transfer, the Norwegian implementation is supposed to be in line with EU law. Norwegian courts, and others making use of Norwegian law, must therefore be well acquainted with the developments of the case law of the ECJ and the EFTA Courts. Which brings me to the second part of my conclusion: what does follow from the case law of the ECJ and the EFTA Courts?

6.2 Second research question

Having concluded that the Norwegian implementation of the Directive is based on the premises of harmony and consistency between Norwegian law and EU law, my second research question was: what does really follow from the case law of the ECJ and the EFTA Courts as regards the purpose of the Directive? Is the Norwegian Supreme Court correct in stating that the Directive has the sole purpose of protecting employees – both as regards the conditions and the consequences of the Directive?

Having examined both the legislative history of the Directive and relevant case law from the ECJ and the EFTA Courts, it is my assertion that the Directive resembles the face of Janus – that it has a double purpose. The Directive does not only have workers' protection as an aim – it is also aimed at protecting the employer's need – both as regards which situations are covered by the Directive, and also the extent to which the employer may alter the terms and conditions of the employees after a transfer of business.

Furthermore, the case law emphasises that the Directive should be interpreted in a way that achieves a balance between the interests of the employees and the interests of the employer. It recognises that the transfer of business can be a complex process with potential conflicts of interest, and the Directive aims to provide a fair balance between employers and employees. Thus, it is my humble suggestion that the Norwegian Supreme Court should change its position as regards characterisation of the purpose of the Directive, next time it rules in a case regarding transfer of business.

Notes

1 I would like to extend my gratitude to Professor Johann Mulder and PhD candidate Anne-Beth Meidell Lyche, both from the University of Oslo, for their valuable insights and contributions during the preparation of this trial lecture. Additionally, I would like to thank Professor Knut Bergo from the Norwegian Business School BI for his substantive feedback following the trial lecture. I am also indebted to two anonymous peers that have given valuable comments. Any errors or omissions in this article are solely my responsibility.

2 Act relating to the Working Environment, Working Hours and Job Protection etc. 17 June 2005 No. 62 (Working Environment Act).

3 Council Directive 2001/23/EC of 12. March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (Dir. 2001/23/EC).

4 Act No. 102 of 21 June 2013 relating to job protection, etc. for employees on ships (Ship Labour Act)

5 Prop. 49 LS (2018–2019) Amendments to the Ship Labour Act, etc. and consent to approval of Decision No. 258/2018 of the EEA Committee of 5 December 2018 on incorporation into the EEA Agreement of Directive (EU) 2015/1794 on the labour rights of seafarers.

6 For more information, see Proposisjon 49 LS (2018–2019).

7 See, for example, the Norwegian Supreme Court's formulation of the three criteria in Rt. 2012 p. 983 *Songa*, where reference is made to Rt. 2011 p. 1755 *Gate Gourmet* para. 47-49.

8 See Bernhard Johann Mulder, Anställningen vid verksamhetsövergång, 2004 and Bernhard Johann Mulder, *«Komparativ skiss över reglerna vid verksamhetsövergång»* in: Mulder, Bernhard Johan, Hotvedt, Marianne Jenum, Nesvik, Marie and Sundet, Tron Løkken, Sui Generis – Festskrift til Stein Evju, p. 442-450 at p. 442-444.

9 I worked as a lawyer at the NHO from 2007 to 2012 and again from 2016 to 2024. Additionally, I served as the head of the NHO's legal department from 2022 to 2024.

10 Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses.

11 Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses.

12 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses.

13 General information on the interpretation of sources of EU law and the significance for the interpretation under the EEA-agreement, see: Finn Arnesen, Simen Hammersvik, Erling Hjelmeng, Olav Kolstad and Ole-Andreas Rognstad, Oversikt over EØS-retten, 2022, pp. 49-67. See also Knut Bergo, Rett praksis – Lærebok i norsk juridisk metode, 2022, p. 231-339.

14 Finn Arnesen et al., Oversikt over EØS-retten, 2022, p. 49 (my interpretation).

15 Knut Bergo, Rett praksis – Lærebok i norsk juridisk metode, 2022, p. 231 (my interpretation).

16 See, for example, Rt-2015-718 *Kirkens Bymisjon* para. 60

17 2000/C 364/01, Charter of Fundamental Rights of The European Union.

18 Consolidated version of the Treaty on the Functioning of the European Union.

19 Bob Hepple, *«The Crisis in EEC Labour Law»,* Industrial Law Journal, vol. 16, no. 2, 1987, pp. 77-87.

20 Catherine Barnard, EU Employment Law, 4th ed., 2012, s. 577.

21 Halvard Haukeland Fredriksen, *«Betydningen av EUs prakt om grunnleggende rettigheter for EØS-retten»*, Jussens Venner nr. 6, 2013, p. 372.

22 See, for example, Rt. 2000 p. 1602 *Nøkk.*

23 C-426/11 *Alemo-Herrón.*

24 Halvard Haukeland Fredriksen and Gjermund Mathiesen, EØS-rett, 4. utg., pp. 82-84 and pp. 241-247 (with further references to the discussion).

25 E-10/14 *Deveci*.

26 Ola Mestad, Tidlegare § 101 (1814-2014), Grunnloven, Historisk kommentarutgave 1814-2020 (2021), p. 1125. See also Johs. Andenæs, Statsforfatningen i Norge (1994) p. 411-413.

27 Ola Mestad, Tidlegare § 101 (1814-2014), The Constitution, Historical commentary edition 1814-2020 (2021), pp. 1135-1136. See also the discussion in Document 16 (2011–2012) p. 229.

28 Dokument 16 (2011–2012) p. 233, first column.

29 Dokument 16 (2011–2012) p. 233 second column.

30 Ot.prp. nr. 49 (2004–2005), the proposal for a legislative text, section 1-1 (e).

31 Ot.prp. nr. 49 (2004–2005) point 5.5.

32 Ot.prp. nr. 24 (2005–2006) point 2.3.

33 See also Alexander Sønderland Skjønberg, «Styringsrettens begrunnelse og karakter» in: Skjønberg, Bråthen, Hemmingby and Weltzien (eds.): Styringsretten – prinsipielt, komparativt og aktuelt, 2021, p. 88-130, particularly on p. 116, which emphasises that rules implementing EU directives may have other purposes than protection considerations.

34 Ot.prp. nr. 71 (1991–1992), point 4.1.3. At that time, the rules were placed in Chapter XII A of the Working Environment Act 1977.

35 Ot.prp. nr. 71 (1991–1992) s. 15.

36 Ot.prp. nr. 49 (2004–2005) chapter 21 and Ot.prp. nr. 24 (2005–2006).

37 Ot.prp. nr. 49 (2004–2005) point 21.2.4.

38 Joined cases C-132/91, C-13 8/91 and C-139/91 *Katsikas* cf. para. 31 and 32.

39 Rt. 1999 p. 977 *Nemko*, Rt. 1999 p. 989 *Vest/Ro*, Rt. 2000 p. 2047 *Psykiatri*, Rt. 2000 p. 2047 *Miljøtransport* and HR-2018-1944-A *APF*.

40 The centre-right Bondevik II Government proposed the abolition of the non-statutory right tomaintain employment with the transferor, cf. Ot.prp. nr. 49 (2004–2005) point21.2.4, while the red-green Stoltenberg II Government continued the non-statutoryright, cf. Ot.prp. nr. 24 (2005–2006) point 7.

41 See, for example, the Supreme Court's formulation of the three criteria in Rt. 2012 p. 983 *Songa*, where reference is made to Rt. 2011 p. 1755 *Gate Gourmet* para. 47-49.

42 See Karl Riesenhuber, European Employment Law. A Systematic Exposition, 2021, p. 760.

43 C-392/92.

44 See discussion of the criticism in Catherine Barnard, *EU Employment Law*, 2012, p. 593-597 and Bernhard Johann Mulder, *Anställningen vid verksamhetsövergång*, 2004, p. 167-168.

45 C-48/94 *Rygaard.*

46 C-13/95 *Süzen.*

47 C-13/95 *Süzen* para. 13.

48 C-13/95 *Süzen* para. 15.

49 C-13/95 *Süzen* para. 16.

50 Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses.

51 Ot.prp. nr. 49 (2004–2005) point 21.2.4.

52 C-344/18 *ISS.*

53 C-344/18 *ISS* para.19.

54 C-344/18 *ISS* para.24.

55 C-344/18 *ISS* para.25.

56 See the Advocate General's Opinion in case C-344/18 *ISS* para. 73-75.

57 C-344/18 *ISS* para. 27.

58 C-344/18 *ISS* para. 35.

59 C-344/18 *ISS* para. 37. See also Opinion of Advocate General Szpunar of 26 November 2019 in case C-344/18 *ISS* para.79. (Footnotes in the opinion of the Advocate General are omitted from the quote).

60 I have discussed the provision in detail in Kurt Weltzien, *«Ferjesamband på anbud. Virksomhetsoverdragelse etter yrkestransportloven § 8 (2)»*, Arbeidsrett nr. 2, 2021, p. 153-158.

61 Generally on the subject of referral clauses, see Julie Piil Lorentzen, «Virksomhetsoverdragelse og tariffavtalte lønns- og arbeidsvilkår», Arbeidsrett 2016 no. 2 p. 137-180.

62 C-499/04 *Werhof.*

63 C-426/11 *Alemo-Herron.*

64 C-426/11 *Alemo-Herron* cf. para. 26 and 27.

65 C-426/11 *Alemo-Herron* para. 29.

66 C-426/11 *Alemo-Herron* para. 31.

67 C-426/11 *Alemo-Herron* para. 34.

68 C-426/11 *Alemo-Herron* para. 34.

69 C-426/11 *Alemo-Herron* para. 35.

70 See, for example, Jeremiah Prassel, *«Freedom of Contract as a General Principle for EU Law? Transfer of Undertakings and the Protection of Employer Rights in EU Labour Law»,* Industrial Law Journal, 2013, s. 434-446, Stephen Weatherill, *«Use and abuse of the EU's Charter of Fundamental Rights: on the improper veneration of «freedom of contract»»*, European Review of Contract Las, 2014, pp. 167-182 and Marija Bartl & Candida Leone, *«Minimum Harmonisation after Alemo-Herron: The Janus Face of the EU Fundamental Rights Review»*, European Constitutional Law Review, 11: 140-154 (2015).

71 Karl Riesenhuber, European Employment Law, A systematic Exposition, 2021, s. 746 and pp. 779-780.

72 C-680/15 *Asklepios* para. 18.

73 C-680/15 *Asklepios* para. 20.

74 C-680/15 *Asklepios* para. 21.

75 Kündingungsschutzgesetz (KSchG).

76 Se HR-2019-928-A *Hurtigruten** 44-50. See also Jan Fougner, Endring i arbeidsforhold – styringsrett og arbeidsplikt, 2016, p. 262-263.

77 Reinhard Schinz*, «Cheese fondue, the European Court of Justice and the German Constitution,* Festschrift to Ann Numhauser-Henning, pp. 732-733.

78 Karl Riesenhuber, European Employment Law, A systematic Exposition, 2021, p. 781 (note 212).

79 Stein Evju, *«Eftervirkning, bundethet og endringsadgang. Randbemerkninger til arbeidstvistloven § 8 tredje ledd og arbeidsmiljøloven § 16-2 første og annet ledd»,* Arbeidsrett, 2019 p. 56.

80 In the private sector it is assumed that approximately 50% of workers are subject to a collective agreement, and that the number in the public sectors is 100 %, cf. NOU 2024: 11 Lavlønn i Norge, point 4.5.

81 ARD 2008-189 *D&F Group*.*

82 Whether collective agreements have individual repercussions is in itself a comprehensive and controversial theme. I discuss this in more detail in point 5.3.5.

83 Ot.prp. nr. 71 (1991–1992), point 4.6.4.

84 Ot.prp. nr. 71 (1991–1992) chapter 4.1.4.

85 I have discussed this issue in detail in Kurt Weltzien, «*Ferjesamband på anbud. Virksomhetsoverdragelse etter yrkestransportloven § 8 (2)»,* Arbeidsrett nr. 2, 2021, pp. 140-183, see especially pp. 169-171. See also Stein Evju, «*Eftervikning, bundethet og endringsadgang»*, Arbeidsrett nr. 1, 2019, pp. 60-63.

86 See for example, AR-2019-11 *ISS*.

87 C-328/13 *Österreichischer Gewerkschaftsbund* para. 10.

88 C-328/13 *Österreichischer Gewerkschaftsbund* para. 11.

89 C-328/13 *Österreichischer Gewerkschaftsbund* para. 5.

90 C-328/13 *Österreichischer Gewerkschaftsbund* para. 14.

91 C-328/13 *Österreichischer Gewerkschaftsbund* para. 28.

92 C-328/13 *Österreichischer Gewerkschaftsbund* para. 30.

93 E-10/14 *Deveci* para. 25.

94 See HR-2021-1193-A *Grefsenhjemmet**, which states in para. 112 that a collective agreement that has become a part of the individual employment contract does not lapse as a direct consequence of the termination of the collective agreement but has individual after-effect, on the basis of the individual employment contract.

95 E-10/14 *Deveci* para. 60.

96 AR-2019-5 *Grefsenhjemmet** HR-2021-1193-A *Grefsenhjemmet** and AR 2023-36 *Grefsenhjemmet II**.

97 HR-2021-1193-A *Grefsenhjemmet** para. (112).

98 Alexander Sønderland Skjønberg, *«Den alminnelige regelen om ettervirkning av tariffavtaler»* in: Kollektiv arbeidsrett – en artikelsamling, 2023, p. 73.

99 Stein Evju, *Eftervikning, bundethet og endringsadgang. Randbemerkninger til arbeidstvistloven § 8 tredje ledd og arbeidsmiljøloven § 16-2 først og annet ledd»* i Arbeidsrett, 2019, pp. 39-69.

100 AR-2023-36 *Grefsenhjemmet II** para. 109-110.

101 E-10/14 *Deveci* para. 63.

102 Kündigungsschutzgesetz (KSchG).

103 See more Annette Hemmingby, Ensidig endring av økonomiske ytelser i arbeidsavtaleforhold, 2021, pp. 284-295.

104 Lagen (1976:580) om medbestämmande i arbetslivet 28 § 3 stykket.

105 C-336/15 *Union* para. 23-26.

106 See C-108/10 *Scattolon* and C-343/98 *Collino*.

107 Lagen (1976:580) om medbestämmande i arbetslivet 28 § 3 stykket.

108 C-336/15 *Union* para. 29.

109 C-336/15 *Union* cf. para. 29 and 30.

110 C-336/15 *Union* para. 31.

111 Swedish Supreme Court judgment »Unionen's application for a relief for a substantive defect», NJA 2020 p. 147 (judgment of 27 February 2020 in case no. Ö-5731-18).

112 Opinion of general advocate Cruz Villalón delivered on 19 February 2013 in case C-426/11 *Alemo-Herrón.*