EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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Corporate Re-Structuring – striking the balance between flexibility and employee protection

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FINAL REPORT

1. Introduction

1.1 Purpose of the Project

This Project was the subject of a Grant Agreement with the European Commission entered into on 11th November 2005. The Justification for the Project was set out in the Description of Project annexed to that Agreement –

- The objective of the Lisbon Summit of 2000 was for the EU –

  > "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion"

- To achieve this objective, employers in the European Union need the flexibility to achieve corporate re-structuring wherever this is needed to make the enterprise more competitive and to enhance economic

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growth. On the other hand the aim of “social cohesion” means that any such re-structuring should be carried out in an atmosphere of social responsibility. This balance is at the core of the Lisbon objectives and is crucial to the economic and social success of the European Union.

- In this context the European Union has built up a solid basis of Directives and Case Law on such matters as consultation on collective redundancies, protection in the event of transfers of undertakings and protection in the event of insolvencies (the latter being sometimes used as a method of corporate re-structuring). Meanwhile, the change in the nature of work, with more economically dependent workers who are not formally part of the corporate structure, means that these protections are losing part of their force. There is also resistance from employers to the more prescriptive elements of the EU legislation.

The purpose of this Conference is as follows –

- to evaluate the level of approximation which has occurred in the laws and practice of the national courts in the process of corporate restructuring.
- To assess the implementation and effectiveness of recent changes in EU law, in particular Directive 2001/23 on the transfer of undertakings, Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community and Directive 2002/74 on the approximation of the laws of the member States relating to the protection of employees in the event of the insolvency of their employer.
- To gauge the impact of the increase in the importance of atypical workers and the extent to which new legal concepts and ideas can provide protection to such employees without resort to new Directives.

1.2 Implementation of the Project

The methodology of the project was to ask the Judges from each Member State, including the new entrants, to respond to a Questionnaire. The form of the Questionnaire is annexed to this Report in Appendix I. Based on this Questionnaire, each Member State then prepared a National Report. The National Reports are annexed to this Report as Appendix II. From these Reports the Secretariat then prepared a Synthesis. The final form of this Synthesis is annexed to this Report as Appendix III.

The issues raised by the Questionnaire and the National Reports were then discussed by delegates at an international Congress which first took place at the City Hall, Esch-sur-Alzette, Luxembourg between the 25th and 26th November 2005. The Programme for this Congress is annexed to this report in Appendix IV. The National Reports are set out in Appendix V.

This Report is prepared from the National Reports, the Secretariat’s synthesis and the Notes of the two Congresses.

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2. Background and Objectives

From its formation the European Union has had a mixture of economic, political and social objectives. Over the years the attempt to create a level of conformity or approximation (a "level playing field" to use a footballing metaphor) has seemed to be consistent with each of these objectives.

In economic terms, the objective was to ensure that the free internal market was not imbalanced by some countries being able to under-cut their neighbours by cutting corners on employee protection.

The brave words of the Lisbon Declaration have been tested almost to destruction by the reality of international trade. The danger is now of being overwhelmed by cheap goods and services from developing countries within the global community. This has created an economic imperative of flexibility in the European labour market, to try to match the challenges from countries such as China and India.

The impetus throughout the history of the European Union has been to increase employee protection as part of the social objective. This is now being challenged by demands from employers to reduce that protection for economic reasons. This latter demand is a crude analysis. It is by no means axiomatic that better protected workers are less productive. But it is, nevertheless, a commercial momentum which the European Union has to face up to.

This is, to a large extent, an economic and political argument. It is not the role of the judiciary to get involved in this argument. It is, however, the role of the judiciary to implement the Directives and the Acquis Européenne.

Our aim was to look at the many ways in which individual workers may be affected by moves by commercial and industrial enterprises to improve efficiency. The effect ranges from loss of the job, though reductions in pay, the loss or dereliction of pension schemes, the loss of fringe benefits, as well as loss of rights of collective bargaining, increase in hours and increased pressure to work harder.

These problems come before Judges most commonly where people lose their jobs due to corporate re-structuring, but they may also become the subject of litigation where the employer has failed to consult the work-force, where changes of conditions are forced on the work-force and where the employer becomes insolvent, leading to loss of employment which is hard to compensate under private law.

We were also looking at the European initiatives to increase employee participation by requiring consultation not only on the occasion of climactic events, such as collective redundancies and transfer of undertakings, but also

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in the major decisions made by companies which may affect the work-force.

3. Sources of Protection

3.1 National Law

The national laws of the countries of the European Union show considerable similarities in the protection afforded to employees and other workers, irrespective of the overlay from European Directives.

Historically workers have been protected by contractual rights embedded in Civil and Common Law, by social rights implemented by legislation and by the collective solidarity of trade unions and works councils. Each of these has a place in the continuing protection afforded by national legal systems throughout the European Union. This protection is part of the historic protection provided by national legal systems and is not directly the result of European legislation or the Acquis Européenne.

3.1.1 Consultation and collective bargaining

The legal protection afforded to workers is closely linked with laws and traditions relating to consultation and collective bargaining. The Labour Courts of the different EU countries differ substantially in the role and relevance of collective agreements in their respective jurisdictions.

The tradition of the Nordic countries, in particular, is that Labour Courts deal with collective disputes. Even where the disputes are individual it is often the Union which brings the claim.[1] This has proved an effective method of protection over many years. The union has other weapons, in addition to legal action, and employers have been deterred from taking action which would lead to conflict.

However, the system was subjected to criticism at the Congress. The danger is that sectoral agreements made with entrenched unions may result in a division between "privileged" workers, who are protected by strong trade unions and weak workers who are outside that protection and actually suffer because of the efforts of the unions to protect their members.

The people outside the protection of the unions are often the weakest members of society – immigrant workers, women, unemployed workers who have been forced to find work on the margins. People who are economically dependent on the enterprise, but are employees of small sub-contractors or even are not employees at all, domestic workers, agricultural workers, all these categories may need greater protection than those who are members of strong unions, but, in practice, the labour law systems often leave such people

[1] As in Finland

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with little proteftion. While the *erga omnes* concept may mean that some non-union members receive protection from collective agreements, this is by no means universal.

Nevertheless, the Congress acknowledged the importance and value of collective agreements and the level of protection of the primacy of such agreements incorporated into European Directives.

3.1.2 Works Councils

Led by Germany, but important in many jurisdictions[2], Works Councils are a central part of the protection of workers, which, like unions, can also help to forge a partnership between management and workers to enable them to meet competition from outside, whether from within the EU or across the globe. Works Councils, where representatives are not union delegates, may be seen as prone to being sucked into the management's agenda, but they provide a protection for all workers within the curtain of the enterprise itself, including those who do not wish to become union members. Nevertheless, as with unions, the election process may exclude vulnerable workers who work for small sub-contractors or are themselves independent contractors.

The system does not only favour the employee. For example, in Germany, if the Works Council agrees to the redundancy, it is presumed to be for a valid reason and individual employees cannot challenge their presence of a list agreed with the Works Council. Works Councils are widely seen as a partnership between management and workers which can take hard decisions and put pressure on recalcitrant minorities of employees within the work-force.

It must be remembered, however, that in the majority of EU countries Works Councils are not an essential part of the tradition of employee protection. There are, therefore, dangers in seeking to superimpose systems based on Works Councils upon countries which, in practice, do not operate the system, without first constructing robust institutions, similar which can retain an independent existence within the work-place. In reality there is no alternative model for such institutions.

3.1.3 Legislative Protection

Another area of protection, which is sometimes forgotten, is the overview of the Labour Ministry. Governments have always provided protection from exploitation, by setting safety and welfare standards and such things as a minimum wage or protection from the effects of company insolvency.

This protective social legislation goes back to the social reformers of the 19th Century. All this time it has been forecast by employers that it will be their ruin and the ruin of the country, as cheap imports pour in from abroad where such protections do not exist. In the 19th Century it was cheap cotton from

[2] such as Netherlands, Hungary, Austria and Slovenia (the Worker Participation in Management Act)

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America, now it is cheap clothes from China. The reality, however, has been that good employers with contented workforces continue to thrive.

Nevertheless, the same pressures for flexibility also impinge on social protection and the irreducible overlay from European Directives has helped to ensure that national governments are not tempted to sacrifice the protection of their citizens while at work to the perceived threat to their economies from abroad.

The involvement of the Ministry of Labour in collective redundancies is the oldest form of protection in this area. Countries vary as to the extent that Ministries pursue the protection of individuals. In some countries the role of the Ministry is seen very much as a role of inspection of health and safety standards, including such things as anti-social working hours; in other countries the Ministry also has a role where employees' jobs and contractual conditions are under threat, from re-structuring as well as from insolvency. The Ministry has a particular role in brokering Re-Structuring Plans designed to ameliorate the effect of redundancy on individual employees.

The legislation in different countries gives a role in dealing with redundancy situation to a variety of institutions. There is not only the Ministry, but also Trades Councils, Labour Exchange[3], Employment Relations Board[4], Public Employment Service.[5]

It is a political question whether these bodies are a residue from a socialist system or a necessary check on a capitalist economy.

3.2 European Law

Employee protection in the event of corporate re-structuring has been significantly driven by European Directives.

3.2.1 European Charter

The Charter of Fundamental Rights of the European Union was proclaimed as a Solemn Proclamation at the Council of Nice on 7th December 2000. It was subsequently incorporated into the draft Treaty of Rome, which has not been ratified due to being rejected in two referendums by France and the Netherlands. Its status, therefore, is uncertain. Nevertheless it seems clear that the European Court of Justice will take it seriously in considering cases which come before it. Furthermore the current ratified Treaty specifically refers to the Community Charter of the Fundamental Social Rights of Workers of 1989.

[3] Austria, Iceland,
[4] Malta
[5] Norway

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Articles 27 and 28 of the Charter seek to incorporate the principles of consultation with workers and collective bargaining and action into the Constitution of the European Union.

Article 27 provides:-

> "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community Law and national laws and practices".

Article 28 provides

> "Workers and employers, or their respective organisations, have, in accordance with Community Law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

Despite the debate about whether the Charter has any force in law, Evelyne Pichot, from the European Commission, made clear in her address to the Congress that Directives and other action relating to these two Articles are agenda items as far as the Commission is concerned.

3.2.2 Consultation Directives

Ever since 1975 the EU has sought to protect the rights of employees in the event of collective redundancies by ensuring that they are consulted and that their voice is heard. The Directive 1998/59 consolidated these rights, which apply only where there are at least 10 redundancies in establishments employing more that 20 workers.

This Directive has been implemented in all the countries of the European Union and also, in practice, in the EEA. However, problems have arisen. For example *Junk v Kühnel*[6] makes it clear that the consultation period runs from the declaration of intention to terminate and not the actual cessation of employment. This means that the consultation cannot take place during the notice period. This may conflict with some national provisions[7]. There are also some detailed restrictions[8]

The Framework Directive 2002/14 has the much more ambitious aim of ensuring a general system of consultation of workers, not only in times a crisis, such as re-structuring, transfer of undertakings or insolvency, but generally in respect of changes in the enterprise. However, the Directive does allow a time-scale for implementation for smaller and medium sized firms and

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[6] ECJ Case C-188/03
[7] e.g Germany
[8] In the Netherlands it does not apply for teachers in private schools and part-time domestic servants

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totally excludes (at the choice of the member state) undertakings with less than 50 employees or establishments with less than 20 employees.

This Directive has not yet been implemented in all countries[9]

3.2.3 Transfer of Undertakings Directive.

The Transfer of Undertakings Directive 2001/23 replaced the 1977 Acquired Rights Directive. The 1977 Directive was universally adopted, but not all countries have yet adopted the 2001 Directive[10]. It is, however, only a limited development of the 1977 Directive and a large body of Community Law has built up around the original Directive.

3.2.4 Insolvency Directives

The Insolvency Directive 80/987 as amended by 2002/74 with an implementation deadline of 8 October 2005. The aim of this Directive was to require each country to set up an indemnity fund to provide some social protection to employees who lose their jobs due top insolvency of their employers.

This "safety net" however does not address the many problems of employees who lose their careers and, in all too many cases, their pensions as a result of insolvencies which, in some cases, are manipulated by employers to evade employee protection obligations.

4. The Political Perspective

In his Keynote Address entitled "Corporate Re-Structuring: Global Opportunity or Threat" Prof Alan Neal sought to put the legal issues which we were considering into the perspective of political developments in the European Union. A hard copy of his Powerpoint Presentation is annexed to this Report as Appendix VI.

This Address sought to look at some of the ideas set out in "Background and Objectives" above. The Lisbon Declaration was a baldly economic aim, but it was also an over-optimistic aim. In the past five years the mood has turned to one of pessimism. Furthermore the social dimension is seen always in defensive terms.

Most European economies have had to face up to the challenges of high unemployment and slow growth. This means accepting, or even encouraging structural change. Such change, however, is not necessarily bad for

[9] e.g. in Ireland (where legislation is before parliament) and Malta

[10] In the United Kingdom the new Regulations (which differ in many respects from the Directive in giving additional protection) came into force on 6th April 2006. Other countries have decided not to introduce new legislation in the hope that their existing legislation will prove to be compatible with the new Directive.

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individual employees. A more efficient structure may, in the long run, mean greater prosperity which in turn may mean more jobs. Active participation by the work-force may result in greater productivity and dynamism. The success of a leaner, but more profitable major industry may provide spin-off jobs in the service sector. “Consultants” and independent contractors may have less security but more freedom.

Employees must, therefore, embrace change, but morale will only be retained if new ways forward are in sight – new skills, new co-operation with and participation of employees, continuing involvement of unions in moving forward even if these means the loss of some existing jobs.

The Employment Taskforce of 2003, headed by Wim Kok stated:-

> “The economic transformation is changing the employment profile of the EU, the skills requirements of enterprises and the traditional thinking about how, when and even where people would work. Globalisation is an issue for all but it is affecting and will continue to affect, different Member States and different regions within those countries differently”

The ambition of the EU set out in the Social Agenda of 2005 is

> “A social Europe in the global economy: jobs and opportunities for all”

Despite the emphasis on economics, this declaration still recognises the concept of a “social Europe”. This means retaining the existing protection in the Directives and, also, the fundamental individual and collective rights contained in the international protocols – the ILO Labour standards, the European Charter of Human Rights (from the Council of Europe) and the EU Charter of Fundamental Rights.

Two concepts appear, like a comet, to have shone brightly but briefly before disappearing into space – they are “socially responsible corporate re-structuring” and “corporate social responsibility”. It seems clear now, that these ideas are seen a business models, whereby individual enterprises can be persuaded that it is in their best short-term and long-term interests to show social responsibility, rather than concepts of European Law to be applied to particular situations.

The outcome of this, therefore, is that the Courts will find themselves using the existing tools of the body of Directives in the context of a more flexible market with few additions on the way.

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5. Collective Redundancies

5.1 Consultation Procedures

All the countries of the EU and EEA have implemented the consultation requirements set out in the Directive 1998/59 ("the 1998 Directive")[11]. This Directive is specifically directed to situations where redundancies are contemplated. It does not, therefore, make it mandatory for employers to set up permanent channels of consultation and participation with the workforce. The wider objective of promoting social dialogue between management and labour is addressed by the Framework Directive 2002/14. This latter Directive had a compliance date of 23rd March 2005 for implementation for larger companies, with a partial exemption for medium sized companies until 23 March 2007 and for smaller companies until 23 March 2008. There is a total exemption for small employers. Despite this deadline, this Directive has not yet been fully implemented throughout the EU and EEA[12].

5.1.1 The 1998 Directive

The 1998 Directive requires a consultation period of 90 days where the number of redundancies is at least 20, with three options for a shorter consultation period for smaller numbers of people affected.

- at least 10 employees in establishments normally employing more that 20 and less than 100 workers, or
- at least 10% of workers in establishments normally employing at lest 100 but less than 300 workers, or
- at least 30 in establishments normally employing 300 workers or more,

Many countries have greater protection.[13] However, some have excluded certain categories, such as sea going vessels.

There have been uncertainties about the meaning of "establishment" rather than the wider definition of "enterprise", but the main area of debate at the Congress was about Article 2.1

> "Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement"

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[11] see 3.2.2 above
[12] Implemented for larger firms in the UK by Information and Consultation of Employees Regulations 2004 (SI 2004/3426)
[13] For example, Hungary follows the Directive for private companies, but gives greater protection for the public sector. Ireland applies it to employers of at least 20 people when at least 5 are to be made redundant. Luxembourg has extended the requirement to dismissing 7 employees.

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"An employer" – the Directive uses the word "employer", but does not refer to "employees" but to "workers". Nevertheless it has largely been implemented as applying on to employees[14] . This means that the protection does not extend to economically dependent workers, who may well lose their livelihood of the enterprise reduces in size, but have no right to protection or representation. This is referred to again at section 9.

"Contemplating" – this can mean anything from the moment when the idea of re-structuring entered the head of a senior manager to the date when the precise number of redundancies is announced or even when the notices of dismissal are sent out[15]. The delegates expressed differing views about the relevant time. However, some unanimity was reached.

- It is not necessary to start consultation until a clear plan has been formulated. Employers are entitled to debate commercial decisions before they make any announcement.
- Consultation should begin before the final decision on the identity of the employees to be selected is made.
- Consultation should also begin before the final decision is made on the numbers and terms of the redundancies.
- Consultation must take place before and not during the notice period

"Redundancies" – There was little dispute about the meaning of redundancies. It is of significance that it is Germany that has seen the most political argument about sclerotic re-structuring processes and there the definition of redundancy is particularly strict, namely

> "urgent operational reasons which oppose a continued employment of the employee in this company".[16]

This compared with the far more generous (to the employer) definition in the United Kingdom that –

> "The requirements of that business for employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish"

Hungary also emphasises that redundancy and re-structuring are the decision of the employer and the courts do not have the right to judge its appropriateness. Differences of wording which may seem small can, in practice, have a substantial impact on the ability of employers to re-structure..

Although there has been some agonising in the United Kingdom about the difference between "redundancy" and "re-structuring", the general viewo f the Congress was that any re-structuring which results in dismissal of employees

[14] e.g. in the United Kingdom s. 188 Trade Union & Labour Relations Act 1992
[15] In UK the word is "proposing" and there is uncertainty as to whether the words mean the same thing.
[16] However, the Works Councils have a significant role. If they accept the situation then it is assumed to meet the criteria

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is a redundancy situation. However, re-structuring does not necessary result in redundancies.

"workers' representatives" – the 1998 Directive, which replaced the 1975 Directive, brought in, for the first time, an obligation to consult even in cases where there was no recognised union or Works Council. This change had little impact in those countries where the vast majority of employees in large and medium size companies are represented by unions or Works Councils. But it has had a substantial impact on other countries.

The problem about consultation with representatives in non-unionised businesses is particularly acute in countries such as Hungary and the United Kingdom where a substantial proportion of businesses do not have recognised unions, but it is also a problem in countries like Norway with substantial union representation. Can the union representatives negotiate on behalf of those employees who are not members of the union? If not, how are they to be involved in the union process? In Italy, if there is no union consultation can take place with external unions for the sector.

This problem relates also to the Framework Directive, which seeks to ensure that there are standing bodies for representation, but does nothing to ensure that they have any true independence or legal structure.

"in good time" - again delegates referred to the lack of precision of this phrase, but it helps to qualify the definition of "contemplating". Consultation which takes place when it is too late to make any difference is not "in good time". "When the employer goes to the Works Council he already has his plan and is not seriously willing to discuss it; it is already decided. We have not found out how to deal with that".[17]

"In order to avoid redundancies" – this again means that consultation must take place at a comparatively early stage and must involve some discussion of the need for the redundancies and therefore of the commercial background.

5.1.2 The Framework Directive

The Framework Directive requires employers to set up practical arrangements for information and consultation. It has proved to be controversial, particularly in countries with limited union recognition and where there is opposition to the concept of the Social Partners.

There was considerable scepticism about the practicality of leaving it to employers to set up consultative bodies. Countries with Works Councils have developed of substantial body of law dealing with the working of what is, in effect, a discrete democratic institution. It cannot be expected that even in

[17] Comment from Germany

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countries with long democratic traditions, these consultative bodies will mushroom fully formed out of the compost of the work-place.[18]

Nevertheless, true consultation and participation is a goal which should benefit employers and employees. Ideas from the shop-floor are often to best and most practicable. People who understand the reason for decisions are less likely to battle against them. The purpose of consultation is "with a view of reaching agreement". If this works, employers and employees are going forward together. Many employees are willing to accept change in order to protect and enhance their jobs. There is increasing acceptance throughout the EU of the advantages of local agreements rather than sectoral agreements.

5.2 Criteria for Selection

The criteria for selection might appear to be a minor and technical element of the redundancy process, but it is the main issue in much litigation in the national courts and, more importantly, it is crucial to the "flexibility/security" tension. Employers want to retain their best employees. Employees' organisations tend to show more concern for the social effects of redundancy and want employers to be forced to retain those employees most at risk on the open labour market. The distinction, therefore, is between **organisation criteria** and **social criteria.**

In the past the problem was resolved by the principle of "first in, last out". This meant that older, more experienced workers were retained, newer employees, many of whom were younger and, arguably, more able to find other jobs were lost. The great dangers of this principle are –

- from the employers' point of view, it means that the profile of the work-force becomes older.
- it discourages job mobility, because people moving jobs feel less secure
- from the social point of view, it protects the comparatively well-off established workers and penalises the more marginal.
- it fixes existing disadvantaged groups, particularly women and ethnic minorities and is therefore potentially indirectly discriminatory. If people have struggled to find a job, they are likely to have short service and, as a result, move from one short-term job to another.

As a result "last in, first out" has been largely discredited. However, it is still the norm in Ireland, Netherlands and Malta

There is a significant divergence between EU states as to whether they allow the employers to choose their criteria, in which case they are likely to use organisational criteria or whether the criteria are laid down by law in which

[18] This has caused particular problems in countries with low union membership like Poland and Malta

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case they are social criteria, for example favourable single parents, or people with large families.

For example in Germany the criteria are

> "The seniority, age, maintenance obligation and any possible disability" of the employee

Whereas in the United Kingdom no criteria and laid down by statute and case-law only requires that they should be reasonable and as far as possible, capable of objective analysis[19].

5.3 Redundancy payments and remedies

The 1998 Directive provides at Article 6 –

> "Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers".

There is a similar, rather wider, provision at Article 8 of the Framework Directive.

The remedy for failure to comply may either be compensation[20] which may involve payment of salary to all employees during the consultation period[21], or it may involve treating the dismissal as void[22] and ordering reinstatement of the employees[23].

This, however, only penalizes employers who fail to go through the right procedures. There is also a need for some protection of all employees who lose their jobs through no fault of their own, even after proper consultation, and for individual employees who feel unfairly treated by the operation of the redundancy exercise.

Some countries provide specific payments for people made redundant, even when the employers have followed all the appropriate procedures[24]. In Austria and Italy this is now financed from a special fund to which employers' have to

[19] In Austria, for example, the selection is based on cost and ability to cope with change, but at the same time there is special protection for older or experienced workers. In Hungary, private employers can choose their criteria, but public servants are selected on social criteria such a single parents, couples with three or more children or couples whose partner does not have a job.
[20] it appears that in Ireland the compensation is limited to 4 weeks' pay.
[21] UK. s189 Trade Union & Labour Relations Act 1992
[22] As in Austria
[23] In theory this is the only remedy in Germany, but in practice it may often be substituted, by agreement, with compensation.
[24] such as Hungary, the United Kingdom, Ireland, Iceland

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contribute[25]. Many collective agreements contain similar provisions. The value of these payments varies considerably. There is a distinction to be drawn between, on the one hand, statutory minima and, on the other hand, the norm provided for by collective agreements where the scheme has to be approved by the union or Works Council, or by the Ministry. While, for example the United Kingdom has a minimum figure of 1 week's pay per year of service,[26] there are other countries[27] who make no such provision and leave the dismissed employees either to the terms of a collective agreement or to the general social protection for unemployed workers. This social protection also varies widely among the different countries.

The third main aspect of protection is the right not to be unjustifiably dismissed. This issue was dealt with in respect of individual dismissals in our Report of 3rd March 2005. However, we acknowledge that that report centred on dismissals for reasons which related to the individual, rather than dismissals for economic reasons.

We established during our Congresses in 2004 and 2005 that nearly all EU and EEA countries provide protection for unjustified dismissal. The fact that a dismissal is for economic reasons is not in itself justification. All of the delegates have experience in practice of people who say, either that the reasons were not truly economic reasons (i.e. that this is an artificial explanation used to cover other inadmissible reasons) or that in their particular case the dismissal was not justified, for example because they could have been given a different job in the same enterprise, or because someone else should have been selected, or because they themselves were not consulted individually.

As was made clear in our previous report, the Netherlands has the additional safeguard of requiring the permission of the Employment Service to allow redundancies. This means that the employer has to put together a redundancy programme or social scheme which will help ameliorate the effects of redundancy. This institutional protection is an important safety net for employees whose lives are blighted by redundancy.

6. Transfer of Undertakings

The European Union has long accepted that employees are at particular risk when a business changes hands. This led to the Acquired Rights Directive of 1977, now replaced by the Transfer of Undertakings Directive 2001/23.

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[25] In Italy employers have to pay 9 months' availability allowance in the Natioonal Security Institute for each employee dismissed.
[26] This varies according to age and has a limit of £280 (€392) per week.
[27] such as Germany and Netherlands (though this may be part of the consideration for the Employment Service approving the scheme)

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Although it had immediate effect, several countries have delayed in implementing the changes made by the 2001 amendment. However, all countries of the EU and EEA have implemented the 1977 Directive and accordingly provide protection to employees in the event of a transfer of undertaking.

This superficially simple Directive provides that, on a relevant transfer, the existing employees of the transferor retain their employment and are transferred automatically to the transferee with all their existing rights. It also provides for consultation at the time of the transfer.

It does, however, contain two major derogations. Firstly, under Article 3.4, the employee's pension rights are not directly safeguarded. The protection is contained in article 3.4(b) which requires Member States to adopt measures to protect employees and former employees in respect of immediate and prospective entitlement to private pension benefits. Private pension protection is, therefore, dependent on the way in which individual Member States interpret this provision.

The second derogation is Article 5 which is designed to encourage transferees to take over bankrupt businesses. For those countries who have not opted out of this provision, this means that employees of bankrupt enterprises may lose protection if such businesses are transferred to a solvent purchaser. It is clear that this provision can be abused where a business which wishes to downsize can put itself into liquidation and then transfer a slimmed down undertaking to another connected company, thereby avoiding liabilities under the Directive. The United Kingdom has not put Article 5 into force and, accordingly, transferees of bankrupt businesses have to treat the existing employees as if the transfer was of a business which was a viable concern.

All of our delegates indicated that their country had passed legislation intended to comply with the 2001 Directive[28].

6.1 When does a relevant transfer occur?

6.1.1 Involuntary transfers

Originally it was assumed that the Directive would only apply where a willing transferor disposed of their business to a buyer as a going concern. However, after the landmark case of *Bork*[29] it became apparent that the provisions also apply where the transfer is involuntary. In that case a sawmill was re-possessed by the landlord and then continued its operations. It was held that this amounted to a relevant transfer.

[28] The new UK Regulations came into force on 6th April 2006. Germany and the Netherlands expressed some reservations about complete compliance and, in Ireland, legislation is planned.

[29] *Bork International SA v. Foreningen of Arbejdledere I Danmark ECJ 101/87*

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This, in turn, opened up the process of out-sourcing and privatisation which was taking place throughout the EU. It had been assumed that when a public authority or large corporation contracted out a part of its operation, for example cleaning, or refuse collection, to a separate contractor then there was no transfer of the business, the existing employees would be made redundant and the new operator would re-engage those he chose on such terms as he wished. This, however, proved not to be the case. A relevant transfer can occur even where there is no "deal" at all between the parties, for example where one contractor loses the contract and another takes it over[30].

6.1.2 Out-sourcing

When an activity, such as catering, is out-sourced, then the essential activity remains the same. However, a transfer only occurs where

> "…there is a transfer of an economic entity which retains its identity" (Article 1.1(a)).

Although this definition is contained in the 2001 Directive it comes from ECJ case law. There was considerable discussion about the effect of this definition.

The clear view of the delegates was that courts should not be too keen to see transfers where none truly existed. It is not enough that the activity remains the same. It is necessary to find something more than the activity which defines the "economic entity". This may apply where the assets transfer, for example where the contract is for a bus route, where the buses are transferred. It may apply where the work-force or key members of the work-force are transferred, but it does not apply where the transferee refuses to accept either the moveable assets or the work-force[31]. If the transferee wishes to take this step in order to avoid a relevant transfer, then that is their prerogative.[32]

Generally speaking it was accepted that the national laws applied to involuntary transfers, but in Italy it appears that the law has only been applied to changes in ownership of the business. Furhtermore, German Federal Law provides that the loss of a tender to a competitor does not constitute a transfer of the undertaking and the French Cour de Cassation has held that there must be a transfer of "material assets". This contrasts with the new UK Regulations which expressly include a "service provision change" in the definition of a "transfer".

[30] It was our impression that, in Italy, the Directive was only applied to changes of ownership.
[31] In Austria, if none of the staff are transferred there is usually not a transfer
[32] The Courts of the UK have taken an entirely opposite view, creating a doctrine that a transfer is deemed to take place when the employer dismisses people with the specific aim of avoiding a transfer.

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6.2 Consultation

Information and consultation are central to the protection of employees in the event of transfer of undertaking, just as they are in respect of collective redundancies and, more generally, in respect of all developments of the undertaking or the establishment's activities and economic situation.

The Council Directive 2001/23 does not require employers to set up a representative body. This differs from 1998/59 is respect of collective redundancies. Where there is a representative body then the transferors must consult with that body in good time with a view to reaching agreement. However, where there is no such body there is no requirement of individual consultation. There is, however, a require to provide information to the employees.

It is important that adequate remedies should be available if no consultation takes place. The United Kingdom provides for compensation where an employee suffers detriment as a result of failure to consult, but, for example, German law does not provide any sanction.

6.3 Protection from dismissal

The structure of the Directive is to ensure, not only that employees transfer automatically to the new employer on the date of the transfer, but also that they are protected from dismissal for reasons connected with that transfer. Article 4 states

> "1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."

As stated above, many countries exclude employees of bankrupt companies from protection. [33] This may be partially alleviated by providing that the transferor and the transferee are jointly liable for any compensation for unjustified dismissal[34].

There are obvious potential problems where an employee is dismissed before or after the transfer, but the employer asserts that the reasons are unrelated to the transfer. These also relate to whether the transferor or the transferee is liable. This is particularly a problem where the transferor reduces the number of employees to prepare the business for transfer before an actual transferee has been identified. In the Netherlands, this issue has been decided in favour

[33] See 7.4 below

[34] As in Austria, Hungary (where the transferor is liable for any unjustified dismissals for one year after the transfer), Italy and Slovenia

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of the employee. A dismissal can be for reasons connected with the transfer even before the identify of the transferee is known.

6.4 Right to object

The European Court of Justice[35] decided that Article 3 of the Directive meant that employees could object to a transfer. However, it is difficult to see how this can operate where the job a person is doing has effectively transferred to the new owner. [36]

6.5 Protection from changes

The Directive makes clear that all the transferor's rights and obligations (with the exception of pension rights) transfer to the transferee. However, Member States have the choice of making the transferor and transferee jointly liable. The problem occurs where there is insolvency or economic weakness. It is always possible that an employer with employees with substantial rights will seek to off-load those obligations onto a weak subsidiary or contractor which will then default.

In Austria if working conditions worsen within one month of the transfer, the employee can leave and claim compensation as if he had been unjustifiably dismissed.

The Directive does not, however, prevent the transferee from taking normal steps to vary the contracts of employment, for example by bringing them into line with their own standard terms, as long as those changes are not so detrimental as to amount, in effect, to a dismissal ("constructive dismissal"). [37] This is one of many situations where an employer which recognises a union (or has a Works Council) has an advantage, since, by agreement with the union, conditions can be varied and enforced upon the employee. Some countries seek to clarify the point in time at which changes cease to be treated as relating to the transfer, by setting out a fixed period before change can occur.[38]

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[35] In *Katsikas v Konstantindis*: C-132/91

[36] In UK the employee has a right to object, but he loses his job and has no remedy (Reg 5(4B) Transfer of undertaking Regulations 1981. In Norway, a refusal to work for the new employer is treated as a resignation.

[37] Article 4.2

[38] In Germany, where there is a collective agreement or a works council agreement, this cannot be varied for one year after the transfer. in Luxembourg the employee can object to any substantial changes for a period of one year after the transfer. If he leaves as a result he can bring a claim of unjustified dismissal. In Austria and Hungary no changes can be made for one year after the transfer. In Malta the relevant period is the end of the period of the collective agreement.

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It was not very clear to what extent changes can be forced on employees[39]. In the Netherlands there is a recent Supreme Court Judgement that reasonable proposals for change can be forced on employees, but the United Kingdom has taken the view that substantial changes cannot be made unilaterally without giving dismissal notices.

There was debate about the short-comings of the protection. As stated above, there was little concern about the effects of out-sourcing and privatisation, which was regarded as principally a political issue.

Serious concern was, however, expressed about people outside the umbrella of the protection. A transfer will mean not only changes for the core employees, but also the possibility that the transferee will have different policies about sub-contractors and independent consultants. These are the "economically dependent workers" referred to in section 9 below. Germany has sought to resolve this by extending the definition of "employee" in relation to transfers of undertakings to include economically dependent workers, such as independent contractors who work solely for the business being transferred.

In many countries[40] civil and public servants are not regarded as employees. Although such people usually have considerable protection from dismissal and changes in employment terms, a problem can arise where there is out-sourcing by a public employer or, indeed, where out-sourced contracts are taken back in-house.

There was also concern about the effect on pension rights. Article 4 excludes company pension schemes from protection, but balances this with a requirement that Member States "adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of…" private pension rights.[41]

6.6 Remedies

In all countries legal action is available where employees are dismissed for reasons connected with the transfer or where changes are made to their employment rights without their agreement, though in some countries this right to object to change is not absolute.

There are, however, strict limitation periods and ceilings on the amount of compensation. For example in some cases an application alleging unfair dismissal must be brought within 3 weeks of the dismissal and in Hungary the compensation is ljmited to 12 months' pay. Our Report of Unjustified

[39] In Norway, it is also considered that there is a right of management to make changes, whereas dismissals and offers of new employment on new conditions are not allowed.
[40] including Netherlands, United Kingdom, France etc.
[41] See Section 7.6 beow.

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Dismissal made clear that short periods to bring claims and limitations on the amount of compensation are the norm.

7. Insolvency

7.1 The Problem

Although we did not discuss this in detail, the effect of insolvency on employees is a very serious problem. There is no point in providing full protection to an employee against unjustified dismissal, if he can find himself unemployed and without redress when the business fails. This is particularly the case where the owners of the business may seek to manipulate the insolvency laws to protect their own assets and interests at the expense of employees who they no longer require.

The European Union has not become involved in insolvency problems, except to require the Member States to provide a safety net of state protection and to deal with transfers of undertakings as a going concern following insolvency.

There are two different situations

- Where the business is closing the issues are
  - what share, if any, the ex-employees get of the assets
  - what indemnity they receive from the state

  Some suggestions have been made of a more radical option, namely that employers have no automatic right to close a business, but this is not realistic in a modern liberal economy.
- Where the insolvent business or part of it is disposed of as a going concern.
  - What happens to an employee who is dismissed?
  - Can an employee or ex-employee claim arrears of pay etc?

7.2 The Protection of employees under the insolvency process

All the countries of the EU and EEA have systems for dealing with individual and corporate insolvency. Generally these systems are aimed principally at encouraging enterprise by allowing failed businesses to carry on business without being saddled with debt. But the systems also aim to protect creditors in so far as there are assets available. The protection of employees has generally been a low priority.

Litigation about the insolvency process generally takes place in the commercial courts and, as a result, the judges attending our meeting were not experts in insolvency. The responses to the questionnaire, however, were

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illuminating in many ways. It is clear that, although the different systems have a similar aim, they have different traditions and terms.

All the systems acknowledge the interest of employees, in particular in respect of money which may be owed to individual employees. In most systems they have priority over ordinary unsecured creditors, but this is of little value where the Revenue and secured creditors (ie those with mortgages over the company's assets) have priority over the employees. We think that in most, and possibly all, countries the Revenue and secured creditors have priority over employees. Since most failing businesses have built up debts to banks and other financial institutions who have demanded security, this means that the preferential rights of employees are a largely empty benefit. Most employees of failed businesses get nothing from the insolvency process except what is provided by the State.

7.3 Consultation rights of employees and employee representatives

The right to be consulted about the insolvency process, particularly where all or parts of the insolvent business are to be disposed of as a going concern, is an important benefit for employees. This right exists in some countries, but by no means all. Countries with Works Councils all provide that the consultation rights enjoyed by the Works Council continue as long as the business continues trading, even if it is in administration. In other countries the rights include the obligation of the probate court to appoint a representative for the employees, as in Norway and Slovenia, and the right to notification as in Hungary. However, in Ireland and the United Kingdom there is no special right for employees, except their general rights as creditors.

7.4 Derogation from protection on Transfer of Undertaking

As stated above, Article 5.2 of the Transfer of Undertakings Directive 2001/23 allows member states to derogate from the normal protection afforded to employees when there is a transfer in the event of the transferor being insolvent. The object of this derogation is to encourage businesses which fail to maintain as much as possible of the operation and this allows them extra freedom.

EU and EEA Member States appear to be fairly equally divided as to whether or not they have taken advantage of this derogation.[42] We have no information on the extent to which the derogation has prevented total closure of businesses. Certainly the United Kingdom experience is that many businesses who get into financial difficulties do manage to dispose of all or parts of their operation despite the perceived burden of liability toward existing employees. The European Court of Justice has held that the derogation

[42] Austria, Iceland, Ireland, Luxembourg, and Norway have used the derogation. Germany (in part), Hungary, Slovenia and United Kingdom have not.*Check Malta report*

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cannot be partial. Thus excluding management staff, but including shop-floor workers is not allowed.[43]

7.5 Indemnity Fund

Directives 80/987 and 2002/74 require Member States to put in place an Indemnity Fund to protect employees from the effects of company closure due to insolvency. We believe that all member states have set up a system in compliance with these Directives.

The important matter which we tried to investigate was the extent of the compensation provided. The most comprehensive scheme appears to be the Austrian one which is based on funding by the state and prescribed contributions by employers. This approach has been followed in the United Kingdom in respect of the Pension Fund referred to below.

Most countries limit the rights to existing contractual obligations, such as arrears of pay and do not seek to compensate employees for loss of earnings after the termination. In Italy it is 3 months' pay, in UK it is 8 weeks with a cap of £290 (about €400) per week, in Netherlands 6 weeks. Malta has a separate Guarantee Fund which seeks to recover its costs from the company. Member States do, of course, also have social funds to protect unemployed workers.

In most countries the rights are restricted to employees, but in some countries[44] the definition is extended to include economically dependent workers who are closely connected with the company.

Concern was expressed at the congress about the limitation of this right to closures where the employer has gone through formal insolvency procedures. The problem of a corporate business which simply ceases trading applies to most countries. In Ireland the Indemnity Fund is available for companies which have ceased trading without going through formal insolvency procedures.

7.6 Protection of Pension Funds

The problem of private pension funds which are financial linked to the employers and, therefore, are liable to become under-financed when the employer ceases trading is one that is receiving increasing prominence.

Some countries, such as the Netherlands, have provisions to ensure that the pension funds are properly separated from the business, which must include ensuring that the pension fund does not invest in the business. This provides adequate protection. In Germany a "Pension Securing Society" takes over the pension exercise. The United Kingdom has recently set up a new Fund,

[43] Spain tried to make such a provision. Also they attempted to exclude family members in a family business.
[44] In particular the Netherlands.

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financed by “at risk” employers, to protect employees; this follows a number of tragic cases where people’s private pensions were totally lost.

8. Trans-national impact

National judges are mainly involved in dealing with the impact of re-structuring on employees within their own national jurisdictions. Evelyne Pichot from the European Commission addressed the Congress and broadened the discussion by referring to Directives aimed at encouraging European Businesses structured on a trans-national basis.

The Directives she referred to were the European Works Council Directive 1994/45, which encourages the creation of Works Councils in trans-national businesses and 2001/86 which provides for involvement of employees in respect of European Companies together with the European Co-operative Societies Directive.

There are currently 750 European Works Councils though the majority were formed before 1996. The difficulty arises where there multi-national companies dispose of parts of their undertaking within a single country. In such a situation the existing European Works Council ceases to exist and there is no provision for a new separate national Works Council to arise.

There is an obvious need for trans-national protection for employees of multi-national companies which operate a pan-European or global strategy. The difficulties of structuring an international body in a Community which operates by way of national courts, does not abnegate the importance of the existing structures.

Despite the existence of the legislation, there are, in fact, very few European companies set up under the Directive. The legislation is there, but most companies have chosen instead to have a base in one Member State and then to set up subsidiaries registered in the different Member States where they operate.

There has been little consideration of the impact of the Transfer of Undertakings Directive on trans-national transfers. There is no clear provision in the Directive which limits its application to transfers within the Member State. Rather than lose his job, an employee might prefer to follow the business and move to work in another Member State. However, it would be difficult to harmonise terms and conditions in such an event. The Commission is preparing a Green Paper on this issue.

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9. Economically dependent workers

This issue was addressed in the Questionnaire, but there was insufficient time to debate it. It is considered that it will be an appropriate subject for a further Congress.

"Economically dependent workers" includes all people who are dependent on an enterprise without being employed by it. It therefore includes employees of sub-contractors who work for the principal enterprise, agency workers and independent contractors who work primarily for the principal enterprise without entering into an employment relationship.

Traditionally fixed term workers and part-time workers have been treated differently from permanent full-time employees, but the two Directives 98/23 and 99/70 have outlawed discrimination on these grounds. Accordingly our consideration centred on people outside these categories.

It was accepted that these are not necessarily down-trodden minions, but are often people who choose to retain a degree of independence from the enterprise, which enables them to choose the hours they work, the place they work, when to leave and gives them the right to work for other enterprises as well. Nevertheless, the sector does include the most vulnerable members of society – immigrants, ethnic minorities, disabled people. They also arguably include a disproportionate number of women. It is also a feature of such categories of worker that they are not represented by independent unions.

It was acknowledged that an attempt to regulate Agency Workers by a draft Directive is stalled and that it is unlikely, in the immediate future, for there to be legal protection from the European Union.

It is of interest that the Framework Directive on consultation has a broad definition of employee –

> "…any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practices"

This definition puts the onus of deciding how widely "employee" is to be defined back onto the national courts. It, therefore, allows individual member States to extend the definition of employee to economically dependent workers. There is a similar definition in Article 2.2 of the Transfer of Undertakings Directive which refers to "contract of employment or employment relationship".

In most countries there is a requirement of a direct contractual relationship between the employer and the worker and people entering into contracts as part of their business are excluded. Agency workers are largely treated as employed by the agency and not the principal enterprise. This gives them

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protection rights against the agency, but not, for example, where the principal employer decides to lay them off or decides to reject an individual. However, in Italy there is a long-established State Fund to protect self-employed workers who suffer from the closure or reduction of the main enterprise. In the Netherlands there is specific provision for workers who work for more than one employer, but not more than two and also for people who work with one or two assistants. In the United Kingdom and in Ireland, recent case-law has accepted the concept of an implied contract of employment with the principal enterprise, despite the express provisions of the tri-partite agreement between the agency and the worker and between the agency and the principal enterprise.

There were different approaches to casual and seasonal workers. It Germany it was asserted that casual and seasonal workers were not treated as employees. In Hungary it is said that casual workers are not so treated, but seasonal workers are. In Norway and to some extent the United Kingdom they are treated as employees while the contract lasts, but may not be employees during the periods when they are not working. The proposition that such workers are treated as employees if they have concluded a contract of employment[45] is perhaps tautological

In short, the problem is a difficult and complex one, which is faced by labour courts on a daily basis and is resolved on a case by case basis.

10. Conclusions

The Labour Court system is an essential element of the "Social Europe" which is still acknowledged as being a central part of what the European Union is. Labour Court Judges spend their lives adjudicating on the situations where, individually or collectively, employees and other workers are entitled to protection from the actions of employers.

On the other hand, social and economic protection depends on a successful economy and, in the end, there is no point in trying to protect jobs which do not exist. The best interests of employees as a whole may be protected by encouraging re-structuring, as a means to economic growth which will, in turn, create new jobs. This can be accepted without endorsing the hyperbole of the Lisbon Declaration.

The difference between the European Union and other world economic powers like India and China is not the level of protection given to workers, but their respective abilities to deliver goods and services at a quality and a price which the rest of the world wants. Countries like China and India do provide

[45] as asserted by Ireland and Slovenia

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protection for their workers. The primary difference is that their workers are prepared to work for less money than those in the EU. In order to succeed against them the EU has to provide greater added value.

In terms of employee protection much of the ground has been covered by existing national and EU legislation. Employees have appropriate protection against unjustified dismissal[46], in the event of collective redundancies, on transfer of undertakings and to protect employees from unfair discrimination, both on such grounds as sex and race, but also on employment grounds, such as discrimination against part-time workers and fixed-term workers.

There is also provision for consultation in the event of collective redundancies and transfer of undertakings.

The Framework Directive of 2002 and Article 29 of the Charter seek to promote a more general climate of consultation and information. It is in this area that there are wide divergences between Member States. Many Member States have high levels of union membership and recognition. From this it is not difficult to develop consultation and dissemination of information. Other States have Works Councils which have a similar effect. There are, however, many countries with much lower levels of union recognition and there are many countries which have proved reluctant to implement the Directive.

To try to impose consultation without an institutional structure of bodies to consult is liable to prove ineffective. The most vulnerable people are those without representation. They exist in all countries in the EU. They need protection from the courts.

The Congress analysed many areas where that protection exists and where satisfactory remedies are available for people who are inappropriately treated. This protection needs to be universalised and embedded. It is for free and independent unions to expand their representation, which will then be protected. It is also desirable to encourage employers to develop channels of communication with their workforce, but the tool of a Directive which assumes that there will be universal consultation is less clear.

One of the things which emerged is that countries are not divided into those which give good protection to redundant employees and those which give little protection. There is a great range of remedies and protection available, with also differences between those given by collective agreements and agreements with Works Councils and the protection for employees of small businesses, who suffer just as badly if they lose their jobs as the employees of large enterprises.

The protection provided for employees when there is a transfer of an undertaking exists throughout the EU in accordance with the Directive. There is some divergence of views about involuntary transfers and out-sourcing and

[46] see "Termination of employment at the Initiative of the employer – the challenge for Corporate Responsibility" – EALCJ Report 3rd March 2005

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about the extent to which employers can seek to avoid the impact of the Directive in involuntary transfers by simply not taking over the assets and staff.

However, the divergence which has the most economic impact it the divergence in the criteria used to select employees for redundancy. Social criteria may provide protection for vulnerable employees, but it prevents employers from using the flexibility they would like in choosing the keep the employees who are of most economic value to them.

Protection on insolvency and protection of private pension funds are both areas of concern. The "flexibility" argument suggests that, on balance, more people will retain their jobs if insolvent businesses are able to take the opportunity to shed as many workers as they wish, but to retain those they want.

Social protection for all people who lose their jobs is part of the "social Europe" concept. Most countries treat people who lose their jobs due to corporate insolvency as being the same as any other unemployed people. The only extra protection they get is the return of some of the money due to them from their employers. There is, therefore, little impetus for higher protection for employees of insolvent businesses.

The protection of pension funds is an even more emotive issue. People who have paid into company pension schemes do not expect to be abandoned when the company fails. This debate has been hotly disputed in the United Kingdom and there is much merit in the principle that company pension schemes should be kept well away form investment in the companies' shares.

The overall conclusions of the Congress, therefore, cannot be summarised in a simple theme. There always has to be a balance between flexibility and employee protection. The concept of "flexicurity" simply restates the dichotomy. On the whole national judges felt that they were able to strike that balance.

12th April 2006

Colin Sara
Secretary-General

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