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LAW 2008/20

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EUI Working Paper LAW No. 2008/20

ISSN 1725-6739

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

http://www.eui.eu/
http://cadmus.eui.eu/

Abstract

This paper aims at assessing the right of employees to refuse to have their contracts of employment transferred within the framework of the transfer of undertakings Directive. A transnational as well as a theoretical analysis is proposed. Beyond the comparison of the implementation of this Directive within six European countries, the elements of contractual, constitutional and labour law that have framed the diverging interpretations of the Member States are listed. As a conclusion, hints are given as to the possible legal evolution of the worker's right to refuse to be transferred.

Keywords:

Transfers of undertakings - right to object - right to refuse - right to work - Europe - international labour standards - comparative law - European Community Law - labour law

The Right of the Employee to Refuse to Be Transferred. A Comparative and Theoretical Analysis[♦]

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H. Olbrich[β], S. Fuller[γ]

1. Introduction

We have recently marked the 30th anniversary of the Council Directive 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.[1] It seems to be a good moment for reflection and analysis of developments up to this day as well as questions relating to the future application of the Directive. The Transfer of Undertakings Directive can, at the age of 30, still be considered fairly young, but national regulations governing situations that fall under the Directive are, regardless of this, differing in age, development and implications. The purpose of this paper is to analyse this variety of national regulations by focussing on the right of the employee to refuse[2] to have the contract of employment or employment relationship[3] transferred.

♦ Paper presented in the framework of the EUI Social Law Working Group. This article summarizes the papers presented at a workshop that took place at the EUI on 24 April 2007. We would like to thank Professor Favennec-Hery and Professor Moreau for their kind participation, and Professor Moreau for her support of the initiative.

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1 The Directive and its amendments will be referred to as the Transfer of Undertakings Directive or simply the Directive.

2 This option of the employee, in the event of the transfer of their employment relationship, has been given various labels in the academic literature. It seems that the verbs "object", "oppose" or "refuse" are more or less the most commonly used to describe this phenomenon. However, this inconsistency is also noticeable in the case law of the European Court of Justice (hereinafter ECJ), which has not yet chosen between these different terms. One may note that the *Katsikas case* (() mentions the right to object, while the *Temco case* ((2002b) European Court of Justice, *Case C-51/00. Temco Service Industries SA v Samir Imzilyen and Others.* 01-24-2002 ECR I-00969.) states the right to refuse. Having in mind the wording of the German deposition on this issue, it is plausible that the terminology used by the ECJ is only repeating the wording used in the question addressed to the ECJ. These terminologies could be considered synonymous. However, the first two, i.e. object and oppose, might be understood as implying an act or an expression of resistance (like a conscientious objector). "Refuse" might rather signify that the worker is not willing to accept or has declined, through her/his silence, the proposition of being transferred. Furthermore, these words are used differently in various national contexts. For the purpose of this paper, it appears to us that the consistent use of the terminology "refuse" is preferable (For the French point of view on this see BAILLY, P. (2003) Le salarié peut-il refuser les effets d'un transfert d'entreprise? *Dr. Soc.***,** p. 474-481, JEAMMAUD, A., CHAGNY, Y. & RODIÈRE, P. (2007) Faut-il reconnaître au salarié la faculté de refuser le transfert de son contrat de travail? *Revue de droit du travail***,** 216-221.). See also GOMES, J. (2007) *Direito do Trabalho*, Coimbra.

3 In the Directive both terms are used, but due to the slightly broader conception of the employment relationship we will use this unless a more narrow meaning is intended.

For this analysis the most interesting factors for our purposes are the underlying concepts or ideas within the national legal systems[4] that set the prerequisites for how rights and obligations adhering to an employment contract can be framed. A simple comparison of different European systems shows how one Directive can be implemented and understood in different ways. This study exemplifies the differences by comparing a sample of countries: United Kingdom, France, Hungary, Portugal, Germany and Sweden.[5] A descriptive method aimed at establishing differences and similarities in order to synthesize and reach general analytical conclusions. The basic role of labour law, contract law, the implementation of EU law in domestic legal orders and fundamental and constitutional rights for workers all are concepts or ideas of importance for such an analysis; the approach taken in the definition of such concepts and ideas will have an impact on how rights and obligations adhering to an employment contract can be framed.

The differences between the Member States' national regulations are related to different factors, such as the date of accession to the EU, or the different social and economic context in which the rules on the transfer of undertakings had to be applied. On the other hand, there are some national systems that had regulations concerning employees' rights in situations of business transfers long before the Directive was adopted and even long before the establishment of the European Social Charter (Revised) (hereinafter ESCR). With reference to the Transfer of Undertakings' Directive the specific issue of the right of an employee to refuse to be transferred can serve to highlight these fundamental concepts within the labour law systems of the Member States. This comparative and theoretical analysis might not only contribute to a reflection of a single Member State's system, but it might also help provide better understanding of the regulations in other Member States which is becoming particularly important as the transfer of a business is, regardless of the nationality of the transferee, governed by the domestic regulations in force at the place of the registered seat of the business taken over.

Arguments in favour of or in opposition to the implementation of the employee's right to refuse to a transfer of the employment contract are derived from various ideas. We have identified what can be considered the key questions in this debate: some are closely linked to contract law, the contractual autonomy of the parties and the perception of the employment contract as being or not being personal for the parties, i.e. *intuitus personae* for the employment contract parties; other questions are related to fundamental rights of workers, such as the right to work, the right of the workers to freely choose whom they wish to work for, the worker's right not to be subject to forced labour and the right to protection against unfair dismissal, which includes the right to protection in the event of dismissal[6] and the right not to be dismissed without a valid

[4] The countries concerned are France, Germany, Hungary, Portugal, Sweden and the UK. We have chosen these countries since they represent various models of labour law systems as well as countries with a varying length of membership in the EU. In addition we are also sure to have good insight and understanding of each of these countries' labour law systems as for each country at least one of the authors is of that nationality.

[5] For this purpose, it is interesting to note that the national analyses were made by nationals of these different countries: A-C. Hartzén is Swedish, N. Hös is Hungarian, F. Lecomte and C. Marzo are French, B. Mestre is Portuguese, H. Olbrich is German, S. Fuller is English.

[6] For example appeal, compensation or damages.

reason. This right is linked to the implementation of the right to information and consultation within the company. Additionally, the ambivalence of labour law,[7] having the role of promoting both employment stability and labour market flexibility at the same time, will also be of importance when assessing the need for the worker's right to refuse the transfer of the employment contract.

This paper aims to develop a conceptual framework analysing the reasons for the existence or non-existence of the right to refuse in various Member States in order to explain how the different answers to the identified key questions can affect the nature and content of this right. As possibilities for implementing the right to refuse to transfer the contract of employment have been elaborated in the case law of the ECJ, we will first provide an explanation of the requirements developed by the ECJ, an explanation that will serve to clarify the possibilities available for the Member States and provide a more rigorous structure for the comparative analysis of the national regulations which follows.

2. Member States' competence in the light of the ECJ's interpretation

2.1. The ECJ case law

The 1977 Directive does not give an answer as to the existence of a right to refuse. It was slightly amended in 1998[8] in order to include some evolution of the case law relating to transfer of undertakings and it was finally codified in 2001[9], but there were neither major changes nor statements about the employee's right to refuse to a transfer. The ECJ had already clarified the following matters in its previous case-law: (1) The transfer takes place *ope legis*,[10] regardless of the will of the transferor and the transferee;[11] (2) the transferor is discharged of his obligations even if the employee does not consent;[12] and (3) the transfer, once decided, cannot be prevented by either party,

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[7] PÉLISSIER, J., SUPIOT, A. & JEAMMAUD, A. (2006) *Droit du travail,* Paris, Dalloz, JEAMMAUD, A. (2005) Le droit du travail dans le capitalisme, question de fonctions et de fonctionnement *WP C.S.D.L.E. "Massimo D'Antona" .INT***,** 41.

[8] (1998d) *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* OJ L 201 , 17/07/1998, p. 88-92.

[9] SIGEMAN, T. (2001) *Arbetsrätten,* Stockholm, Norstedts juridik.

[10] i.e. by operation of law

[11] (1996) European Court of Justice, *Case C-305/94. Claude Rotsart de Hertaing v J. Benoidt SA, in liquidation and IGC Housing Service SA.* . 14-11-1996 ECR I-05927.

[12] After the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking did not consent or if they object. This obligation is subject, however, to the power of the Member States to provide for joint liability of the transferor and the transferee after the date of the transfer §22K: (1988b) The European Court of Justice, *Joined cases 144 and 145/87. Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen.* 05-05-1988 ECR 2559. ECR 2559, paragraph 14.

thus an employee cannot waive the rights conferred upon her/him.[13] However, there is academic discussion as to whether the Directive and the case-law of the ECJ admitted that the employee could refuse to have his/her contract transferred, as in German law, or whether they committed the employee to follow the fate of the undertaking, to which he is inextricably bound, as in the French system.[14]

For a while it seemed as if the ECJ recognised the right to refuse, as can be seen in the *Danmols Intervar* case where the ECJ stated that "*the protection which the Directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer. In that situation, article 3(1) of the Directive does not apply."*[15] The underlying situation was, however, very specific: the ECJ dealt with the question whether an employee who was dismissed by a company, then had bought the same company with the intention of continuing the business, but making himself redundant, should be considered as a worker for the purpose of the Directive. The ECJ answered in the negative and, as shown, based its argument on the right to refuse. Nevertheless, what can be considered as the ECJ's key case on the employee's right to refuse to transfer is the *Katsikas* case: The

> "Directive [...] cannot be interpreted as obliging the employee to continue his employment relationship with the transferee. Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen."[16]

When reading the *Katsikas* case the first impression is that the right to refuse is to be granted to employees as it is said that "the Directive cannot be interpreted as obliging the employee to continue his employment relationship with the transferee."[17]

It could have led to the conclusion that

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[13] The protection provided by the Directive is independent of the will of the parties to the contract of employment. So, *an employee cannot waive the rights conferred upon him by the mandatory provisions of the Directive even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position*. The reason given is that the protection of the worker is a matter of public policy. The Directive sought to afford employees protection, which was independent of the will of the parties to the contract of employment. The rules of the Directive were to be considered to be mandatory.
Nevertheless, the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as an alteration is permitted by the applicable national law in cases other than the transfer of an undertaking. As a result, the contract can be modified IF it is not a case of transfer AND national law allows for it.§25 K : (1988a) European Court of Justice, Case 324/86. Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S. 10-02-1988 ECR 00739., paragraph 15.

[14] DAVIES, P. (1993) Transfers Again: Contracting Out and the Employee's Option. *Industrial Law Journal***,** 151-153.; GRATANI, A. (1993) L'impresa viene trasferita, la tutela del lavoratore resta *Diritto comunitario e degli scambi internazionali***,** 93-94.

[15] §30 of the *Katsikas* case, referring to paragraph 16 of its judgment in (1985b) European Court of Justice, *Case 105/84. Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation*. 11-07-1985 ECR 02639.

[16] (1992b) The European Court of Justice, *Joined cases C-132/91, C-138/91 and C-139/91. Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*. 16-12-1992 ECR I-6577., paragraphs 31, 32.

[17] *Ibid.* paragraph 31.

> "Article 3(1) of the Directive does not preclude an employee from deciding to object to the transfer of his contract of employment or employment relationship and hence deciding not to take advantage of the protection afforded him by the Directive."[18]

However, the conclusion was slightly different as

> "it follows that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the Directive does not require the Member States to provide that the contract or relationship is to be maintained with the transferor. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be"[19]

Worth noting when discussing the *Katsikas* case is that this was a German case by which the national court sought to establish whether the German legislation granting workers the right to refuse was in accordance with the Directive. However, lawyers in different Member States received this statement in astonishingly divergent ways. For example in Germany, Sweden and the UK it was interpreted as essentially saying that the fundamental rights of the Community called for a right of the employee to refuse to transfer, whereas the Member States are free to choose the legal consequences of exercising such a right. Whilst in other Member States like Portugal and Hungary the passage was understood as not answering the question directly but giving Member States a choice as to whether or not to implement the worker's right to refuse to be transferred in the national legal order and how to shape the legal consequences of the exercise of this right. Even though this interpretation might lead to the impression that the Member States have a certain amount of freedom when implementing the Directive, the aim of the Directive, i.e. safeguarding the interests of workers, will be sufficiently ensured regardless of the choices of the Member States. It is a vital concern of workers to be able to keep similar employment to that they used to have.

This ambiguity in the ECJ decision has caused varying interpretations in the national legal order. One explanation for this – apart from the Member States not being willing to let the ECJ interfere with their legal system that has evolved over time – might be that the focus when interpreting the *Katsikas* case is different: while the German view is primarily based on the passage cited above, the alternative interpretation rests on the following paragraph of the same case:

> "In the event of the employee deciding of his own accord not to continue with the contract of employment […] with the transferee, […] it is for the Member States to determine what the fate of the contract of employment or employment relationship should be."[20]

2.2. The implementation of the Katsikas case and the fate of the employment relationship

Following this decision, the Member States have chosen either explicitly or implicitly to implement the ruling in the case. On the basis of our case studies there are generally three options for the contracting parties: the non recognition of such a right (2.2.1);

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[18] *Ibid.* paragraph 33.

[19] *Ibid.* paragraph 35.

[20] (1992b) The European Court of Justice, *Joined cases C-132/91, C-138/91 and C-139/91. Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*. 16-12-1992 ECR I-6577. paragraph 35.

resignation (2.2.2) and the maintenance of the contract of employment with the transferor (2.2.3). As we will see, however, these categories are not so clear cut in some cases.

2.2.1. The non-recognition of the right to refuse

France and Portugal chose this solution. These two countries, which already had quite similar approaches, implemented the Directive by maintaining the contract of employment. The same legal policy was chosen by more recent Member States such as **Hungary**.

In **Portugal**, legislation and case-law have persistently refused to recognise a *right to opposition*[21] on grounds of political economy. Portuguese labour law relating to the transfer of undertakings is dominated by the so called *theory of the enterprise*, according to which workers are part of the assets of the undertaking rather than party to a labour contract. The main focus of the legislation is not to protect the interests of the workers – although they might indirectly benefit – but to protect the integrity and commercial value of the undertakings, which could be endangered in the event that workers refused to be transferred. The only option of the worker that is recognised is to terminate the labour contract, an option that is available to him or her at all times.[22]

In **France** the question has been raised a bit differently. Adopted in 1928 and unchanged since, Art. L. 122-12 of the labour code states that

> "the transferor's rights and obligations arising from the contract of employment or the employment relationship existing on the date of the transfer shall, by reason of such transfer, be transferred to the transferee"[23]

and is considered as the transposition of the Directive. It imposes on both parties the continuation of the employment relationship with or without their consent.[24] For the *Cour de Cassation*, the question has always been "is our interpretation compatible with the one the ECJ adopted"? Based on the ambiguity of the *Katsikas ratio*, the answer has always been that the fundamental freedom of the worker is respected as (s)he still has the freedom to resign if (s)he refuses to work for the transferee.[25] So if a choice were to be identified, it would consist of not implementing a right that would allow the worker to remain at the service of the transferor.

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[21] Translation from the author.

[22] For the portuguese case-law see the extensive work of Julio Gomes GOMES, J. (1996) O conflito entre a jurisprudência nacional e a jurisprudência do TJ das CCEE em matéria de transmissão do estabelecimento no Direito do Trabalho: o art.37º da LCT e a Directiva 77/187/CEE *Revista de Direito e Estudos Sociais*. See also LOBO XAVIER, V. D. G. (1986) Substituição da empresa fornecedora de refeições e situação jurídica do pessoal utilizado no local: inaplicabilidade do art.37º da LCT. *Revista de Direito e Estudos Sociais*, XXVIII. ; ABRANTES, M. C. (1989) *A transmissão do estabelecimento comercial e seus efeitos no contrato de trabalho*, Coimbra. ; ABREU, J. C. D. A. (1982) *A empresa e o empregador np Direito do Trabalho*, Coimbra.

[23] The forthcoming new labour code will contain the same provision, with the same wording, at Art. L. 1224-1.

[24] BAILLY, P. (2007) L'actualité de l'article L. 122-12. *Semaine Sociale Lamy*, 1290**,** 7-11.

[25] *Ibid.;* JEAMMAUD, A., CHAGNY, Y. & RODIÈRE, P. (2007) Faut-il reconnaître au salarié la faculté de refuser le transfert de son contrat de travail? *Revue de droit du travail***,** 216-221.

Another example of the implementation of this option is **Hungary**. The labour law consequences of business transfers are perceived as an automatic modification of the contract of employment, since the identity of one of the parties to the agreement changes as a legal consequence of a transfer of an undertaking.[26] However, in contrast to the general rules on the modification of the labour contracts the consent of employees is not required since the contract of employment will be automatically maintained without any changes in terms and conditions by the transferee.[27] In order to better understand this approach of the Court it is worth going back to the time when the rules on the transfers of undertakings were adopted in Hungary. Given the lack of any statutory provisions in the first Labour Code after the end of communism, the Supreme Court introduced the rules on the transfers of undertakings by its case law and through the interpretation of the existing provisions of the Labour Code in the early 1990s. In order to preserve a consistent interpretation of the law, the then Labour Law Chamber of the Supreme Court published the so- called Resolution Nr. 154, which followed, to a certain extent, the provisions of the Directive 77/187/EEC.[28]

The most important change was the recognition of the automatic transfer of the employment relationships to the new employer. The Court relied on the general rule that the contract of employment terminates automatically only by the cessation of the employer without a legal successor. Hence it followed, if the identity of the employer changed due to the transfer of an undertaking, the new employer could be considered to be a legal successor of the former. This approach was acceptable in the early 1990s when job security and the protection of the acquired rights of the workers during the process of privatisation was a priority of labour law regulation. Consequently, the right of the worker to refuse the automatic transfer of the employment relationship was not established. Although the right to refuse was not recognized during the implementation of the Directives into Hungarian law, several commentators referred to the German *Widerspruchsrecht* and pointed out that it could provide a more favourable treatment for the workers. Kiss emphasized the constitutional importance of the right to refuse, namely that it is based on the right to human dignity in Germany. He highlighted that the right to refuse does not provide an absolute job security for the worker, rather the employee might enjoy a more favourable protection in the case of termination of the

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[26] The change in the identity of the employer is an *exception* to the general rules on the modification of the employment contract. This is indicated by the fact that we find the rules on the transfers of undertakings in Chapter III of the Labour Code laying down the rules on the modification of contracts. HAGELMAYER, I. A. S., DR. SEBESTYÉN KATALIN (1999) *A gazdasági társaságok, az egyesülés és közhasznú társaság munkajogi kérdéseinek új szabályai*, Budapest, Agrocent Kiadó. Under s85/A of the Labour Code the rules on the transfers of undertakings appear under the following heading: 'changes in the identity of the employer by legal succession'. For an introduction to the Hungarian rules on the transfers of undertakings see KISS, G. (2005a) *Munkajog*, Budapest, Osiris, BERKE, G. (2001a) A munkavállalói jogok védelme a munkáltató személyében bekövetkező változások esetében IN KISS, G. (Ed.) *Az Európai Unió Munkajoga*. Budapest Osiris Kiadó.

[27] Court Reports (Bírósági Határozatok) – (1997) *BH 1997/3/153*. Court Reports (Bírósági Határozatok) ; BH 1995/7/434 (1995) *BH 1995/7/434*. Court Reports (Bírósági Határozatok) ; (1998c) Supreme Court, *LB Mfv. I. 10. 161/1998*. unpublished ; For an extensive overview on the recent case law of the Supreme Court see RADNAY, J. (2004) A munkáltatói jogutódlás kérdései. *Gazdaság és Jog*, Vol. 2., pp. 17-22.

[28] The Resolution was adopted on the 26 of November 1992 and it was publish in the Court Reports (Bírósági Határozatok) (1993c) *BH 1993/1*. Court Reports (Bírósági Határozatok) The Resolution, however, was only binding on the Supreme Court itself.

employment relationship.[29] According to Berke the recognition of the right to refuse can be explained by the strong protection of private autonomy in Germany. Autonomy is valued to the extent that it is protected even though the worker might risk the termination of the employment relationship by the exercising his/her right to refuse.[30]

2.2.2. The refusal considered as a resignation

"The worker that refuses is considered as having resigned and loses all the rights (s)he was entitled to."[31] This is the current legal understanding in **France** of the *Cour de Cassation* of a worker's refusal of being transferred. Instead of asserting that the exercise of the right to refuse is considered as a resignation, we would rather say that refusing the transfer of her/his contract leads, in the French legal system, to classification of this behaviour as a resignation. Though, as Mouly states,[32] it is hardly understandable how a refusal can be interpreted as a manifestation of a will that would imply a resignation. Such conduct is only the manifestation of a will to remain at the services of the transferor, certainly not to resign. The current position of the *Cour*, on the one hand, may seem coherent, according to its general understanding of the question – the right to refuse is not a valid claim – but, on the other hand, it certainly does not make sense since this assigns the termination of the contract of employment to someone who has never manifested such a will. Therefore, we would neither consider this as the exercise of a right to refuse nor admit that it is a way of implementing such a right.

In **Hungary**, there are no special provisions on the fate of the employment relationship if the worker wishes to hinder the automatic transfer of the employment relationship. According to the prevailing view in these cases the employee can resign; however, (s)he is not entitled to a statutory severance payment.[33] This situation would be less detrimental for the workers if the Hungarian legislator had transposed Article 4 (2) of the Directive 2001/23.[34] In this case, if the employee terminated the contract of employment because the working conditions were substantially detrimental after the transfer, the employer would be still responsible for the termination of the contract. Consequently, he would have to pay a severance payment to the worker.[35] Finally, the

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[29] KISS, G. (1995) A Legfelsőbb Bíróság MK 154. számú állásfoglalása a munkavállalók jogainak és a vállaltok, üzemek és üzemrészek tulajdonosváltozása esetén történő megóvásáról szóló 77/187 (EGK) számú Irányelvének tükrében *Jogtudományi Közlöny*, Vol. 10**,** pp. 437-450.

[30] BERKE, G. (2001b) A munkajogi jogutódlás. *JURA*, 1**,** 19-35.

[31] MOULY, J. (2007) Une nouvelle rupture du contrat de travail produisant les effets d'une démission : le refus du salarié de passer au service du repreneur. *Recueil Dalloz***,** 472.

[32] *Ibid.*

[33] HAGELMAYER, I. A. S., DR. SEBESTYÉN KATALIN (1999) *A gazdasági társaságok, az egyesülés és közhasznú társaság munkajogi kérdéseinek új szabályai*, Budapest, Agrocent Kiadó.

[34] According to Article 4 of the Directive If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been resposible for the termination of the contract of employment or of the employment relationship. See further on this question section 3.1 of the paper.

[35] PRUGBERGER, T. (2001) *Európai és Magyar Összehasonlító Munka- és Közszolgálati jog* Budapest, KJK-KERSZÖV.

parties can also terminate the contract by mutual agreement following the general rules of the Labour Code on termination.[36]

The **UK** understood the *Katsikas* case as creating an obligation to implement a right to refuse within the national system.[37] It consequently created this right but made sure to empty it of any legal consequence. Thus in an amendment to the original Transfer of Undertakings (Protection of Employees Regulations) (TUPE),[38] it was established that the employee could object and that this would have the effect of terminating the employment contract, but that the employee who objected would not be treated as having been dismissed.[39] This meant that classical notions of freedom of contract were preserved, but provided for no basis for the employee to be able to claim compensation for wrongful dismissal or redundancy payments as a result of the transfer.[40]

Given the consequences of an objection, it was important to clarify what behaviour constituted the exercise of the right to refuse. What precisely is to be treated as an objection was determined by the Employment Appeal Tribunal (EAT) which held that 'object' means an actual refusal to consent to the transfer and that the state of mind must be communicated to either the transferor or the transferee, before the transfer takes place. There is, however, no particular method whereby that state of mind must be brought to the attention of either the transferor or the transferee. It can be by word or deed, or both. The EAT stated that it ought to be possible to distinguish 'between withholding of consent and mere expressions of concern or unwillingness, which may still be consistent with accepting the inevitable'. This means that the mere expression of protest prior to a transfer would not amount to an objection 'unless it is translated into an actual refusal to consent to the transfer which is then in turn communicated to the relevant persons before the transfer takes place'.[41]

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[36] HAGELMAYER, I. A. S., DR. SEBESTYÉN KATALIN (1999) *A gazdasági társaságok, az egyesülés és közhasznú társaság munkajogi kérdéseinek új szabályai*, Budapest, Agrocent Kiadó.

[37] TETHER, M. (1993) *Taking the Lead From Europe – recent developments in relation to business transfers show EC law has not exhausted its potential to influence UK employment rights* Law Society Gazette, 15 Sep, 90 (27). For a discussion of the right to object in a particular employment context see DAVIES, R. (2004) *Contracting Out and the Retention of Employment Model in the National Health Service* Industrial Law Journal 33 (95).

[38] For a discussion of the UK law relating to transfers of undertakings generally see HYAMS, O. (2006) *Employment Aspects of Business Reorganisations*, Oxford, Oxford University Press and DERBYSHIRE, W., HARDY, S. and MAFFEY, S. (2006) *TUPE: Law and Practice*, London, Spiramus.

[39] The current regulations are the Transfer of Undertakings (Protection of Employees) Regulations 2006, which incorporate some of the decisions in the case law discussed below. Regulations 4(7) and (8) establish respectively the right to object and that the exercise of this right is to be treated as a resignation. For a discussion of the most recent regulations see CLAYTON, D. (2006) *TUPE restyled* Law Society Gazette, 16 Mar, 24 and MCMULLEN, J (2006) *An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006* Industrial Law Journal 35(2): 113-139., for a more recent analysis on the right to object see MCMULLEN, J (2008) *The 'Right' to Object to Transfer of Employment under TUPE*, 2008 Industrial Law Journal 37(2): 169-177.

[40] For the English law of employment more generally see COLLINS, H. (2003) *Employment Law*, Oxford, Oxford University Press; and the principle practitioner texts *Harvey on Industrial Relations and Employment Law*, London, Butterworths Law, (2007) and WALLINGTON, P. (ED) (2007) *Butterworths Employment Law Handbook*, London, Butterworths Law.

[41] *Hay v George Hanson (Building Contractors) Limited* [1996] IRLR 427

While in normal circumstances, the employee who has exercised his right to refuse will be treated as having resigned, the question arose as to what should happen where the objection came as a response to a negative change in working conditions. It was argued before the Court of Appeal[42] that the wording of the TUPE regulations (subsequently amended), which stated that an objection would not be treated as a dismissal for any purpose, eliminated the worker's right to claim constructive dismissal or wrongful dismissal where he objected because there was a substantial detriment to his employment conditions. The court rejected this argument and made clear that the purpose of the original Directive had been to protect employee's rights on transfer. Thus where there would be a substantial detrimental change as a result of the transfer, the employee could object and have his objection treated as a dismissal.[43] This decision was incorporated into the 2006 Regulations[44] which otherwise made little change to the UK regime.

2.2.3. The maintenance of the contract of employment with the transferor

This last option differs from the former one to the extent that the exercise of the right to refuse does not automatically lead to the termination of the employment contract, but rather see the employment relationship maintained with the transferor. Even though, as we will see from the examples below, the ultimate consequence of such a refusal might be also a dismissal this option increases the responsibility of the transferor and can provide more protection for the worker.

What is certainly not a choice, but rather a collateral effect, is the statute adopted by the **French** legislator in the event of a transfer of an undertaking to a public entity.[45] Yet, this enables a worker to refuse her/his transfer when it comes to the case of a transfer from a private to a public entity. Despite the ECJ position,[46] the *Cour de Cassation* had refused to admit that the transfer of an undertaking to an administrative entity was among the situations considered by Art. L. 122-12 LC. A special provision had to be adopted in order to include this case among those considered to fall in the ambit of the Directive.[47] It is worded that the transferee shall *propose* a public law contract that preserves the substantial content of the previous private law contract. In the event of a refusal on the part of the worker, the public entity shall dismiss the worker according to general provisions of labour law.[48] In this situation the employee is entitled to refuse to work for the transferee and the former contract is maintained. Thus, 'maintained' here no longer means substituting one employing party for another. In the event of a transfer

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[42] *Humphreys v Oxford University* [2000] IRLR 183

[43] For a discussion of this case and its implications see MILLER, S. (2004) *Rough Justice, TUPE style* Scots Law Times 3: 13-16 and the uncredited article *Transfer of Undertakings* European Law Monitor 8 (5) (9) 2000.

[44] Regulations (9), (10) and (11).

[45] BAILLY, P. (2007) L'actualité de l'article L. 122-12. *Semaine Sociale Lamy,* 1290**,** 7-11, BOUBLI, B. (2005) L. 122-12 dissout dans le service public. *Semaine Sociale Lamy,* 1238**,** 6-9.

[46] (2000) European Court of Justice, *Case C-175/99. Didier Mayeur v Association Promotion de l'information messine (APIM)*. ECR I-07755.

[47] Art. 20 of the Statute n° 2005-843 of 26 July 2005.

[48] *Ibid.* This particular disposition was enacted in order to prevent disputes on the question of which jurisdiction shall be competent to evaluate the legality of the possible dismissal following the refusal.

from a private to a public entity, maintaining signifies that the employer is still the transferor, who will then have the choice either to keep or dismiss the worker.

Since 2003, in **Hungary**, similarly to this French situation, the only case where the Labour Code requires the consent of the employees to the transfer is the case of public sector reorganisations. In these cases there is a change in the legal status of the employer that can be overtly detrimental to the interest of the employees. However, if there is a change in the legal entity of the employer following the transfer of the undertaking or part of it[49] to the public sector, the employment relationships assigned to that part of the undertaking will automatically be terminated. According to the LC, within 15 days of being provided with information about the proposed transfer,[50] the employee has to declare in a written statement whether (s)he consents to the continuation of his/her employment in the public sector. If (s)he fails to do so, it must be considered as if (s)he did not agree to the transfer.[51] Formally speaking, similarly to the French solution, the employer has an obligation to offer a *re-employment* to the worker in the public sector and only if the employer refuses this offer will (s)he be notified about the termination of the relationship, and in this case the employer has to make a redundancy payment.[52]

The **German** system provides a good example of this final approach, since it was this option which had already been chosen by the German legislator before the *Katsikas* case. Indeed, this was the reason that the ECJ developed this model of choice for the Member States. In Germany, the Federal Labour Court (Bundesarbeitsgericht) has acknowledged a right to refuse since 1974 for reasons of private autonomy and fundamental rights of the employee.[53] Nevertheless, the right to refuse was laid down in section 613a para. 6 BGB (German Civil Code) as recently as 2002. This was done in the course of implementing the amendments necessary to comply with the Directive 2001/23/EC.[54] According to this provision, employees are entitled to lodge their objections in writing within the period of one month of receiving the information on the transfer provided by transferor or transferee. The legal consequences in cases of objection have not yet been laid down in a statute but have been elaborated by legal discussion and the case-law of the Federal Labour Court. The right to refuse is considered to be a "right to refuse legal consequences"[55] of a transfer of business set up

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[49] Under the part of the undertaking the Labour Code lists the transfer of an organisational unit, material or immaterial assests, a ceratain group of trasks or competences [s86/B (1)].

[50] According to s86/B (2)-(3) beyond the general obligation of the employer to information and consultation the employees under the Directive on for instance the reasons and the negative social consequences of the transfer, the employer has to inform the employees and their representatives also about the fact that following the transfer the worker will be employed in the public sector and about his/her special duties regarding his/her employment in the public sector.

[51] s86/B (5) of the Labour Code.

[52] s86/B (6) of the Labour Code.

[53] (1974a) Bundesarbeitsgericht, *5 AZR 504/73*. Neue Juristische Wochenschrift (NJW) 1975, pp. 1978, at p. 1979; (1986) Bundesarbeitsgericht, *BAG AP § 613a Nr. 55, 2 AZR 101/85,* Arbeitsrechtliche Praxis (AP).

[54] (2002c) *Gesetz zur Änderung des Seemannsgesetzes* Bundesgesetzblatt (BGBl.) (Federal Law Gazette) Teil I Nr. 21 p.1163.

[55] Dissenting: LÜKE, G. (1986) Übergang des Arbeitsverhältnisses bei Betriebsübergang *Arbeits-rechtliche Praxis***,** case comment on § 613a BGB Nr. 55.

by section 613a para. 1 cl. 1 BGB – the transfer of the employment by operation of law.[56] If the employee decides to refuse these consequences, the employment contract is not terminated but continues to exist with the transferor.[57]

As the period for objection of one month only starts running if the employee is given correct and complete information on the transfer[58] with advice on the content of information, an objection might be lodged after the date of the transfer. According to the prevailing opinion the objection acts *ab initio*, not *a data*.[59] The employment relationship is treated as never having existed with the transferee but as having continuously been in force with the transferor. Nevertheless, the transferor has the right to dismiss the employee objecting to the transfer for economic, technical or organisational reasons. Section 613a Para. 4 Cl. 1 BGB does not stand in the way of this, for the notice of termination is not given on account of the transfer but on other grounds under Para. 4 Cl. 2, namely the refusal to work for the transferee.[60] This concept involves a considerable advantage for the employee - the obligation of the transferor to offer a replacement position, i.e. to maintain the actual employment in a part of the business that is not affected by the transfer, if it is possible and practical to do so.[61] Otherwise the employee is entitled to redundancy payments.

Another resulting problem is whether an employee refusing the transfer of his employment relationship is granted full protection under the Protection against Dismissal Act (KSchG). Under this act, of the employees holding comparable positions within the plant "Betrieb", the one requiring the least social protection must be made redundant under so called social election "Sozialauswahl",[62] and not the one exercising his right of objection.

One has to bear in mind that the question should not be decided at the expense of employees not affected by the transfer. This is why the full protection of social election used to be granted by the federal labour court only in case of commendable reasons,[63] such as the imminent risk of dismissal or considerable change of working conditions to the detriment of the employee. But in a recent decision the federal labour court gave up this jurisdiction. It stated that under section 1 para 3. KSchG amended in January in 2004

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[56] (2006) Bundesarbeitsgericht, *BAG AP § 613a Nr. 312, 8 AZR 305/05*, Arbeitsrechtliche Praxis (AP) with further reference.

[57] Ibid.

[58] Ibid. with advice for the content of information.

[59] Ibid., with further reference.

[60] GAUL, B. (2005) Sozialauswahl nach Widerspruch gegen Betriebsübergang. *Neue Zeitschrift für Arbeitsrecht (NZA)* 2005**,** 730 et sqq., at p. 730.

[61] Ibid., at p. 730.

[62] Under Section 1 Para. 1 - 3 KSchG (Kündigungsschutzgesetz - Protection against Dismissal Act) the dismissal of an employee who has worked in the same business for more than 6 months in a row justified by economic, technical or organisational reasons nevertheless is void, if the employer has not or not sufficiently considered company seniority, age, obligations to support and severe disability of the employee. Basically this means that of the employees holding comparable positions within the business ("Betrieb") the one requiring the least social protection must be made redundant. MÜLLER-GLÖGE, R., PREIS, U. AND SCHMIDT, I. (Ed.) (2008) *Erfurter Kommentar zum Arbeitsrecht, 8th Edition*, § 1 KSchG, marginal numbers 299 et sqq.

[63] (1993b) Bundesarbeitsgericht, *BAG AP § KSchG 1969 Soziale Auswahl Nr. 22, 2 AZR 449/91 (B)*. Arbeitsrechtliche Praxis (AP).

the reasons for the objection could no longer be taken into account. Considering these reasons was contrary to the unambiguous wording of this section due to the fact that it now limits the criteria for social election to the ones enumerated. By giving courts such discretion, the aim of predictability of legal decisions would be foiled.[64]

Furthermore, in **Sweden**, the labour law system does not explicitly provide the employee with a right to refuse to the transfer of the undertaking as such, nor did the legislator interpret the *Katsikas* case as obliging the Member States to do so.[65] However, Article 6b, paragraph 4, the Swedish Employment Protection Act[66] does state that "in spite of the provisions in paragraph one, the employment contract and relation shall not be transferred to a new employer should the employee object to this."[67]

This clearly provides the employee with a right to refuse the transfer of the employment relationship, but it does not entail any specific protection for the worker's employment, other than what can be found in the provisions governing protection against unfair dismissal in the Employment Protection Act,[68] in such a situation. The Swedish labour court has specifically stated that the intention of this provision is to assure the employees of a right to refuse only and not to establish further employment protection.[69] Article 7 of the Employment Protection Act[70] obliges the employer to find replacement positions for workers at first and only when this is not possible will redundancy be considered just cause for dismissal of the workers. The protection, similar to that in the German system, thus consists of an obligation for the transferor to find replacement positions for the worker refusing the transfer and only if this is not possible the worker will be made redundant.[71]

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[64] (2007) Bundesarbeitsgericht, *2 AZR 276/06*. Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (ZIP) 2007 p. 2433

[65] It is evident that the Swedish legislator interpreted the *Katsikas* case so as to provide the Member States with the possibility of implementing a right to refuse and not an obligation to implement this right, see (1994c) *Regeringens proposition 1994/95:102 - Övergång av verksamheter och kollektiva uppsägningar* The Swedish Government Prop. 1994/95:102., pp. 34 and 45. The Swedish debate on the right to refuse has however remained limited and the most interesting work discussing the issue is to be found in the eminent and important work concerning legal aspects of transfer of undertakings on the employment relationship; MULDER, B. J. (2004) *Anställningen vid verksamhetsövergång*, Lund, Juristförlaget i Lund. pp. 296-309. The issue of the right to refuse is briefly mentioned with special reference to the Katsikas case also in NYSTRÖM, B. (2002) *EU och arbetsrätten*, Stockholm, Norstedts Juridik AB. pp. 272-273.

[66] Lag (1982:80) om anställningsskydd, hereinafter LAS.

[67] Translation by the authour.

[68] LAS.

[69] (1998a) Arbetsdomstolen, *AD 1998 nr 144. Handelsanställdas förbund mot Blomman SC Aktiebolag i Stockholm*. 1998-12-16.

[70] LAS Article 7, 1st paragraph states that there must be a just cause for dismissal and the 2nd paragraph states that if it is reasonable to demand that the employer provides the employee with other work there will be no just cause for dismissal (translation by the author).

[71] Worth noting is that before the Directive was implemented in the Swedish system no protection of the employment contracts existed in the event of a business transfer, instead workers often found themselves made redundant even though agreements between transferor and transferee for taking over the work force were not completely uncommon. For a thorough analysis of the situation before the implementation of the Directive see EKLUND, R. (1983) *Anställningsförhållandet vid företagsöverlåtelser*, Stockholm, Norstedts. For works providing an overview of the Swedish regulations and discussing different legal aspects for the employment relationship in situations of

There is thus a significant difference compared to the system in Great Britain. As an example, the Swedish labour court considered in the *Blomman* case that Article 6b, 4th paragraph of the Employment Protection Act[72] established a right, but it did not grant the employees any additional employment protection with the transferor.[73] In other words the employees have the right to refuse the transfer of their employment, but if the transferor has no possibility of offering them replacement positions they are most likely to be made redundant and thus get redundancy payments. Even though the practical result of a worker exercising the right to refuse the transfer in the Swedish system in most cases is likely to be that the worker is made redundant, the framework is set up on the basis that the employment contract is maintained with the transferor. This solution, whereby the employee continues to work for the transferor, has also been acknowledged by the ECJ in the *Temco case*.[74]

Some legal academics have argued for this solution in **Portugal** and today there are at least two decisions of the Supreme Court of Justice (dated from 19.06.2002 and 27.05.2004), which seem to have been open to this solution, stating that the employee had a right to refuse the transfer of the employment contract and that the content of the right was to demand the continuation of the labour contract with the employer. If the employer did not have another position available, however, the contract would be terminated by objective reasons (*caducidade* – art.387º). These are isolated decisions, however, and the right they contained is merely a creation of the case law. Lower courts do not have a strict duty to follow a decision of the higher courts – although if they diverge, appealing is always admissible – and the impact of this case-law is yet to be seen.[75]

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transfer of undertakings after the implementation of the Directive see NYSTRÖM, B. (2002) *EU och arbetsrätten,* Stockholm, Norstedts Juridik AB. pp. 255-275 and 289-301, SIGEMAN, T. (2001) *Arbetsrätten,* Stockholm, Norstedts juridik. pp. 72-73 and 142-145, KÄLLSTRÖM, K. & MALMBERG, J. (2006) *Anställningsförhållandet - Inledning till den individuella arbetsrätten,* Uppsala, Iustus Förlag AB. pp. 277-291, LUNNING, L. & TOIJER, G. (2002) *Anställningsskydd,* Stockholm, Norstedts Juridik Ab. pp. 241-269 and for the collective labour law aspects in this field see for example SCHMIDT, F. (1997) *Facklig arbetsrätt,* Stockholm, Juristförlaget. section 9.8.

[72] Article 6b, 4th para. LAS.

[73] (1998a) Arbetsdomstolen, *AD 1998 nr 144. Handelsanställdas förbund mot Blomman SC Aktiebolag i Stockholm.* 1998-12-16

[74] Article 3(1) of the Directive must be interpreted as meaning that it does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking within the meaning of Article 1(1) of the Directive from continuing with the transferor where that worker objects to the transfer of his employment contract or employment relationship to the transferee. This means that the continuation of the employment relationship with the transferor is to be considered as a legal option in accordance with the Directive.

[75] The origin of this case-law lies in the groundbreaking work of Julio Gomes. GOMES, J. (1996) O conflito entre a jurisprudência nacional e a jurisprudência do TJ das CCEE em matéria de transmissão do estabelecimento no Direito do Trabalho: o art.37º da LCT e a Directiva 77/187/CEE *Revista de Direito e Estudos Sociais.*), a schollar who has undertaken extensive studies on the subject. Several schollars have posteriously aligned their positions in accordance with the opinion of Julio Gomes. See LIBERAL FERNANDES, F. (1999) Transmissão do estabelecimento e oposição à transferência do contrato do trabalho: uma leitura do art.37º da LCT conforme ao Direito Comunitário. *Questões Laborais,* VI. ; SIMÃO, J. (2002) A transmissão do estabelecimento na jurisprudência do trabalho comunitária e nacional. *Questões Laborais,* IX. ; VASCONCELOS, J. (2004) A transmissão da empresa ou estabelecimento no Código do Trabalho. *Revista do CEJ***,** 73-95, GARCIA PEREIRA, R. (2005) Natureza Jurídica da Transmissão do Estabelecimento Comercial. Verbo Jurídico. and

Thus, the ECJ has guaranteed that the aim of protecting the interests of the workers is always upheld, even though in various degrees on a scale from the minimum level in accordance with the two first alternatives up to the higher level (two last alternatives mentionned above). At first sight it could seem discomfiting that, following the *Katiskas* case which took place in 1993, the new wording of 1998 or 2001 of the Directive does not mention the right to refuse either to recognize or to exclude it and that those reforms have not "disturbed the silence".[76] However, on second thoughts this is easily explained by the fact that the focus of the ECJ has been the worker's real protection against dismissal. The ECJ has accepted to give space to the Member States to adapt their own legislation as long as the protection of the worker is ensured. Only the United Kingdom understood the *Katsikas* case to necessitate legislative change.[77] The other Member States discussed in this paper have understood that there are different methods for protecting the workers and they have chosen not to bring any significant changes to their own national labour law systems. As long as the question of the right to refuse is left unsolved by the European Union, it will be important to consider the theoretical and practical relevance of this right bearing in mind the differences between Member States.

3. A prospective analysis of the legal tools that would (or would not) corroborate a right for the worker to refuse

In the previous section, the current solutions that are to be found in the countries of our panel were outlined. Those solutions are grounded on the interpretation of those provisions. No (labour) lawyer ignores that law is a social fact, a moving substance, and this particular legal discipline has often been a special field of research to verify this hypothesis.[78] That is why this section will explore and evaluate the pertinence and the likely possibilities of changes in the interpretation of those legal solutions in the light of different sources of law which might range from ILO conventions to the private autonomy, including the Directive itself.

3.1. Fundamental rights

Fundamental rights such as the right to work, the right to protection against unfair dismissal, prohibition of forced work and the worker's right to choose their employer

ANACORETA CORREIA, J. & AMORIM MAGALHÃES, J. (2007) Perspectiva laboral da transmissão de estabelecimento. *Actualidade Jurídica (Uría Menendez)***,** 98 ff.

[76] MAZEAUD, A. (2005) Le sort des contrats de travail lors des transferts d'entreprises. *Dr. Soc.***,** 737-742.

[77] See supra. Even though Sweden also adopted the whole system it was not truly caused by the *Katsikas* case, but rather by the fact that Sweden was in the process of implementing the EU legal system in the national order and made the choice of also implementing the option provided for in the *Katsikas* case. See (1994c) *Regeringens proposition 1994/95:102 - Övergång av verksamheter och kollektiva uppsägningar* The Swedish Government Prop. 1994/95:102., pp. 34 and 45.

[78] The Directive has already been the object of such a verification, and it leads some authors to call the different occurrences in its implementation a *saga*. JEAMMAUD, A. & LE FRIANT, M. (1997) La Directive 77/187 CEE, la Cour de Justice et le droit français. *EUI Working Paper*, 97/3.

can and have been used as arguments in favour of or against the implementation of the worker's right to refuse to the transfer of the employment contract. The following sections will present the panorama of the different rights available as justifications for the right to refuse or the absence of such a right. We will start by an examination of the supranational provisions and then we will look into the national contexts.

3.1.1. Legal tools to be found in the Directive

The Directive is based on fundamental rights. These rights can be interpreted as in favour or against the right to refuse. Three rights can be identified: the right to information and consultation of workers, the right to protection against unfair dismissal and the freedom to choose one's employer.

A right to information[79] and consultation[80] is given[81] to the workers' representatives. It is point 5 of the preamble which states that

> "Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practice in force in the various Member States. Such information, consultation and participation must be implemented in due time, particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers".

Though this does not help to solve the question of having or not a right to refuse, this right is part of the necessary tools to enable a worker to wisely accept or refuse the transfer. It can therefore be considered as the *sine qua non* condition to enable the worker to make her/his choice.

A right to protection is in the preamble and in article 4 of the Directive. Firstly, point 3 of the preamble states that "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".

It can be linked with the idea that

> "the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies".[82]

Such provisions can also be found in the "Social Charter".[83] Secondly Article 4 aims to protect the worker against dismissals caused by the transfer.[84] According to it, a transfer,

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[79] Information in good time about the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, the measures envisaged in relation to the employees, the date or proposed date of the transfer (added in 1998), see also case C-478/03, 26 may 2005, Celtec Ltd v. John Astley.

[80] The consultation must be made 'with a view to seeking agreement' in good time: Article 6 of the Directive.

[81] Article 5 of the Directive.

[82] Point 5 of the preamble of the Directive on transfer.

[83] Points 7, 17 and 18 of the Community Charter of the Fundamental Social Rights of Workers adopted on 9 December 1989.

[84] Paragraph 15 of the Foreningen case.

defined as the legal transfer or merger of an undertaking where the identity of the transferred entity is retained, cannot constitute a reason for dismissal.

Dismissal is only allowed for economic, technical or organisational reasons, or when Member States make exceptions in respect of certain categories of workers. The Directive states that in all other cases, the employer is considered responsible for having terminated employment.

Exceptions to these provisions are allowed when the transfer occurs within the context of insolvency proceedings concerning the entity transferred, provided the worker has protection at least equivalent to that laid down by the insolvency Directive.[85]

This article is more difficult to understand as it is not obvious whether the point is to protect workers or to undermine the effect of the Directive. On the one hand, it can be considered as protecting the worker as (s)he should never have a lower level of protection than that offered by the EC Directives. On the other hand, it seems that the Directive will apply in only a few cases as the worker can be dismissed for economic reasons. This article limits the Directive, but it is a logical limit in the sense that the Directive cannot impose unreasonable burdens on the firm and prevent it from dismissing some workers. In this context, this article does not give an answer as to whether a right to refuse should exist, but again it usefully completes it.

Another protection is provided by article 4 paragraph 2 which states that "if the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship". Thus, if the worker considers that the transfer will bring about such changes to the working conditions and therefore chooses to exercise the right to refuse, the implications would be that the worker is considered as being dismissed and entitled to redundancy payments. With this in mind when interpreting the *Katsikas* case, whereby the Member States are free to choose the legal implications of the right to refuse[86] it is undoubtedly so that this alternative is a feasible option that can be observed in the UK.

This provision was implemented in 2003 in **Portugal** in the new Labour Code. It recognised in art.441ºnº.3, b) a right of the worker to terminate the employment contract in the event of "substantial changes in working conditions arising from the exercise of the legitimate powers of the employer".

However, the employee is not entitled to any redundancy payments.[87] This protection is very much linked to the right to refuse, as an employee may not have any interest in

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[85] Directive 80/987/EC on the protection of employees in the event of insolvency of their employer. Member States must take the necessary measures to prevent abusive use of insolvency procedures depriving workers of their rights in the event of a transfer. Case 12 march 1998, C-319/94, Dether Equipements SE v. Dassy et Soyam SPRL.

[86] (1992b) The European Court of Justice, *Joined cases C-132/91, C-138/91 and C-139/91. Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*. 16-12-1992 ECR I-6577. paragraph 35.

[87] The dominant legal thinking is that this rule was shaped exactly for the situation of the transfer of undertakings and is the only option available to the employee in this specific event; the only difference in relation to the pure and simple termination of the labour contract (*denúncia* – art.447º) is a shorter period of notice. Therefore the only option for the employee in the event that he does not want to work

choosing to terminate the contract if (s)he does not get redundancy payment. We have to conclude once more that the right to refuse is linked to the context and cannot be deduced from this fundamental right to protection.[88]

Because of this fundamental right to protection, most of the countries of our panel have considered the Directive as imposing the continuation of the contract of employment whatever the positions of the contracting parties. Although it could be a way of implementing the requirements of the Directive, it may not be the only one as it may be in conflict with its objectives on some occasions. In this case, it is understood as giving clues on how to interpret paragraph 3 about the transfer. The question is to determine what exactly are the "the transferor's rights and obligations". It used to precisely designate contractual commitment (*ob-ligare* in latin).[89] It now has become a more general term to signify any kind of duties arising from a legal source such as a statute, or a convention. Therefore, the single maintenance of the contract may not be sufficient to safeguard the employees' rights as they may arise from another legal source. Thus, to an imperative interpretation can be opposed a much wider one which implies the consideration of a more flexible approach to the protection of the worker and the possibility to choose which employer (s)he wants to work for.

This leads us to another fundamental right that cannot be found in the Directive, but is visible in the European Court of Justice case law. It is the right to freely choose one's employer. The Court's view can be understood as a preference for the right to refuse as it is stated that

> "such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen".[90]

But, it has also been said that this argument protects the fundamental right, but not necessarily the right to refuse as it can also be understood that the obligation to stay to work in the new company can know exceptions.[91]

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with the transferee is to terminate the labour contract with a shorter period of notice without being entitled to redundancy payments. If we don't take into consideration the specific aspect of a shorter period of notice – which is of no real advantage to the employee – we can observe that this is in fact the continuation of the former legislative and jurisprudential tradition, of protecting the commercial value of the undertakings by incorporating the labour contracts into the assets of the undertaking.

[88] See ROMANO MARTINEZ, P. (2007) *Direito do Trabalho*, Almedina. ; ROMANO MARTINEZ, P., MONTEIRO, L. M., VASCONCELOS, J., BRITO, P. M. D., DRAY, G. & SILVA, L. G. D. (2004) *Código do Trabalho Anotado*, Almedina. ; VASCONCELOS, J. (2004) A transmissão da empresa ou estabelecimento no Código do Trabalho. *Revista do CEJ***,** 73-95; GONÇALVES DA SILVA, L. (2007) Nótula sobre os efeitos colectivos da transmissão de empresa *Sub-Judice*. ; MONTEIRO FERNANDES, A. (2007) *Direito do Trabalho*, Almedina.

[89] VILLEY, M. (2001) *Philosophie du droit*, Paris, Dalloz.

[90] (1992b) The European Court of Justice, *Joined cases C-132/91, C-138/91 and C-139/91. Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*. 16-12-1992 ECR I-6577. paragraph 32.

[91] For a good perspective on this question see GOMES, J. (2001) A jurisprudência recente do TJCE em matéria de transmissão de empresa, estabelecimento ou parte de estabelecimento: inflexão ou continuidade? *Estudos do Instituto de Direito do Trabalho.* Lisboa, Almedina. ; also CARVALHO, C. N. D. O. (2003) Admissibilidade de um acordo entre o transmitente e transmissário no sentido de excluir a transmissão dos contratos de trabalho. *Questões Laborais*, XXI**,** 99-103.

In the same way, in the Foreningen case, the Court stated that "the protection which the Directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer. In that situation, article 3(1) of the Directive does not apply".[92] But, a conclusion cannot be drawn from this statement as the situation was very peculiar: the case occurred in Denmark and the Court was trying to decide whether an employee dismissed by a company and who had afterwards bought the same company and restarted the same job as previously should be considered as a worker for the purpose of the Directive 77. The Court answered no and its explanation goes through the right to object. It appears that the tools given by the Directive can be interpreted in different ways and do not logically or radically push towards one option or the other. Fundamental rights at other levels might give a clearer direction.

3.1.2. Supranational law

Three fundamental rights can be called upon: the right to protection against unfair dismissal, the right to work and finally the right to collective action. Different international conventions or declarations stating universal values reflect the prescription of the recognition of the right to refuse.[93] First of all, the worker's right to choose her/his employer poses an argument in favour of implementing the right to refuse as well as the prohibition of forced labour and the free choice of one's activity. Art. 23(1) of the 1948 Universal Declaration of Human Rights states that "Everyone has the right to work, to free choice of employment".

Legislation from the International Labour Organization (ILO) also aims at eradicating forced labour and promoting freely consented activity. Art. 2(b) of the 1998 Declaration on Fundamental Principles and Rights at Work enunciates "the elimination of all forms of forced or compulsory labour" as one of the main four objectives of the ILO and its Member States. The ILO Forced Labour Convention, 1930, No 29 in its Article 2(1) reinforces this aim by stating that

> "forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and **for which the said person has not offered himself voluntarily**".[94]

This issue has received some attention also within the EU legal order in which Art. 5(2) of the European Charter of Fundamental Rights states: "No one shall be required to perform forced or compulsory labour" and Art. 15(1) "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".

Implementing the right to refuse would, with this in mind, be a good way of ensuring that the workers are protected against forced labour and assured the right to choose their employer. This argument is even mentioned by the ECJ in the *Katsikas* case.[95] This

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[92] §30 : paragraph 16 of its judgment in Case 105/84, Foreningen af Arbejdsledere i Danmark v Danmols Inventar [1985] ECR 2639.

[93] SUPIOT, A. (2006) Les salariés ne sont pas à vendre. *Dr. Soc.*, 264-273.

[94] Emphasis by the author.

[95] See section 3.1.1. (1992b) The European Court of Justice, *Joined cases C-132/91, C-138/91 and C-139/91. Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*. 16-12-1992 ECR I-6577. paragraph 32.

understanding is at the basis of the German system that therefore gives a full and effective right to refuse.

Nonetheless, some argue the application of fundamental rights could be nuanced, as the absence of a right to refuse would not automatically violate these rights, because the worker would still have the possibility of resigning from the employment contract. Rejecting the right to refuse would in other words not imply that a worker is forced to work for an employer which (s)he has not freely chosen. Nevertheless, the right to refuse would provide one more option for the worker in the case of a transfer of an undertaking, thus assuring a better protection of the interest of the workers.

The right to work can, however, be used in a totally different way: it can be an argument against the implementation of the right to refuse as this right would shift focus towards measures which assure that workers are given the possibility to remain in employment. This way the right to refuse could be considered as affecting the right to work since the automatic transfer of the employment contract has the function of ensuring that the workers are not dismissed simply because of the transfer of the undertaking for which they work and the right to refuse could open up the possibility of dismissing workers that exercise this right in such a situation. This argument could also take the workers' right to protection against unfair dismissal as a starting point leading to a similar result, i.e. the right to refuse would jeopardize the workers' protection.

The workers' right to protection against unfair dismissal is another ground for discussion of the right to refuse. It is protected at Article 30 of the Charter of Fundamental Rights and by the Convention n° 158 of the ILO of 22 June 1982, on Termination of Employment and the Convention n° 173 of 23 June 1992, on Protection of Workers' Claims. (Employer's Insolvency). Article 24 of the revised European Social Charter of 3 May 1996 gives a right to protection in cases of termination of employment whereas Article 29 gives a right to information and consultation in collective redundancy procedures. One would then agree that the EU level substantially shapes this right.[96]

[96] 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, OJ L 61 of 5 March 1977; Directive 80/987 of 20 October 1980, 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, OJ L 283 of 20 October 1980; Directive 91/533 of 14 October 1991, on an employer' s obligation to inform employees of the conditions applicable to the contract or employment relationship. Official Journal L 188, 08/07/1992 p. 0044; Directive 98/59 of 20 July 1998, on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225 of 12 August 1998; Directive 2001/23 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, OJ L 82 of 22 March 2001; Directive 2002/14 of the European Parliament and of the Council of 11 March 2002, establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, Official Journal L 080, 23/03/2002 p. 0029 – 0034; Directive 2002/74 of 23 September 2002 amending Council Directive 80/987/EEC 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, Official Journal L 270 , 08/10/2002 p. 0010 – 0013.

On the one hand, it can be said that protection against unfair dismissal is a reason why the right to refuse should not be given to workers. The transfer of employment in the case of a transfer of undertaking is a way to protect the worker against unfair dismissal in the sense that employees cannot be dismissed just by virtue of the transfer. The right to refuse would thus be a limitation of this protection and should therefore not be granted. On the other hand, one could easily state that this argument confuses two separate questions: the fate of the contract due to the transfer and the substitution of one's employer without her/his consent. Depending on the approach one has to labour law, it is nevertheless understandable that such a decision could be left to the person concerned, i.e. the worker.

The right to negotiation and collective action is a last ground. It is protected by article 28 of the Charter of Fundamental Rights but also by Article 8 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 16 December 1966 which includes the right to strike (point d). Three ILO conventions protect collective rights[97] and its Declaration on Fundamental Principles and Rights at Work of 19 June 1998 emphasises it as well. Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 is about freedom of assembly and association, which is closely related. Finally, article 6 of the revised European Social Charter protects the right to bargain collectively. It can be seen as a way to defend the existence of a right to refuse as collective action protects different means of action of the workers in order to have more tools to convince the employer to listen to their arguments and interests.

It would therefore justify a collective right to refuse for the workers. This has been proposed in **Germany** where the problem of whether or not employees are entitled to a collective use of the right to refuse was raised.[98] Dealing with this question the Federal Labour Court held that a collective objection is not *per se* illegal – if a single employee is entitled to a right to refuse the concurrence of refusals cannot affect this result.[99] Thus the Federal Labour Court does not consider that there might be a difference whether there is mere coincidence or a coordination of lodging refusals.[100] Beyond this, the Federal Labour Court does not require a legitimate reason for refusals, as it is hardly possible to define the scope of such reasons. But the motive for lodging an objection is not irrelevant. The use of this right might be considered an abuse of law and therefore be void by virtue of section 242 BGB, especially if the employees primarily pursue ends other than preventing the transfer of their employment contracts such as improving their working conditions or inhibiting the transfer as a whole.[101] The decisive factor in order to determine whether or not there is an abuse of law has to be the intended purpose of

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[97] Convention 98 of the ILO of 1 July 1949, concerning the Application of the Principles of the Right to Organize and to Bargain Collectively; Convention 135 of the ILO of 23 June 1971, concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking; Convention 154 of the ILO of 19 June 1981, concerning the Promotion of Collective Bargaining.

[98] KRAUSE, R. (2006) Kollektiver Widerspruch beim Betriebsübergang - Rechtsmissbrauch wegen zu Grunde liegender Zweckverfolgung *Recht der Arbeit (RdA)* 2006, pp. 229 - 235.; RIEBLE, V. (2005) Kollektivwiderspruch nach § 613a VI BGB. *Neue Zeitschrift für Arbeitsrecht (NZA)* 2005**,** 1-8.

[99] (2004) Bundesarbeitsgericht, *BAG AP § 613a Nr. 275, 8 AZR 462/03*. Arbeitsrechtliche Praxis (AP).

[100]KRAUSE, R. (2006) Kollektiver Widerspruch beim Betriebsübergang - Rechtsmissbrauch wegen zu Grunde liegender Zweckverfolgung. *Recht der Arbeit (RdA)* 2006**,** pp. 229-230.

[101](2004) Bundesarbeitsgericht, *BAG AP § 613a Nr. 275, 8 AZR 462/03*. Arbeitsrechtliche Praxis (AP).

granting the right to object – it can therefore only be used for defensive not for aggressive reasons.

However, such a collective objection might also be characterized as a means of labour struggle. Under German labour law the right to use means of labour struggle like the right to strike is limited to trade unions. Wildcat strikes and political strikes are illegal, as are sympathy strikes. Measures of labour struggle are the means to put pressure on the social partner in order to achieve a collective bargaining agreement. As labour struggle for other reasons is unlawful, it is a moot point whether trade unions or works councils are entitled to organise a collective lodging of objections. Thus, this right is not necessarily an argument in favour of the right to refuse. Courts have also made use of domestic fundamental rights at national levels.

3.1.3. Fundamental rights in Member States' constitutions

As well as being of significant value for international and regional pieces of legislation, labour is a founding value of some Member States' political regimes. The constitutions of countries such as France,[102] Germany[103] or Italy for instance explicitly refer to this value; the latter being probably the most relevant, as the first Article of the Italian Constitution states: "Italy is a democratic Republic founded on labour".[104]

When evaluating the consistency of the right to refuse, it is of high importance to take into consideration the web of normative provisions as a whole set of interacting norms. It includes provisions of EU law, fundamental domestic law and domestic law in general. Therefore it not only questions the conformity of domestic law with supranational law,[105] but it also challenges its conformity within national legal systems, amongst which stands the current hierarchisation of norms.

The main arguments used in **French** academic literature in favour of the recognition of the right to refuse[106] will exemplify our point. Whether it has been named "freedom to work"[107] or now "freedom of practicing a professional activity",[108] this freedom, which now has a constitutional authority,[109] is derived from Art. 7 of the 2nd-17th of March

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102 Paragraph 5 to 8 of the preamble of the constitution of 1946

103 Art. 12 GG (German Constitution).

104 "L'Italia è una Repubblica democratica, fondata sul lavoro."

105 As it has been done above in 3.1 and 3.2

106 JEAMMAUD, A., CHAGNY, Y. & RODIÈRE, P. (2007) Faut-il reconnaître au salarié la faculté de refuser le transfert de son contrat de travail? *Revue de droit du travail***,** 216-221.

107 DARDALHON, L. (2005) La liberté du travail devant le Conseil Constitutionnel et la Cour de Cassation. *Revue française de droit constitutionnel***,** 755-780.

108 PÉLISSIER, J., SUPIOT, A. & JEAMMAUD, A. (2006) *Droit du travail*, Paris, Dalloz, (1983) French Constitutional Council, *Loi portant diverses mesures relatives aux prestations de vieillesse*. May, 28th 1983

109 (1983) French Constitutional Council, *Loi portant diverses mesures relatives aux prestations de vieillesse*. May, 28th 1983. Loi pourtant diverses mesures relatives aux prestations de vieillesse. DC n° 83-156, 28 mai 1983 (French Constitution Council).

1791 decree *d'Allarde* which stated that "any person will be free to choose the trade, profession, art or occupation he wants…"[110]

This wording achieved particular prominence when the Cour de Cassation used it in cases dealing with the validity of *non-competition* clauses.[111] In an *attendu de principe*[112], the Court stated that this freedom should be restricted only in a very limited number of cases, and in particular conditions, and decided to rule that the legality of such clauses had to be narrowly conceived. In its decision, the *Cour de Cassation* not only referred to this *fundamental principle* of French Law, but also to Art. L. 120-2 of the labour code[113] which states that

> "no one may restrict individual rights and personal freedoms in a way that would not be justified by the nature of the task to be accomplished or which is not proportionate to the aim pursued".[114]

If the same reasoning were to be applied to the right to refuse, the same *ratio* would surely be adopted - and the freedom of exercising a professional activity and Art. L. 120-2 would be called in support of the claim. However, as indicated in Art. L. 120-2, the *Cour* could rule that maintaining the contract of employment from the transferor to the transferee is a justified and proportionate limitation of the concerned freedom. And to some extent, this resumes the position of the *Cour de Cassation* which consists of ignoring the possibility of recognizing such a right by claiming that it is right to protect the employment rather than the contract.[115]

In **Portugal** the constitutional tradition also played a role in (not) recognising a right to refuse. The 1969-2003 legislation went through two distinct constitutional orders, the *corporatist* and the *democratic*. The first one was enforced during the right wing dictatorship which lasted until 1974. It was considered that there should be solidarity between capital and labour in the attainment of their mutual interests. Labour lawyers considered that the interests of the workers consisted in maintaining stable employment and that the interests of capital consisted in acquiring stable undertakings. Therefore, the worker was considered as a part of the undertaking and could not refuse to have his contract transferred, not only to preserve the market value of the undertaking but also to preserve stability in employment. This objective was maintained in the democratic

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110 HIRSCH, J.-P. (1989) Revolutionary France, Cradle of Free Enterprise. *The American Historical Review,* 94**,** 1281-1289, SOUBIRAN-PAILET, F. (1998) De nouvelles règles du jeu? Le décret d'Allarde et la loi Le Chapelier. IN LE CROM, J.-P. (Ed.) *Deux siècles de Droit du Travail.* Paris, Les éditions de l'atelier.

111 Soc. 10th of July, 2002, *Recueil Dalloz* 2002, Somm. 3111, obs. J. Pélissier

112 This is a general consideration that follows the provisionson which the court based its solution. It is a special judicial technique of wording the ratio in order to indicate what the interpretation should have been.

113 The French Parliament adopted a new labour code with the ordonnance n°2007-329 du 12 mars 2007. This article will become the new Art. L. 1121-1.

114 "Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché" Translation from DOCKÈS, E. (2002) Equality in Labour Law: An Economically Efficient Human Right? Reflections from a French Law Perspective. *The International Journal of Comparative Labour Law and industrial Relations,* 18**,** 187-196.

115 CHAGNY, Y. (2005) "La jurisprudence française sur le libre choix du salarié". IN ISLSSL (Ed.) *VIII European Congress.* Bologna.

constitution of 1976, although with different arguments. Art.53º of the Portuguese Democratic Constitution grants employees the right to *security in employment*. The rejection of the right to refuse was grounded on this provision, arguing that the other employees had to be protected against the possibility of mass-refusal endangering the viability of the undertaking transferred and thus endangering their own labour posts. This was the way that both constitutional traditions rejected the right to refuse.[116]

Curiously, the enactment of the new Labour Code, in 2003, coincided with a change of orientation in the courts. The same article of the Portuguese constitution – art.53º: right to security in employment – was interpreted as a constitutional ground to recognise a right to refuse to the transfer and keep the employment contract with the transferor. The Portuguese Supreme Court of Justice claimed that this provision of the Constitution provided the employee with a right to refuse the transfer and keep his employment. Employment stability was seen as containing the right to keep the labour relationship with the transferor whenever possible. However, this is merely a creation of case-law and its substance is contested by the legal thinking.

As for **Germany**, in 1974 the German Federal Labour Court for the first time had to decide whether an employment in the case of a transfer of an undertaking is transferred, even if the employee refuses to transfer. As section 613a BGB deals with the transfer of employment but used to be silent to the question of refusal, the Federal Labour Court, predominantly in an analysis supported by academics by academics, based its decision on fundamental rights, holding that a transfer against the employee's will contradicted human dignity and the right to freely choose one's profession.[117] The Federal Labour Court later adhered to that – the right to freely choose one's profession includes the right to choose who to work for and a person cannot be made an object of state action without infringing upon human dignity.[118]

In a recent decision[119], though, the same court cast doubts on the constitutional foundation of this right: The right to freely choose one's profession was rather safeguarded than limited by the transfer – because of the transfer the employee kept his freely chosen workplace, whilst in case of an objection he kept his employer but lost his workplace.[120] For reasons of general welfare, i.e. conserving the workplace in question, the legislator may interfere with the freedom of contract; also the employee can resign at any time.[121] Surprisingly, this line of reasoning is much the same as the one used to justify the absence of a right to refuse.

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116 PROCURADORIA GERAL DA REPÚBLICA (1980) Parecer nº.139/80. ; (1994b) Supremo Tribunal de Justiça, *Acórdão de 9 de Novembro de 1994*, (2002a) Supremo Tribunal de Justiça, *Acórdão de 19.06.2002*. , RADNAY, J. (2004) A munkáltatói jogutódlás kérdései. *Gazdaság és Jog*, Vol. 2., pp. 17-22.

117 (1974) Bundesarbeitsgericht, *5 AZR 504/73, BAG AP § 613a Nr. 1*. Arbeitsrechtliche Praxis (AP)

118 (1974) Bundesarbeitsgericht, *5 AZR 504/73, BAG AP § 613a Nr. 1*. Arbeitsrechtliche Praxis (AP) ; (1977) Bundesarbeitsgericht, *BAG AP § 613a Nr. 8, 3 AZR 703/75*. Arbeitsrechtliche Praxis (AP); (1992a) Bundesarbeitsgericht, *BAG AP § 613a Nr. 96, 2 AZR 449/91*. Arbeitsrechtliche Praxis (AP); (1993a) Bundesarbeitsgericht, *BAG AP § 613a Nr. 103, 2 AZR 50/92*. Arbeitsrechtliche Praxis (AP); (1998b) Bundesarbeitsgericht, *BAG AP § 613a Nr. 177, 8 AZR 139/97*. Arbeitsrechtliche Praxis (AP)

119 (2001a) Bundesarbeitsgericht, *BAG AP § 613a Nr. 215, 8 AZR 336/00*. Arbeitsrechtliche Praxis (AP).

120 *Ibid.*

121 *Ibid.*

When finally codifying the right to refuse, the German legislator argued in contrast to the recent decision that forcing a new employer upon an employee constituted an infringement of human dignity (Art. 1 para. 1 GG[122]), the right of personality granted by Art. 1 para. 1, 2 para. 1 GG and the right to freely choose one's profession and place of employment laid down in Art. 12 para. GG.[123] As the right to refuse has now been codified, in spite of the doubts regarding its foundation on fundamental rights,[124] no significant changes in its application are to be expected.

It is interesting from the perspective of this evolution in other European states that the **Hungarian** Constitutional Court dismissed the claims of the parties on the basis of the 'right to work'.[125] Article 70/B of the Hungarian Constitution stipulates that "In the Republic of Hungary everyone has the right to work, to freely choose his job and profession".

The Constitutional Court concluded that this fundamental right includes also the *negative right*, that nobody can be obliged to work for an employer, which he has not freely chosen or he does not want to work for. However, the Court concluded that the rules on ordinary dismissals guarantee that employees can be released from the employment relationship which they do not want to continue. Moreover, the Court also dismissed the claims of the applicants, who argued that if the employee resigns he is not entitled to a statutory severance payment. According to the applicants this was detrimental to the employees because the reason for the resignation arose on the side of the employer, nevertheless it was the employee who had to terminate the contract. The Constitutional Court dismissed this argument on the basis that employees do not have a constitutional right to statutory severance payments. The Court went on to argue that the rule of the Labour Code stipulating that the change of the employer by a legal transfer does not affect the employment relationship was in fact what allowed compliance with the fundamental right to work.[126]

According to Kollonay the vague formulation of the sentence in Article 70/B (1) reflects a political compromise of the drafters of the Hungarian Constitution. One interpretation is that this section embraces *two, independent* contents of the right to work. On the one hand, it contains the right to freely choose one's occupation as a negative right, which includes the prohibition of forced labour and protection against unfair discrimination. On the other hand, it can be interpreted as also embracing the second dimension of the right to work, which implies a positive obligation of the state to guarantee this right.[127]

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122 Grundgesetz that is the German constitution.

123 (2001b) *Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Seemannsgesetzes und anderer Gesetze* Bundestagsdrucksache, BT-Drs. 14/7760 p. 20 .

124 For further analysis see (2000) *Menze, S.*, Das Widerspruchsrecht der Arbeitnehmer beim Betriebsübergang; (2002) *Eichler, M.*, Das Widerspruchsrecht des Arbeitnehmers beim Betriebsübergang nach § 613a BGB; as to the underlying question of the influence of constitutional rights on the labour law system in Germany: (1994) *Aussem, U.*, Die Ausstrahlungswirkung der Grundrechte auf das Arbeitsrecht.

125 (1994a) Magyar Köztársaság Alkotmánybírósága (Constitutional Court of the Hungarian Republic), *500/B/1994*

126 *Ibid.*

127 LEHOCZKYNÉ KOLLONAY, C. (2002) Alkotmányos alapelvek a munkajogi szabályozásban. IN CZÚCZ, O. A. I., SZABÓ (Ed.) *Munkaügyi Igazgatás, Munkaügyi Bíráskodás, Ünnepi Tanulmányok Radany József 75. születésnapára*. Miskolc, Bíbor Kiadó. p. 293-295.

However, after reading the Article Kiss draws the conclusion that the second part of the sentence must be read together with the first part. This would mean, however, that the Hungarian Constitution does not recognize a positive right to work, but only a general principle to organize effective employment policies.[128] As a consequence of the vague formulation of the sentence, the recognition of the right to work is matter of interpretation and might have contributed to the fact that the Constitutional Court recognized in its case law only the first interpretation of this right in the 1990s.[129]

The recognition of a right to refuse causes particular difficulties in the Hungarian context because it implies a conflict between the negative and positive contents of the *same* constitutional right. With the recognition of the automatic transfer of the employment relationship the state provides job security to the worker, who cannot be deprived from employment and from his/her acquired rights on the basis of unfair dismissals and without adequate compensation. However, this job security might undermine the other, equally important part of this right, namely to guarantee the contractual freedom of the employees to choose the employer or the undertaking s(he) wants to work for. This strong connection with the freedom of contract is reinforced by the fact that the rules on business transfers are in the chapter of the Labour Code about the rules on the modification of the contract of employment. However, as we have seen before, the transfer of an undertaking leads to an automatic modification of the contract of employment, therefore the consent of the parties is not required for the transfer of the rights and obligations arising from a contract of employment. This interpretation was based on the idea that in the majority of the cases the terms and conditions of the contract of employment remain intact following the transfer as well. It is only the person of the employer what will change. Indeed, the rules on the transfer of undertakings are called 'changes in the identity of the employer by legal succession'.

The focus of the legislator on the person and identity of the employer and not on the conditions of the employment is important for our analysis. In the case of *outsourcing* for example an employee might be interested not only in job security and in the preservation of his/her *transferred rights*, but in maintaining the same overall conditions of employment. In these cases it might not be proportionate to force the employee to work for the new employer in order to enable the economic entity to continue the same activity following the transfer. In these cases the recognition of the right to refuse might create a better balance between the two elements of the right to work. However, the recognition of a right to refuse itself would not be sufficient to properly implement the right to work. It becomes only a substantial freedom of the worker, if other provisions, especially the rules on information and consultation, are properly enforced, which enable the workers to take the right decision.[130]

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128 KISS, G. (2005b) Néhány észrevétel a „munkához való jog" és a foglalkozás és a munkavégzés szabad megválasztása alapjogi minősítéséhez. IN BALOGH, Á. É. S., HORNYÁK (Ed.) *Tanulmánykötet Erdősy Emil Professzor 80. Születésnapja Tiszteletére.* Pécs, Kódex Nyomda Kft. p. 279.

129 Lehoczkyné Kollonay Cs. Ibid p. 293-295.

130 See similarly the Opinion of the Advocate General Van Gernven in the Katsikas case, (1992b) The European Court of Justice, *Joined cases C-132/91, C-138/91 and C-139/91. Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH*. 16-12-1992 ECR I-6577.paragraph 19.

Interestingly the **Swedish** legislator did not refer to fundamental rights when deciding to implement the right to refuse. Instead the legislator simply stated that not granting the workers the possibility of requesting to remain in employment with the transferor, when implementing the rules of the Directive, would cause a change of the Swedish labour law system that would be to the detriment of the employees.[131] The implementation of the right to refuse would thus have to be interpreted in light of the founding principles of the Swedish labour law system in which fundamental rights do have a strong, albeit implicit, impact. Thus the legislator might not explicitly state that the absence of a right to refuse would jeopardize fundamental rights and ILO's prohibition of forced labour, but even so the protection against forced labour is to be considered part of the Swedish legal system.[132]

In the light of the above elaborated comparative analysis it seems to be common ground that the recognition of the right to refuse is approached on the basis of the 'right to work'. One of the reasons for the diversity of national laws might be the different interpretations and constitutional status of this right as such in the national constitutional traditions. One might conclude that this approach was constrained also by the case law of the German national courts, which referred the joined cases in the early 1990s to the European Court of Justice. Even though the *exercise* of the right to refuse has important implications in the field of law on termination, the right to protection against unfair dismissal is not an independent constitutional basis for justification for the right to refuse. It is usually considered in the framework of the right to work as well. The right to work has important connections with the contractual freedom of the parties as well. This is the question we would like to turn to in the next chapter.

3.2. Aspects of contract law

Being the original source of the employment relationship, analyzing the worker's right to refuse the transfer of her/his contract of employment would not be complete without a particular focus on contract law. While this perspective had already been partially explored,[133] two questions still need to be raised[134]: is the identity of the parties part of the contractual substance, i.e. is it like the remuneration,[135] for instance, part of the different matters that can be regulated through a contract? If the reply were to be positive, we have then to analyze the content of the obligations to determine its scope, i.e. to what extent the substitution of one of the contracting parties distorts the contract

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131 (1994c) *Regeringens proposition 1994/95:102 - Övergång av verksamheter och kollektiva uppsägningar* The Swedish Government Prop. 1994/95:102., p. 45.

132 See for example the Swedish Constitution Chapter1, Article 2 of the Instrument of Government (Regeringsformen), which states that "*Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person*" and further Chapter 2, Article 23 stating "*No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.*" Thus, the ILO convention might not be mentioned, but regardless the protection of fundamental rights is established in the Swedish constitution.

133 See *supra* § 2. 2. 2. 2 in the event of a transfer in France from a private to a public entity

134 This distinction was primarly elaborated by JEAMMAUD, A. (1989) Les polyvalences du contrat de travail. *Les Transformations du droit du travail : études offertes à Gérard Lyon-Caen.* Paris, Dalloz.

135 Who would contest the contractual nature of the obligation to pay the salary, even though its amount may be determined, for the bottom line, by the legislator or collective agreement ?

of employment so that it must be perceived as a modification of the contract of employment that requires either the approval of any of the parties or their non-refusal.

3.2.1. The contractual substance and the identification of the contacting parties

Though it may be obvious that such a matter is part of the contractual substance, one could consider the undertaking for which the employee is performing his/her work to be the employer. The change of owner of this undertaking would thus not implicate a change of her/his employing party. This would imply that the contract of employment is personally binding for the employee whereas the employer is not judged by legal personality, but, rather by function and activity carried out. With such an outlook the employee's right to refuse the transfer of the employment contract would not be necessary as the employer is not considered to have changed in any matter that would be of importance for the continuation of the contract. This was the solution adopted without any disagreement by Portuguese legal thinking and courts up to 2003. It was considered that the employment relationship had been established with the undertaking; the transfer of the undertaking did not therefore imply a change of the employer but merely a change in the person owning the undertaking. The employee was rather seen as part of the assets of the undertaking than as a party of a contract of employment concluded with a physical or legal person.[136]

Though seductive, this solution seems, however, either false or ignorant of knowledge from different disciplines, including law. The term *undertaking* is often used as a term to designate either the firm or the employer. But all these expressions belong to fields of knowledge (law, management and economics) between which, concepts and ideas are not always interchangeable. While the firm and employer may be very close (one is an economic agent, the other is a legal actor),[137] the concept of undertaking is definitely not a satisfactory synonym for the concept of employer. The apparent interchangeability in colloquial language hides the specificity of the legal language and obstructs the correct application of the legal provisions. It is then hardly arguable that the identification of the contracting parties is not a matter of the contract of employment. We will now turn to the issue of to what extent the contract of employment can be modified without the consent of both parties.

3.2.2. The intuitus personae and the private autonomy dimension of the contract of employment

Undoubtedly, the identification of the contracting parties is part of the substance of the contract of employment, as showed in the previous section. We will argue that the *intuitus personae* dimension makes it a (substantial) change of the contract of

136 PROCURADORIA GERAL DA REPÚBLICA (1980) Parecer nº.139/80.

137 But even on this, there still is a lot to discuss on. Sociology could surely be called as well to evaluate the concept of undertaking. For an interdisciplinary example of such a discussion, see for instance BERNOUX, P. & LIVIAN, Y.-F. (1999) L'entreprise est-elle toujours une institution? *Sociologie du travail*, 41**,** 179-194.

employment[138] that requires either the approval of both parties or, at least, the non-refusal of the worker.

A contract of employment is a convention based on private law,[139] therefore general principles of contract law are applicable as long as the characteristics of the employment relationship do not require otherwise. The first focus when analysing the right of the employee to refuse to transfer is the concept of private autonomy. Private autonomy and, an important element of it, freedom of contract, basically provide natural and legal persons with the right to freely conclude agreements. These agreements for all parties are only binding thanks to their will, because they freely agree to all conditions.[140] And therefore contractual conditions can only be changed with the consent of all parties.

Private autonomy is another pillar on which the right to refuse has been based, within **German** Labour Court case-law.[141] As stated above, section 613a para. 1 cl. 1 BGB says that the transfer of the employment in the case of a transfer of an undertaking takes place by operation of law. When this norm had not yet entered into force, transferring a part of a business was an easy way to circumvent the protection of the Protection against Dismissal Act (KschG). The transfer of an employment contract only occurred if there was a trilateral agreement on this between transferor, transferee and affected employee.[142] This former legal situation in the light of private autonomy points at the demand for the consent of the affected employee or at least at the demand for a right to refuse.[143] It should also be considered that section 613 Cl. 2 BGB states that the right to the performance of services in cases of doubt is not assignable,[144] which is a clear expression of the so called *intuitus personae* dimension of the labour contract. Furthermore, in the case of transfers of employment the employee gets a new debtor; the assumption of a debt in general depends on the approval of the creditor under section 415 Para. 1 Cl. 1 BGB. This principle, which is a result of the doctrine of private autonomy, is also applicable regarding a contract of employment.[145]

In relation to this discussion it is interesting to note the **Swedish** regulations in force before the implementation of the Directive. At this time general contract law rules were applied to such situations. This meant that if the employee did not agree the employer would not be able to liberate himself from his contractual obligations by simply

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138 In opposition to non substantial modifications or what legislation like the French one describes as a modification of the execution of the contract which is up to the power of the employer.

139 With further references: PICKER, E. (2007) Arbeitsrecht als Privatrecht - Zur Leitidee der frühen Arbeitsrechtsdogmatik bei Philipp Lotmar und Erwin Jacobi, ANNUSS, G., PICKER.,E., WISSMANN, H. (Eds.) *Festschrift für Reinhard Richardi zum 70. Geburtstag*, p. 141 et sqq.

140 As to the interdependency of private autonomy and the underlying legal system see with basic and essential consideration (1992) *Flume, W.*, Allgemeiner Teil des Bürgerlichen Rechts II – Das Rechtsgeschäft, chapt. I, § 1.

141 For further discussion on third party interest as a limit to freedom of contract: (1992) *Habersack, M.*, Vertragsfreiheit und Drittinteressen.

142 (1960) Bundesarbeitsgericht, *BAGE 9, 62, 5 AZR 472/57*. Entscheidungen des Bundesarbeitsgerichts (BAGE).

143 (1974) Bundesarbeitsgericht, *BAGE 26, 301, 5 AZR 504/73*. Entscheidungen des Bundesarbeitsgerichts (BAGE).

144 (1977) Bundesarbeitsgericht, *BAG AP § 613a Nr. 8, AZR 703/75*. Arbeitsrechtliche Praxis (AP).

145 *Ibid.*

transferring those obligations to someone else.[146] In order for the employment to be transferred to the transferee an agreement to this would have to be established between the employer and the employees. In practice, however, the transferor and the transferee did during this period often agree that the employees in the undertaking at stake were to be offered employment with the transferee and in practice such an agreement could be called upon by employees in order to claim a right to employment with the transferee.[147] The right to re-employment in accordance with Article 25 of the Employment Protection Act[148] was not fully applicable in situations of transfer of undertakings and it was actually possible for transferees to choose the employees with the transferor that were to be offered new employment. The weakness of the right to re-employment in these situations, not surprisingly, received a lot of criticism from trade unions and the problems that were pointed out by trade unions and scholars[149] have to a great extent been solved through the implementation of the Directive. Aspects of contract law were thus prevailing in the Swedish system at the time of implementation of the Directive and any changes that could be seen as decreasing the protection of the workers could not be considered.[150] It would thus have been impossible to implement the Directive in the Swedish system without including the right to refuse as such a solution would have neglected the worker's contractual autonomy in that (s) he would not have the possibility of voicing disagreement to the changes of the contract.

Hungarian private law recognizes the fundamental principle that a debt may be transferred only with the creditor's consent.[151] However, if the transfer of the obligations is prescribed by law, i.e. by an Act of Parliament, the transfer is mandatory and it does not require the consent of the creditor(s).[152] In order to provide job security and the protection of acquired rights of the workers under the conditions of growing unemployment and the dispersion of state ownership in the early 1990s, the rules on the transfer of undertakings in the Labour Code established an exception according to the above mentioned section in private law.[153]

The need for the acceptance of both parties for the contract of employment to be valid poses some problems when considering the automatic transfer of the contract of

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146 MULDER, B. J. (2004) *Anställningen vid verksamhetsövergång,* Lund, Juristförlaget i Lund., pp. 128-129.

147 (1985a) Arbetsdomstolen, *AD 1985 nr 35 Gävleborgs Byggplåt*. (The Swedish labour court judgement 1985 number 35).

148 Article 25 LAS.

149 EKLUND, R. (1990) Entreprenader - arbetsrättsliga aspekter på en organisationsfråga. *Juridisk Tidskrift,* 1989-90**,** 271-285. p. 284.

150 On this position of the Swedish legislator see (1994c) *Regeringens proposition 1994/95:102 - Övergång av verksamheter och kollektiva uppsägningar* The Swedish Government Prop. 1994/95:102., p. 45 where it is stated that any changes to the domestic legal order should not give rise to implications that are detrimental to the workers in comparison with the law in the current domestic legal order and that this current legal order does not oblige the workers to continue the employment relationship with the transferee. This was thus one of the major reasons for the Swedish legislator to implement the right to refuse.

151 S. 332 (1)-2) of the Hungarian Civil Code (Act of Parliamnet No. 1959/IV).

152 S. 333.

153 In order to reinforce the aim of Directive to protect the interests of the workers the ECJ came to a similar conclusion as early as in the 1980s. See Joined Cases C-144 and 145/87 Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen para. 13.

employment to the transferee as such a transfer automatically substitutes one of the contracting parties, i.e. the employer. The worker's right to refuse the transfer thus serves as a means of ensuring that the change of employer does not occur without the acceptance of the employee. This also includes the acceptance of being transferred since an employee who is entitled to the right could decide to exercise it by not refusing the proposition of the modification of her/his contract of employment.

This section aimed to investigate the different arguments that have been or could be used to claim the existence of the right to refuse. A plurality of sources has been called upon in this research, and the results certainly do not indicate the irrelevance of such a claim. As Dockès observes:

> "when the only means to refuse one's employer's decision is to resign, then this decision is contingent on the employer's and not the employee's decision. On the other hand, if a right to refuse exists, the contract remains with its actual contracting parties. It cannot be said on one side that the worker has the freedom to choose her/his employer, and on the other side that the substitution of the employing party is imposed on the worker unless (s)he resigns. The first contradicts the latter".[154]

Thus the most obvious solution is the possibility of seeing a reluctant worker remaining at the services of the transferor. However, this solution has rarely been chosen by the Member States though it may be one to be explored.

4. Conclusion and Outlook

In summarising our findings and drawing some conclusions we can first of all state that the *Katsikas* case has been received and interpreted differently in the Member States. Some Member States have interpreted the judgement in the *Katsikas* case as introducing a right for the workers to refuse to have the contract of employment transferred and obliging the Member States to implement this right, as, for example, Sweden and the UK. Others have, however, instead interpreted the judgement as leaving it to the discretion of the Member States to decide whether or not such a right should be implemented in the national legal order, for example Hungary and Portugal. This has led to national variation concerning the solutions adopted in the Member States covered in our study.

In France, Hungary and Portugal the workers' right to refuse to have the contract of employment transferred has not been implemented. The main reasons for this have been: that the Directive imposes on both parties the continuation of the employment relationship and the fundamental freedom of the worker is respected as (s)he still has the freedom to resign if (s)he refuses to work for the transferee in France; that the legal consequences of business transfers are perceived as an automatic modification of the contract of employment since the contract of employment will be automatically maintained without any changes in terms and conditions, because the contract of employment is personally binding on the side of the employee, but not so on the side of the employer in Hungary; and grounds of political economy encompassing the idea that

[154] DOCKÈS, E. (2005) *Droit du travail, Relations individuelles*, Paris, Dalloz. (The translation is ours)

workers are part of the assets of the undertaking rather than a party to a labour contract in Portugal.

In the UK the right has been implemented, but since the exercise of the right will have the effect of the worker being considered as having resigned from the contract of employment, such a disposition can be considered as emptying the right. The reason being that the UK understood the *Katsikas* case as obliging the Member States to implement this right, but there was a wish to preserve classical notions of freedom of contract, but not to provide a basis for the employee to be able to claim compensation for wrongful dismissal or redundancy payments as a result of the transfer. In Germany and Sweden the right to refuse has been implemented in a manner that can provide the worker with a stronger protection since the exercise of the right will oblige the transferor to find a replacement position for the worker and only if this is not possible will the employment contract be terminated. This termination will, however, be considered as a dismissal which grants the worker the right to redundancy payments, thus limiting the financial consequences for the workers exercising their right to refuse. Whereas the implementation of this right in the German system was what generated the *Katsikas* case, the Swedish legislator interpreted the *Katsikas* case as providing an option to implement this right and chose to do so in order to assure that the level of protection for the workers would not be infringed by the implementation of the Directive.

It has further been shown that fundamental rights, such as the right to work, the prohibition of forced labour and the protection against unfair dismissal, are all of relevance when discussing the workers' right to refuse to have the contract of employment transferred. However, these fundamental rights have been used in arguments both in favour of and against the implementation of the right to refuse. This diversity of possible interpretations, both of the fundamental rights and of the ECJ judgement in the *Katsikas* case, shows two things. First, something that is commonly known amongst lawyers, that law is an art of interpretation and formulation of convincing arguments based on legal sources. Secondly, and more important in this discussion, that the national context is of utmost importance when law is interpreted and implemented. In fact the solutions adopted in the Member States that we have examined all show that the national traditions have governed the choice of the legislator.

The most promising track might be actually located in the contract of employment itself. Indeed, two interpretations can be elaborated from that section. A first and modest interpretation would be to state that those tools, which could be used to enable a worker to refuse her/his transfer, are only epiphenomena that do not predetermine a general recognition of the right to refuse. A second and certainly more ambitious one would rather consider that the contractual vigour demonstrates its potentiality to enable workers to refuse their transfer. These examples indicate the beginning of a more general judicial process that would recognize for the worker the right to refuse her/his transfer. Once all the other paths have been examined, they will appear conclusive elements to admit that workers are entitled to refuse. This solution would only mean that there are different ways to implement this right to refuse, but that normatively the right is no longer to be questioned. The variety of implementation would hence demonstrate the plurality of possibilities in the Member States that are conceivable in order to safeguard employees' rights in the event of a transfer of undertaking.

But this question of the right to refuse also raises matters of legal policy considerations concerning labour market structures and systems that deserve some more detailed attention. One of the words most often repeated over the last 20 years in the legal thinking concerning labour law has been *flexibility*. There is a perceived need for labour markets to be more flexible although the perception is not as strong when you ask what exactly the content of this flexibility is.

The question of the right to refuse could be framed within such a discussion; the protection in events of transfers of undertakings plays in itself a dual role of protection, it intends both to protect employers and employees. The intention to protect employers is manifested in ensuring them a stable undertaking, in particular in sectors where the workforce is of crucial importance for the commercial value of the undertaking. The intention to protect employees is manifested in the obligation of the transferee to accept all of them and prohibit situations of cherry-picking and bargaining over which employees are transferred. In this context, the recognition of the right to refuse is an expression of this movement of individualisation of labour law because in this framework employees are *not* considered to be part of the assets of the undertaking. It is an expression of the emancipation of the employee as an individual and a party of a contract and at the same time it functions as a strong instrument for his/her protection because it grants him/her a say in the destiny of his/her employment relationship.

However, this might work as a double-edged sword, taking into account its impact on the market. If on the one hand it emancipates the individual, it might on the other hand have adverse effects on the commercial transactions that have the undertaking as its object because a mass refusal to be transferred could jeopardise the whole intention underlying the transfer. This is where the information and consultation procedures provided for in the Directive are of primary importance, in order to achieve a harmonisation of interests beforehand.

Agell argues

> "It is common to argue that the process of globalization will pressure politicians to make the labour market more flexible… I argue that the opposite may happen. Labour market institutions can be thought of as an instrument of social insurance that protects workers against risks that for which private insurance is hard to come by. Due to the increased external risks that accompany globalization, the demand for social insurance through a rigid labour market may increase in the future".[155]

The current debate on the right to refuse could illustrate this demand; such a position would be a very worker-oriented position of both notions of employment and stability. However, as some authors indicate,[156] the main function of the Directive, through the

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[155] AGELL, J. (1999) On the Benefits from Rigid Labour Markets: Norms, Market Failures and Social Insurance. *The Economic Journal,* 109**,** 143-164. quoted from POCHET, P. (2007) Restructurations: quelles politiques publiques d'accompagnement: Construction des mécanismes d'adaptabilité dans l'Union européenne. *unpublished*.

[156] BAILLY, P. (2003) Le salarié peut-il refuser les effets d'un transfert d'entreprise? *Dr. Soc.***,** p. 474-481, BAILLY, P. (2007) L'actualité de l'article L. 122-12. *Semaine Sociale Lamy,* 1290**,** 7-11, CHAGNY, Y. (2005) "La jurisprudence française sur le libre choix du salarié". IN ISLSSL (Ed.) *VIII European Congress.* Bologna, HENRY, M. (2006) Aux limites de l'article L. 122-12. *Dr. Soc.***,** 275-279, JEAMMAUD, A., CHAGNY, Y. & RODIÈRE, P. (2007) Faut-il reconnaître au salarié la faculté de refuser le transfert de son contrat de travail? *Revue de droit du travail***,** 216-221, MAZEAUD, A. (2005) Le sort des contrats de travail lors des transferts d'entreprises. *Dr. Soc.***,** 737-742, SUPIOT, A. (2006) Les salariés ne sont pas à vendre. *Dr. Soc.***,** 264-273.

automatic transfer of the contracts from the transferor to the transferee, is nowadays to enable the latter to have the workforce needed to pursue the operation of the undertaking. We then assume that the stability, targeted through the Directive and its national transposition, is more sought by the employing entities than by the workers. The Directive seemed to pursue a particular goal: safeguarding the employees' rights. Time may have come to reset the interpretation of the Directive and correct the growing dissymmetry between the objective and the current solutions.

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