Law Department

The Impact of Community Law on German Labour Law

The Example of Transfer of Undertakings

MARITA KÖRNER

LAW No. 96/8

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

EUI Working Paper **LAW** No. 96/8

The Impact of Community Law on German Labour Law

The Example of Transfer of Undertakings

MARITA KÖRNER

BADIA FIESOLANA, SAN DOMENICO (FI)

© Marita Körner
Printed in Italy in December 1996
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

THE IMPACT OF COMMUNITY LAW ON GERMAN LABOUR LAW
- the example of transfer of undertakings*

Dr. Marita Körner
Institute of Labour Law
J.W. Goethe-University, Frankfurt/M.

* This working paper is part of a research programme undertaken at the European University Institute under the direction of Professor Silvana Sciarra. The project focuses on the dynamic relationship between national courts and the European Court of Justice in the field of Labour Law as a consequence of article 177 preliminary ruling procedures. Cases have been selected by the research group taking into account both the relevance of the subject mater and also the number of procedures started by national judges. A further criterion for such a selection is the impact of the court's decisions in legal systems different from the one where the case first originated.

I. Background

Skepticism and indifference rather than passionate discussion were the reactions in Germany to the Community's attempts to regulate the labour market. None of the leading manuals of labour law fails to mention the Community, but also never forgets to underline in the few random remarks its lack of power to enforce real changes[1]. It is therefore not surprising that in a country with a most sophisticated system of publications registering nearly every regulation, the first collections including the EU-rules were only published recently.

The reasons for this abstention are multiple[2]. First, there is a long-standing, deep-rooted distrust in any attempt to argue clearly domestic issues on a comparative basis[3]. Labour law is probably next to family law the most typical example of hostility towards a comparative analysis. In both cases fundamental economic, political and societal principles are involved. References to foreign experiences and regulations are hence perceived as totally out of place where issues linked to what could be addresses as the hard core of national law are at stake. A comparative approach is accepted as long as it leads to a compilation of foreign regulations but is rejected where it would lead to dissociate the questions to be answered from their national frame and understand them as the result of a series of political and societal problems transcending national frontiers and linked to a specific stage of economic, technological and cultural

[1] Söllner (1994), Grundriß des Arbeitsrechts, p. 42; Zöllner/Loritz (1983), Arbeitsrecht, p. 113 ss.

[2] For a detailed analysis see Simitis (1994), Europäisierung oder Renationalisierung des Arbeitsrechts?, in: Heinze/Söllner (ed.), Arbeitsrecht in der Bewährung, Festschrift für Otto R. Kissel, München, p. 1097 ff.

[3] See for example Reuter (1983), Gibt es eine arbeitsrechtliche Methode? - Ein Plädoyer für die Einheit der Rechtsordnung -, in: Festschrift für M.L. Hilger und H. Stumpf, p. 573 ss.

development[4]. Any comparative analysis is then quickly suspected of destabilizing the foundations of the domestic principles.

Secondly, EU-provisions challenge the very structure of German labour law. The constitution sets clear priorities. Provisions affecting working conditions are to be established first and foremost by agreements initiated, negotiated and concluded by the parties, i.e. employers and employees (representation). Consequently, legislator and government have to confine themselves to an essentially subsidiary role. Thus the dominant role of state regulation, typical e.g. for the French system, is restricted in favor of collective bargaining. Hence, the legitimacy of statutory rules depends to a large extent on the inability or the refusal of employers and unions to establish a regulatory frame through collective bargaining. Any attempt by the EU to impose directly or indirectly a specific scheme of working conditions endangers the balance between negotiated and state rules. As different as the positions of employers and unions may be with regard to the particular problems to be addressed, their interests and expectations coincide from the very moment their regulatory power is questioned. Consequently, their reaction is as strongly dictated by the wish to preserve their influence as are the reactions of the member states by the claim to safeguard their sovereignty.

Thirdly, EU-rules tend to involve constitutional rights. The main example are the provisions concerning equal treatment of men and women. However, the more constitutional aspects are concerned the more the Community's structural deficit becomes evident. For historically understandable reasons the Common Market was not the result of a political union based on common constitutional principles. The political union only began to develop out of the economic unification. This is why the EU has up to now expressed itself in market terms and not in terms of constitutional rights. It was the ECJ which step by step reminded the Community of its duty to respect the citizens' fundamental rights and to realize that a "Europe of citizens" presupposes a constitutional frame guaranteeing not only mobility but also civil liberties without which a democratic society cannot exist. It is therefore not surprising that the

[4]See Kahn-Freund (1983), Labour and the law, p. 65 ss. and (1974), On Uses and Misuses of Comparative Law, in MoLR, p. 785 ss.

German Federal Constitutional Court reacted by adopting the position that Community-decisions have, in the absence of constitutional rights on the community level, to be evaluated against the German constitution[5]. This means that the Community, whatever its intentions may be, cannot go beyond the limits marked by the constitutional provisions safeguarding individual liberties. Later, in 1986 and in 1989 the Court acknowledged that especially the ECJ had through its decisions established a basis for the protection of constitutional rights[6]. Consequently, the Federal Constitutional Court exchanged its claim to directly control Community decisions for a less intrusive attitude: It accepted the primary jurisdiction of the ECJ and at the same time restricted its own interference to cases where the Community's constitutional frame proves to be insufficient.

Recently the Constitutional Court has, however, in part again withdrawn from the 1986 position. In the Maastricht decision of 12 October 1993[7] the Court claims to evaluate the legality of further steps towards a strengthening of the European integration against the background of the German constitution.

Fourthly, the EU has addressed problems which in most cases had already been dealt with in an identical or similar way by German law. For instance, the Community's requirements in both the job security and the health and safety fields corresponded largely to the already existing rules. The impact of the European rules was therefore marginal. Under these circumstances it is not surprising that the importance attached to Community law was not particularly great. These rules were rather seen as a corrective of the inferior standards in other member states.

The situation finally began to change with the Community's increasing efforts to ensure equal treatment of men and women. At first, Germany seemed again to have no particular reason to pay special attention to the Community' expectations. The German constitution unequivocally

[5]BVerfGE 37, 271 of 29 May 1974.

[6]BVerfGE 73, 339 (368) of 22 October 1986; BVerfG - 2 BvQ 3/89 of 12 May 1989.

[7]BVerfG, NJW 1993, 3047 ss.

prohibits any discrimination of women. Many of the male privileges had been restricted or abolished. However, compared for example to the changes in family law, progress in labour law had been minimal. Most of the provisions related to female labour remained unaffected. Their apparently strictly "protective" character exempted them from any suspicion of having discriminatory effects. Beyond this type of rules, the legislator remained passive. The responsibility for the necessary corrections was, in conformity with the structural principles of German labour law, burdened upon the parties. Thus a statute like the Works Constitution Act[8] which undoubtedly determines some of the most essential employees' rights at their work place includes no more than a general provision mentioning sex discrimination along with a whole series of other discriminatory practices, reminding the employer as well as the works council of their duty to avoid any such practice[9]. Both the general policy and the specific measures have therefore to be defined by the parties. The chances of equality thus depend wholly on their reaction. The same is true for collective agreements. They are the main regulatory instrument and were hence considered as a decisive tool for implementing equality. However, neither the employers nor the unions were willing to really challenge the traditional roles. Instead of paving the way for thoroughly revised working conditions, guaranteeing for example not only equal payment but also equal access, they stabilized a clearly discriminatory system. Women still found themselves in the lowest paid groups and were still the first to be dismissed. Consequently it is not surprising that their protest started with a series of activities openly directed against discriminatory payment considered as being perfectly adequate and correct by unions and employers. The EU forced by its directives both the legislator and the courts to face a problem constantly repressed and to initiate at last the long due reforms[10]. Hence, for the first time Germany had to cope with a situation other Community members had had to deal with before: to reject its own regulations in favor of new rules based on standards determined by the Community.

---

[8]Betriebsverfassungsgesetz, BGBl. 1972 I, p. 13 ss.

[9]Sec. 75 para. 1 Works Constitution Act.

[10]Details in part 2 of the project on gender discrimination.

This is part of the explanation for the fact that discrimination cases, especially the ones concerning indirect discrimination, dominate the German courts' references for preliminary rulings[11]. The vast majority of German cases submitted to the ECJ - 26 out of a total number of 37 - concern equal treatment of men and women. All other subjects have so far only played a minor role.

II. Transfer of undertakings

a) Impact of Directive 77/187 on German law

Council Directive 77/187 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses of 14 February 1977, seems to have come to the knowledge of German labour lawyers only recently, when the second German case on the subject was decided by the European Court of Justice and immediately raised a controversial discussion on the competencies of the court.
Until then only secondary problems of Directive 77/187 had played a role.

When it was enacted in 1977, in Germany the problem of job security in the event of transfer of undertakings was the following:

On the whole, protection of employees' acquired rights in the event of transfers of undertakings was already achieved in 1972 when Sec. 613a was included in the Civil Code (BGB - Bürgerliches Gesetzbuch). However, this section was only clear as far as individual rights were concerned. The dismissal of an employee as a consequence of a transfer of an undertaking was inadmissible. The same has been decided for circumventing agreements like contracts between employer and employee on the initiative of the employer to terminate the employment (Aufhebungsvertrag)[12] or fixed-term employment contracts in relation to a transfer[13].

---

[11] See Colneric, Verbot der Frauendiskriminierung im EG-Recht, Festschrift für Gnade (1992), p. 627 ss.
[12] For example BAG decision of 28.4.1987, DB 1988, p. 400 ss.

Only recently, however, the Federal Labour Court denied a transfer under Sec. 613a BGB in a case where employees had been dismissed in view of a future sale of the undertaking[14]. This denial is apparently due to the fact that the undertaking is situated in the new Länder under the administration of the former Treuhandanstalt. The latter wanted to sell the undertaking. Prospective buyers, however, would only take over the undertaking with a reduced number of employees. Therefore a structural adjustment with a reduction of the production as well as the number of employees was elaborated and realized by the old management. Then the undertaking could be sold. The Federal Labour Court did not consider this operation to be a transfer of an undertaking under Sec. 613a, basing this decision on the argument that the reduction of both the production and the number of employees had been inevitable for the survival of the undertaking in any case, not only for a sale and that therefore the dismissals had not been linked to a transfer.

When first enacted Sec. 613a of the Civil Code left open collective aspects. It became a matter of controversy whether the protection in Sec. 613a also meant rights derived from collective agreements. This debate becomes understandable if we take into account the above-mentioned fact that generally all important rules governing the contract of employment are to be found in collective agreements, i.e. in collective bargaining agreements (trade unions and employers) or works agreements (works councils and employers) and not in the contract of employment itself.

The fate of bodies of workers' participation in the case of transfers of undertakings was also uncertain. Insofar Directive 77/187 led to a clear decision: rights acquired through sources of collective labour law also have to be safeguarded. Accordingly, Sec. 613a of the Civil Code had to be and was amended in 1980[15]. Sec. 613a para. 1 Civil Code now determines

---

[13]For example BAG decision of 15.2.1995, DB 1995, p. 1916 s. with further references.

[14]Federal Labour Court, decision of 18 July 1996 - AZ 8 AZR 127/94.

[15]EG-Anpassungsgesetz of 13 August 1980, BGBl. 1980 I, p. 1308.

that also rights acquired through collective instruments become part of the individual employment contract.

As to the information and consultation procedure of part III of the Directive no adaptation of German law was necessary. Sections 111 and 112 of the Works Constitution Act already provided for proceedings which reach beyond the scope of the Directive.

A strong tendency to try to undermine Sec. 613a can be perceived during the past decade. The labour courts, however, tended to rule in favor of the affected workers. As far as cases of insolvency are concerned, the Federal Labour Court even overrode the Directive by deciding that its principles also apply in these situations[16].

Directive 77/187, meant to protect workers affected by transfers of undertakings, overlooked an important aspect of the very interests of these workers: they might wish not to continue an employment relationship with the transferee. Quantitatively this is not a marginal problem, because often employees prefer to stay with the original employer, especially, but not only, in cases of privatization of public enterprises as employment in the public sector is considered to be more secure than with a private employer[17].
Nevertheless, the possibility of opposing the transfer was not provided for in the Directive. On the contrary, according to the Directive, the transfer of the employment relationship is automatic. In Germany the discussion on Directive 77/187 centered on this topic. On the one hand it was stated that the employee must be able to decide whether or not to continue the employment with the new employer[18]. On the other hand this view was

---

[16]BAG NJW 1984, p. 627. This is the general rule for the sale of the enterprise by the liquidator.

[17]On the problems of Sec. 613a of the Civil Code in privatization cases see Schipp (1994), Arbeitsrechtliche Probleme bei der Privatisierung öffentlicher Einrichtungen, NZA, p. 865 ss.

[18]For example Hitzfeld (1991), § 613 a BGB im System der europäischen Rechtsprechung, BB, p. 200 ss.

opposed by arguing that this is a contravention of the Directive which clearly provides for an automatic transfer[19]. This position was also shared by the ECJ, which, in an 1988 decision involving the Netherlands, stated that Art. 3 para. 1 of Directive 77/187 signifies that by the transfer of an undertaking the transferor is automatically discharged of his duties as employer even if the employees oppose the transfer[20]. Although the European Court of Justice in a preliminary ruling on reference of the labour courts of Bamberg[21] and Hamburg[22] as well as the Federal Labour Court[23] changed its view[24] and now concedes that the right of an employee to oppose the transfer of his employment relationship is part of his fundamental rights and thus compatible with the Directive, it is instructive to take into account the reactions of the Federal Labour Court on the 1988 ECJ-decision. In fact the German Court continued to interpret Sec. 613a of the Civil Code restrictively insofar as it granted the employee a right to oppose the transfer with the effect that the employment relationship with the old employer remained intact[25].

The Federal Labour Court based this interpretation on the one hand on Art.12 as well as Art.1 and 2 of the Constitution - Art. 12 guaranteeing the free choice of an employment, Arts. 1 and 2 being concerned with the protection of human dignity - and on the other hand on the so-called "Günstigkeitsprinzip", which has been developed in relation to conflicts between contractual rights and rights granted by higher ranking sources of law, i.e. collective agreements and statutes. In such a case of conflict the

---

[19]Birk, comment of BAG AP No. 10 concerning Sec. 613a BGB Civil code.

[20]EuGH v. 5.5.88, Slg. 1988, 2559 ff.

[21]EuZW 1992, 160.

[22]EuZW 1992, 31.

[23]BAG, AP Nr. 96 zu § 613 a BGB.

[24]EuGH v. 16.12.1992, AP Nr. 97 zu § 613 a BGB (Katsikas).

[25]After 1988 see for example BAG BB 1989, p. 2118. As for the cases before 1988 see BAG AP Nos. 1, 8, 10, 21, 37 concerning Sec. 613a BGB.

contractual regulation prevails if it is more favorable for the employee than the collective or statutory regulation. Taking into account this background of the principle (Günstigkeitsprinzip), it becomes evident why its applicability in the case of transfers of undertakings is questionable[26]. Furthermore, it is not clear if a right to object to the transfer is really more favorable for the individual employee, who will in most instances be dismissed for operational reasons by the original employer.
Accordingly, the discussion on the right of the individual to oppose the transfer shifted onto this latter aspect. The first question is if, and how far, a dismissal of an employee who had opposed the transfer of his employment relationship has to be justified under sec. 1 of the German Law on protection against dismissal (Kündigungsschutzgesetz - KSchG). Furthermore, a second question arises if employees opposing a transfer can profit from the benefits of a social plan provided for in Sec. 112 of the Works Constitution Act, which - to complicate things - might only have had to be concluded because a certain number of employees of one undertaking or business have opposed the transfer thus forcing the employer to pay a compensation for collective dismissal under Sec. 112 of the Works Constitution Act.

As to the first question, the Federal Labour Court has restricted the rights of employees opposing a transfer. In a standard dismissal case for economic reasons the employer has to choose the employees to be dismissed according to social criteria, like age, family status or length of service (Sec. 1 para. 3 KSchG). For Sec. 613a-cases the Federal Labour Court has decided that the opposing employee could only claim this evaluation if he can present objectively reasonable grounds for the opposition to the transfer[27]. At first sight this seems to be a contradiction to the Courts' long-standing effort to establish a right of the employee to oppose a transfer of the employment relationship. However, an analysis of the decision discloses the motivation of the Court. The question concentrates on the point of who should be dismissed: the objecting employee who would have had the chance to continue an employment with the transferee, or another employee, who fulfils less the criteria of Sec. 1

---

[26]The debate is reported in Hitzfeld (1991), p. 201 (note 16).
[27]BAG v. 7.4.1993, NZA 1993, 796.

para. 3 KSchG, abut who is, however, not affected by the transfer and thus not able to continue an employment with another employer.

In the case in question the employer transferred a part of an undertaking where the opposing employee had been working. The latter was then dismissed for economic reasons. He brought an action against the dismissal arguing that he could have been employed in another part of the undertaking where other employees, less protected under Sec. 1 para. 3 KSchG should have been dismissed first. The Federal Labour Court outlined the above-mentioned principles, but did not finally decide the case. It had to be referred back to the appellate court which had not considered the reasons for the objection of the employee. Consequently, it is so far only evident that the Federal Labour Court wants to restrict an unlimited access to sec. 1 para. 3 KSchG for opposing employees regardless of what the reasons for the objection to a transfer had been[28]. However, the borderlines for this restriction are not yet clear. Nobody really knows what "objective and reasonable grounds" for an objection are. It is not surprising therefore that this term is becoming a matter of controversy[29].

The second question - the applicability of Sec.112 of the Works Constitution Act - has not yet led to court decisions. However, the discussion is controversial. Sec. 112 and 112a of the Works Constitution Act provide for a compensation laid down in a so-called social plan in certain cases of collective dismissal. One could imagine cases where employees collectively exercise their right to oppose a transfer of their employment relationship to the transferee, thus provoking the dismissal by

---

[28]Until now the Federal Labour Court has been followed by the Landesarbeitsgericht (LAG) Hamm, DB 1994, 2242 ss. The LAG stated that the employee had objected on reasonable grounds because he would have been transferred from an undertaking with 300 employees to an undertaking with only 18, where the Works Constitutions Act's protective regulations on collective dismissals would not have been applicable as these require a minimum of 20 employees.

[29]Lunk (1995), Widerspruch gegen Betriebsübergang und Sozialauswahl, NZA p. 711 with further references; Schlachter (1995), Die Rechtsstellung des widersprechenden Arbeitnehmers bei Betriebsübergang, NZA p. 705 ss.; Hoffmeister (1995), Soziale Auswahl nach Widerspruch bei Betriebsübergang, ArbuR, p. 132 ss.

the transferor, which again may call upon the duty of the latter to negotiate a social plan with the works council. The effect of this operation would be that unlike the risk-sharing concept of Sec. 613a of the Civil Code, the transferor and not the transferee would take on the employment costs. Therefore two aspects play a major role. First, it is a matter of dispute if a transfer of an undertaking is at all a "change of undertaking" which Sec. 112 of the Works Constitution Act presupposes[30]. Secondly, it is argued that the employee's right to object to a transfer must be open to control of abuse[31].

Taking into account this recent restriction of the right to object to a transfer in Germany, it could be questionable if this is admissible under European law, as the ECJ has in its 1993 Katsikas-decision[32] granted a right to object to a transfer on fundamental rights grounds.

However, although the ECJ has pronounced that the employee must retain his or her freedom of decision not to work with the transferee, the Court has not restricted the means to reach this aim. In other words, the national laws must not necessarily provide for a right to object to a transfer, but can for example also grant the employee a right of termination of the contract of employment without notice. That means that the Court centers on the employee's freedom of decision, not on the maintenance of the employment relationship with the transferor. Under these circumstances where a right of objection can, but does not have to be, granted to comply with directive 77/187[33], a certain restriction of that right seems to be compatible with the directive, even more so since it is not the right to

---

[30]The discussion is reported by Däubler in: Däubler/Kittner/Klebe/Schneider (ed.), Betriebsverfassungsgesetz, 1994, § 111 BetrVG, notes 94 ss.

[31]Bauer (1994), Aktuelle Probleme des Personalabbaus im Rahmen von Betriebsänderungen, DB, p. 217 (220); Gaul (1990), Der Betriebsübergang, p. 226; Neef (1994), Betriebsübergang und Betriebsänderung, NZA, p. 97 ss. (102); Henssler (1994), Aktuelle Probleme des Betriebsübergangs, NZA p. 913 ss. (922).

[32]See above note 23.

[33]Interestingly, the draft for a revised directive on transfer of undertakings still does not provide for a right to object to the transfer, see Hanau (1994), EU-Richtlinienentwurf zum Betriebsübergang, ZIP, p. 1598 ss.

object as such is restricted, but only some of the legal consequences of other laws in cases where an objection would evidently be unjustified[34].

Nevertheless, there remains room for some doubts. On the one hand the practical problem of what is an unjustified objection will lead to endless definitions. On the other hand, and more importantly, it is hardly possible to separate the right of objection from its legal consequences. The ECJ tends to guarantee the freedom of decision of the transferred employee. This freedom, however, can be severely affected if its exercise causes unwanted results.

From the point of view of a transferred employee it is not so much the wish not to work with the transferee but foremost the aim to stay with the transferor, which motivates the objection to a transfer, especially in cases where only a part of an undertaking is transferred and where consequently there remains a chance to be further employed in another part.

b) Christel Schmidt case

While the above-mentioned problems concern the legal consequences of a transfer of an undertaking, the main controversy concerns the question of what exactly a transfer of undertaking or business or parts of them is. It is in this context that the highly controversial Christel Schmidt decision of the European Court of Justice has to be seen[35].

Ms Schmidt was employed by the Savings Bank as the only cleaner in the Bank's premises in Wacken. She was dismissed on account of the refurbishment of that branch office, when the Savings Bank wished to entrust the cleaning to a firm which was already responsible for the cleaning of most of the Savings Bank's other premises. The new cleaning firm offered to employ Ms Schmidt for a higher monthly wage. However, Ms Schmidt refused this offer, because she calculated that her hourly wage

---

[34]See among others Schlachter (1995), NZA p. 710 (above note 27).
[35]ECJ decision of 14 April 1994 - Rs. C-392/92.

would in fact be lower as a result of the increase in the surface area to be cleaned.

Ms Schmidt brought an action challenging her dismissal under Sec. 1 of the German Law on protection against dismissal (Kündigungsschutzgesetz) on the ground that it was not socially justified within the meaning of that provision. The Labour Court (Arbeitsgericht) dismissed the action. It held that the Bank was able to rely on business-related grounds in order to justify the dismissal: the renovation of the branch and the resulting extension of the surface area to be cleaned had caused the Bank to take a commercial decision to have the cleaning carried out in future by a cleaning firm rather than by its own staff. The Labour Court held that it could review such a decision only on the issue of whether it was manifestly unreasonable or arbitrary. The Bank's decision was held to be neither.

Ms. Schmidt thereupon appealed to the Higher Labour Court (Landesarbeitsgericht) of Schleswig-Holstein, which, taking the view that the outcome of the dispute depended on the interpretation of Directive 77/187 made the reference for a preliminary ruling under Art. 177 of the EEC Treaty - incidentally the first German reference concerning the main problem of the directive, the interpretation of the term "part of an undertaking or business" - with the following questions:

"1. May an undertaking's cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of Directive 77/187/EEC?

2. If the answer to Question 1 is in principle in the affirmative, does that also apply if prior to the transfer the cleaning operations were undertaken by a single employee?"

It is interesting to note that the president of the Higher Court of Schleswig-Holstein is and also has been in her former positions one of the most active judges in referring cases to the ECJ, especially in the equal

treatment field. The overwhelming majority of German references under Art. 177 EEC Treaty have been made by Labour Courts, i.e. the first instance. However, out of a total of 123 Labour Courts only a small minority were involved (12 in the equal treatment sector), while also the regional distribution of references was and is very unequal.
The southern Bundesländer are by far underrepresented[36].

In its decision the ECJ answered both questions in the affirmative, explaining that neither the fact that such a transfer relates only to an ancillary activity of the transferor not necessarily connected with its objects[37], nor the fact that it is not accompanied by any transfer of tangible assets, nor the number of employees concerned, is capable of exempting such an operation from the scope of the directive since the decisive criterion for establishing whether there is a transfer for the purposes of directive 77/187 is whether the business in question retains its identity as indicated in particular by the actual continuation or resumption by the new employer of the same or similar activity.

The German Government had put forward the argument that the term "business" implies a clearly defined economic objective which is being pursued within the context of an autonomous organization, excluding isolated elements, such as a machine or a parcel of land, as a transferable part of an undertaking within the meaning of the directive. The ECJ did not follow this view, but concentrated on the question of whether an economic unit has been transferred, i.e. whether the business in question retains its identity. From this angle the Court also considers cleaning operations of a branch of an undertaking as part of a business.

The Christel Schmidt-decision of the ECJ caused sharp reactions among German labour lawyers which center around the competencies of the European Court. Although controversies on the competencies of the ECJ

---

[36]See Ninon Colneric, Europäischer Gerichtshof und deutsche Arbeitsgerichtsbarkeit, Paper for the Symposion of the Federal Labour Court of 29.9.1995, p. 18 s. (unpublished).

[37]This view had already been outlined in the ECJ's Rask decision of 12 November 1992, Slg. 1992, p. 5755.

are by no means a recent phenomenon, they have over decades only taken place among specialists. Furthermore, labour law was for a long period of only minor interest. However, in the meantime labour law matters have become an important part of the ECJ's jurisdiction, thus challenging the national systems more and more. Parallel to this development ECJ-decisions provoke a wider interest and fear among national lawyers. "The ECJ in labour law - the black series is continuing" was the title of one of the articles[38], which considered the decisions of the ECJ to be "inappropriate and irresponsible". Labour law should be referred back from the European to the national level, because "a centralized, supranational law, imposed on the member states violates the core of national law systems"[39]. The reasons for this negative attitude are multiple. They vary from the refusal of interference with national law to the practical problem that against the background of the ECJ-jurisdiction outsourcing may become more difficult and certainly more expensive. Recent management studies point out that outsourcing will be one of the major factors for future company organization[40]. This may or may not be realistic. In any case it is evident that outsourcing is a phenomenon with increasing importance as the structures of production and distribution as well as services have changed considerably according to the internationally induced necessity of cost reduction. This latter is considered to be endangered by the extensive interpretation of instruments protecting employees affected by outsourcing.

Despite the harsh reactions to the ECJ-decision there have also been positive comments[41] and above all the Federal Labour Court itself seems

---

[38]Junker (1994), Der EuGH im Arbeitsrecht - Die schwarze Serie geht weiter, NJW, p. 2527 s.

[39]Heinze (1994), Europäische Einflüsse auf das nationale Arbeitsrecht, RdA, p. 1 ss (esp. p. 4 and 9). Among the other unfavourable opinions are: Bauer (1994), Outsourcing out?, BB, p. 1433 ss.; Buchner (1994), Verlagerung betrieblicher Aufgaben als Betriebsübergang i.S. § 613 a BGB, DB, p. 1417 ss.; Henssler (1994), Aktuelle Rechtsprobleme des Betriebsübergangs, NZA, p. 913; Voss (1995), Funktionsnachfolge als Betriebsübergang i.S. von § 613 a BGB, NZA, p. 205 ss.

[40]See the references in Sydow/Windeler (ed.), Management interorganisationaler Beziehungen, 1994, p. 1 ss.

to be rethinking its interpretation of Sec. 613a of the Civil Code[42] as far as the interpretation of the term "part of an undertaking or business" is concerned. From the German point of view this interpretation causes the main complications in applying directive 77/187. Here the definitions of the Federal Labour Court and the European Court of Justice differ considerably. This is partly due to the fact that under German law the differentiation between "Unternehmen" and "Betrieb" is more strictly made than in other member states, although the definitions of these two entities are not homogeneous as far as the different fields of law are concerned[43] and even within labour law different concepts of what is a "Betrieb" prevail. In any case there are already problems of translation. "Unternehmen" can be "undertaking" or "enterprise", "Betrieb" would rather have to be translated with the term "plant". However, the English use of "undertaking" or "enterprise" does not only cover the German "Unternehmen", but also the "Betrieb".

Sec. 613a of the Civil Code only provides for the transfer of a "Betrieb". As however an "Unternehmen" always consists of one or several "Betriebe" so also a transfer of an undertaking in the sense of "Unternehmen" falls within the scope of Sec. 613a. Even if the definitions of "Betrieb" were different in the Directive and in Sec. 613a leading to a situation where a "Betrieb" under the directive would not be considered as such under German law, it would still be possible to apply Sec. 613a to a transfer of a part of an undertaking or business. Therefore the interpretation of what is a part of an undertaking is of major interest.

---

[41] Zwanziger (1994), Vom Reinigungsvertrag zur Krise der Europäischen Union?, DB, p. 2621 ff.; for further references see Gaul (1995), Die aktuelle Entwicklung zum Betriebs- und Unternehmensübergang, ArbuR, p. 119.

[42] See Heither, a presiding judge of the Court in his paper "Verfahrenskoordination bei der Auslegung der EG-Richtlinie über die Wahrung von Ansprüchen der Arbeitnehmer beim Betriebsübergang" at the Symposion of the Federal Labour Court on 29 September 1995 (unpublished).

[43] See Joost (1988), Betrieb und Unternehmen als Grundbegriffe im Arbeitsrecht, with further references.

The Federal Labour Court in interpreting Sec. 613a refers to the leading definition of a "Betrieb" in labour law which requires an autonomous organization where an employer is working on his own or with the help of employees using tangible or intangible assets.

For the purposes of Sec. 613a the Federal Labour Court modifies this definition insofar as the employees themselves shall not be part of the undertaking. The transfer of their employment relationships is considered to be the consequence of Sec. 613a of the Civil Code, not part of the facts constituting the applicability of Sec. 613a. However, the Federal Labour Court concedes one exception to this rule: if an employee with specialized know-how is of considerable importance for the undertaking, this employee can be part of the undertaking and thus his transfer can be a transfer of a part of an undertaking or business and consequently part of its assets[44]. Generally, however, simply the transfer of employees is not sufficient. It is the transfer of assets which is the central element in the interpretation of Sec. 613a[45]. Exactly which assets are considered to be sufficient for the application of Sec. 613a depends on the type of undertaking. In a manufacturing undertaking this can be machines, means of transport, raw materials etc., in the service sector it will be intangible assets like lists of regular customers or know-how. In any case the transfer of a part of an undertaking or business requires that a partly autonomous section of a business is being transferred. The transferee must be able to continue in business with the transferred assets. As long as this condition is being fulfilled, it is not decisive if the transferred part of the business

---

[44]Federal Labour Court, decision of 9 February 1994, AP No. 104 concerning Sec. 613a of the Civil Code, where the employee concerned was responsible for the aquisition of new clients as he had the necessary contacts. Due to his special know-how potential clients approached him and not, as is normally the case, vice versa.

[45]Examples for this interpretation are: Federal Labour Court decision of 29 September 1988, AP No. 76 concerning Sec. 613a of the Civil Code; decision of 18 October 1990, AP Nr. 88 concerning Sec. 613a; decision of 22 May 1985, AP No. 42 concerning Sec. 613a; decision of 30 April 1987, BAGE 55, p. 262.

only concerns an ancillary activity[46]. Furthermore, it is commonly agreed upon, although there are no Federal Labour Court decisions so far, that for a transfer of a business or part of a business the number of employees concerned is irrelevant[47]. At least as far as these two aspects are concerned, the ECJ-decision on Christel Schmidt should not have caused such surprise.

The position of the Federal Labour Court that a transfer of an undertaking can only have the consequences of Sec. 613a if tangible or intangible assets are transferred, excludes undertakings which do not depend on such assets as cleaning or maintenance operations. The jurisdiction of the Federal Labour Court thus differentiates between groups of employees: those with specialized know-how are privileged, others with lower qualifications are discriminated against. Therefore it is doubtful if the Federal Labour Court's interpretation of Sec. 613a of the Civil Code really takes account of the scope of protection granted by this section.

German labour law principles do not necessarily require a definition of "Betrieb" which excludes the employees. On the contrary, a business or a part thereof could also be defined as an organizational entity including employees, a view which is shared in interpreting the Works Constitution Act, which itself, however, does not define the term "Betrieb"[48].

The decisions of the Federal Labour Court are avoiding the question of whether the Court's interpretation of Sec. 613a of the Civil Code is compatible with Directive 77/187. The decisions of the European Court of Justice on defining the term of undertaking or part of undertaking have not been taken into consideration. Accordingly, the Christel Schmidt decision of 14 April 1994 came as a "surprise", although the ECJ had in a number

---

[46]Federal Labour Court, EzA No. 66 concerning Sec. 613a of the Civil Code, where the Court agreed that with the sale of a rented house the employment of the caretaker is being transferred.

[47]See Gaul (1993), Der Betriebsübergang, 1993, p. 100 with further references.

[48]Fitting/Auffarth ed al, Betriebsverfassungsgesetz,
18th ed., Sec. 1, note 53 ss. with further references.

of previous cases outlined its general position in defining an undertaking or business.

Already in the Spijkers decision of 18.3.1986[49] the ECJ had held that for a transfer of an undertaking in the sense of the Directive it is decisive that an economic unit keeps its identity, a concept which has been derived from French law and is as such not known under German law. Nevertheless, many criteria which are relevant in the decisions of the Federal Labour Court in interpreting Sec. 613a also play a role in the ECJ's definition of an economic unit. The European Court of Justice used the term "economic unit" also in a number of other cases prior to the Christel Schmidt decision[50], recognizing an "economic unit" as a common denominator underlying the three concepts of undertaking, business and part of a business.

Against this background it should not have been unpredictable that the Court would consider the cleaning operations of the Savings Bank to be an economic unit which had been carried out by the transferee. The only new aspect was that such a unit can also consist of a single employee.

To reproach the ECJ with disregard of the rulings of the Federal Labour Court means to misunderstand the significance of Community law. Directives address all member states with the objective of harmonizing the different national laws. This, however, will not be achieved if the European Court has to take respective national interpretations into account. On the contrary, without an autonomous definition of terms, harmonization of the member states' laws is not possible. However, the dilemma for the European Court is evident: an autonomous interpretation demands specialists of the respective subject matters, a requirement which can at best be fulfilled by the Advocates General with their staff, but not by the

---

[49]Rs. 24/85 - Slg. 1986, p. 1119.

[50]Landesorganisationen i Danmark-decision of 17 December 1987 - Rs. 287/86 - Slg. 1987, p. 5465; Redmond Stichting-decision of 19 May 1992 - Rs C-29/91 - Slg. 1992, p. 3189; Anne Watson Rask-decision of 12 November 1992 - Rs. C-209/91 - Slg. 1992, p. 5755.

judges of the ECJ who have to deal with the whole range of Community law.

c) Recent cases

The main differences between the ECJ and the Federal Labour Court - on the one hand the ECJ's position that employees are part of a business and thus their take over by the transferee can constitute a transfer of an undertaking, and on the other the Federal Labour Court's interpretation that a transfer in the sense of Sec. 613a of the Civil Code always requires a transfer of assets - are less strongly marked in the Labour Court's decisions subsequent to Christel Schmidt.

Some first-instance labour courts have very clearly referred to and followed the ECJ's Christel Schmidt decision, stating that Sec. 613a of the Civil Code has to be interpreted in conformity with Community Law. Thus they take over the term "economic unit". In one case this has led to the conclusion that even according to the criteria of the ECJ there was no transfer of a part of a business[51], in another case - concerning as in Christel Schmidt a transfer of cleaning operations - the question of a transfer has been answered in the affirmative[52]. Clearly, the Labour Court stated that the transfer of assets is not necessary, but that the transfer of functions was sufficient for the application of Sec. 613a of the Civil Code.

The Federal Labour Court has not yet expressed itself

---

[51]Labour Court Berlin, decision of 8 September 1994, DB 1995, 1772. In this case the employer transferred the marketing of an ancilliary product
to a newly established undertaking. The Labour Court denied the applicability of Sec. 613a, because the marketing of this product did not fall within the scope of duties of single employees.
The case is pending before the Federal Labour Court.

[52]Labour Court Hamburg, decision of 4 July 1994, DB 1994, 1424. The employer wanted to dissolve an ancilliary undertaking employing 27 workers charged with cleaning duties. Instead, an independent undertaking was to be entrusted with this function.

so distinctly. Nevertheless, in two different decisions on the same case the first steps to adapt the interpretation of Sec. 613a of the Civil Code could be seen [53].
In these two rulings the Court referred to the Christel Schmidt case. However, it could be left open whether the ECJ ruling had to be adhered to, because the Schmidt case enough room for the application of the old criteria of the Federal Labour Court, i.e. the transfer of assets.

The US Forces had entrusted a German undertaking with the operation of a depot. After the expiry of the mandate another undertaking was entrusted with the same activity, taking over warehouses including their equipment, electronic data processing for the administration, a part of the vehicles and the majority of the employees. Therefore the Court stated that Sec. 613a of the Civil Code was applicable as the transferee had taken over important tangible and intangible assets, including know-how. In this situation it was in fact not really necessary to consider the ECJ's position. Nevertheless, the Court at least admitted that a distinction between service and production undertakings would no longer be decisive. Rather, the character of the undertaking would determine which type of assets could constitute a transfer of an undertaking[54].
In another case, the decision of 22 September 1994, the Federal Labour Court held, without directly referring to the ECJ's Christel Schmidt ruling, that even in a production undertaking labour is always linked to tangible assets and thus the transfer of an undertaking depends on the question which sorts of tangible and intangible assets are indispensable for the transferee to continue the undertaking's activity[55].

Although the ECJ, in its Mercks-ruling of 7 March 1996, confirmed its position on interpreting a transfer of an undertaking or part thereof as a transfer of functions, i.e. the transfer of an "economic unit", the Federal Labour Court asked the European Court of Justice on 21 March 1996 for

---

[53]Federal Labour Court, decision of 14 July 1994, ZIP 1995, p. 863 ss. and decision of 27 July 1994, ArbuR 1995, p. 156 ss.
[54]Decision of 27 July 1994, see note 53.

[55]DB 1995, p. 432 ss.

another preliminary ruling under Art. 177 of the EEC Treaty with a long list of 8 questions[56], which demonstrates that the Christel Schmidt judgment is still being disputed in Germany. The opinions of the lower courts are not only diverging from acceptance of the ECJ-view[57] to total refusal[58], but they are also engaging in preliminary rulings concerning Directive 77/187[59].

The new Federal Labour Court case also concerns the transfer of cleaning operations. This is not just a strange coincidence but is due to the fact that especially in the wide-ranging field of ancillary operations outsourcing has a specific impact[60].
In this case a cleaner was employed by firm A and worked exclusively in hospital P. The latter canceled the contract with firm A and entrusted firm B with the same duties. B bought from A three washing-machines which had been used by A to wash the cleaning rags. Most of A's employees have been re-employed by B, however with the exception of the plaintiff who therefore brought an action for continued employment.

The Labour Court dismissed the case, the Labour Court of Appeal on the contrary followed the ECJ and assumed a transfer of an undertaking.

---

[56]Federal Labour Court, 21.3.96 - 8 AZR 156/96, in: NZA 1996, p. 869 ss. The president of the Federal Labour Court explains in an article concerning this subject that the Christel Schmidt-decision of the ECJ left open more questions than it answered and that therefore a new preliminary ruling is necessary: Dieterich, Die Arbeitsgerichte zwischen Bundesverfassungsgericht und Europäischem Gerichtshof, in: NZA 1996, p. 673 ss. (679).

[57]Apart from the above-mentioned cases (notes 51 and 52) see Labour Court of Appeal Hamm, in: DB 1995, p. 881 ss.

[58]E.g. Labour Court of Appeal Düsseldorf, 22.8.1995, in: EuroAS 4/1996, p. 74.

[59]Labour Court Bonn, 30.11.1994, in: NZA 1995, p. 311; Labour Court Wiesbaden, 21.3.1995 - 8 Ca 2624/93.

[60]See e.g. Hermann Schneider, Outsourcing von Gebäude- und Verwaltungsdiensten, Stuttgart 1996.

In this situation the Federal Labour Court made the reference mainly asking for a more precise definition of an undertaking or business. The list of questions reflects the contradiction in the ECJ's and the Federal Labour Court's interpretation of an undertaking or part thereof. Accordingly, the Federal Labour Court tries to include all aspects which have so far influenced the German courts' definition.

Abbreviations

AP	Arbeitsrechtliche Praxis
ArbuR	Arbeit und Recht
BAG	Bundesarbeitsgericht
BB	Betriebsberater
BetrVG	Betriebsverfassungsgesetz
BGB	Bürgerliches Gesetzbuch
BGBl.	Bundesgesetzblatt
BVerfGE	Bundesverfassungsgericht - Entscheidungen
DB	Der Betrieb
DZWir	Deutsche Zeitschrift für Wirtschaftsrecht
EuGH	Europäischer Gerichtshof
EuroAS	Europäisches Arbeits- und Sozialrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EzA	Entscheidungssammlung zum Arbeitsrecht
MoLR	Modern Law Review
NJW	Neue Juristische Wochenschrift
NZA	Neue Zeitschrift für Arbeits- und Sozialrech
RdA	Recht der Arbeit
Rs.	Rechtssache
Slg.	Amtliche Sammlung des EuGH
ZIP	Zeitschrift für Wirtschaftsrecht (für Insolvenzpraxis)

Annex : § 613a Bürgerliches Gesetzbuch (BGB)

§ 613a[1] (1) Geht ein Betrieb oder Betriebsteil durch Rechtsgeschäft auf einen anderen Inhaber über, so tritt dieser in die Rechte und Pflichten aus den im Zeitpunkt des Übergangs bestehenden Arbeitsverhältnissen ein. Sind diese Rechte und Pflichten durch Rechtsnormen eines Tarifvertrags oder durch eine Betriebsvereinbarung geregelt, so werden sie Inhalt des Arbeitsverhältnisses zwischen dem neuen Inhaber und dem Arbeitnehmer und dürfen nicht vor Ablauf eines Jahres nach dem Zeitpunkt des Übergangs zum Nachteil des Arbeitnehmers geändert werden. Satz 2 gilt nicht, wenn die Rechte und Pflichten bei dem neuen Inhaber durch Rechtsnormen eines anderen Tarifvertrags oder durch eine andere Betriebsvereinbarung geregelt werden. Vor Ablauf der Frist nach Satz 2 können die Rechte und Pflichten geändert werden, wenn der Tarifvertrag oder die Betriebsvereinbarung nicht mehr gilt oder bei fehlender beiderseitiger Tarifgebundenheit im Geltungsbereich eines anderen Tarifvertrags dessen Anwendung zwischen dem neuen Inhaber und dem Arbeitnehmer vereinbart wird.

(2) Der bisherige Arbeitgeber haftet neben dem neuen Inhaber für Verpflichtungen nach Absatz 1, soweit sie vor dem Zeitpunkt des Übergangs entstanden sind und vor Ablauf von einem Jahr nach diesem Zeitpunkt fällig werden, als Gesamtschuldner. Werden solche Verpflichtungen nach dem Zeitpunkt des Übergangs fällig, so haftet der bisherige Arbeitgeber für sie jedoch nur in dem Umfang, der dem im Zeitpunkt des Übergangs abgelaufenen Teil ihres Bemessungszeitraums entspricht.

(3) Absatz 2 gilt nicht, wenn eine juristische Person oder eine Personenhandelsgesellschaft durch Umwandlung erlischt.

(4) Die Kündigung des Arbeitsverhältnisses eines Arbeitnehmers durch den bisherigen Arbeitgeber oder durch den neuen Inhaber wegen des Übergangs eines Betriebs oder eines Betriebsteils ist unwirksam. Das Recht zur Kündigung des Arbeitsverhältnisses aus anderen Gründen bleibt unberührt.

EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge
– depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI) – Italy
Telefax No: +39/55/4685 636
E-mail: publish@datacomm.iue.it

From

Name .....
Address.....
.....
.....
.....
.....

❒ Please send me a complete list of EUI Working Papers
❒ Please send me a complete list of EUI book publications
❒ Please send me the EUI brochure Academic Year 1997/98

Please send me the following EUI Working Paper(s):

No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....

Date .....

Signature .....

Working Papers in Law

LAW No. 90/1
David NELKEN
The Truth about Law's Truth *

LAW No. 90/2
Antonio CASSESE/Andrew CLAPHAM/Joseph H. H. WEILER
1992 – What are our Rights? Agenda for a Human Rights Action Plan *

LAW No. 90/3
Sophie PAPAEFTHYMIOU
On a "Constructivist Epistemology of Law"

LAW No. 90/4
Joachim WÜRMELING
Legislativer Trilog im Institutionellen Dreieck der Europäischen Gemeinschaft. Das Verfahren der Zusammenarbeit nach Artikel 149 Absatz 2 EWGV. *

LAW No. 90/5
Renaud DEHOUSSE
Représentation territoriale et représentation institutionnelle: réflexions sur la réforme du Sénat belge à la lumière des expériences étrangères

LAW No. 90/6
J. KORTE (ed.)/
A. E. KELLERMANN/
W. M. LEVELT-OVERMARS/
F. H. M. POSSEN
Primus Inter Pares: The European Court and National Courts. The Follow-up by National Courts of Preliminary Rulings * ex Art. 177 of the Treaty of Rome: A Report on the Situation in the Netherlands

LAW No. 90/7
Reiner GRUNDMANN
Luhmann Conservative, Luhmann Progressive

LAW No. 90/8
Bruno DE WITTE
The Integrated Mediterranean Programmes in the Context of Community Regional Policy *

LAW No. 90/9
Anne-Laurence FAROUX
Le Ministère de la Culture en France: Création et organisation

***

LAW No. 91/10
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 1
Christian JOERGES
The Juridification of Product Safety Policy *

LAW No. 91/11
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 2
Gert BRÜGGEMEIER/
Hans-W. MICKLITZ
Product Safety Legislation in France and in the United Kingdom *

*out of print

LAW No. 91/12
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 3
Gert BRÜGGEMEIER/
Josef FALKE/Christian JOERGES
Product Safety Legislation in the Federal Republic of Germany and in the United States *

LAW No. 91/13
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 4
Josef FALKE/Christian JOERGES
"Traditional" Harmonisation Policy, European Consumer Protection Programmes and the New Approach *

LAW No. 91/14
Christian JOERGES (ed.)
European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards
Vol. 5
Christian JOERGES/
Hans-W. MICKLITZ
Internal Market and Product Safety Policy *

LAW No. 91/15
Christian JOERGES
Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik *

LAW No. 91/16
Erk Volkmar HEYEN
Systemic Interference and Social Segmentation of Scientific Legal Discourse: Some Theoretical Perspectives and Empirical Results in the Field of Continental Administrative Law *

LAW No. 91/17
Andrea SCHULZ
Verfassungsrechtliche Grundlagen der auswärtigen Kulturpolitik *

LAW No. 91/18
Hans-W. MICKLITZ
Internal Legal Instruments for the Regulation and Control of the Production and Use of Chemicals and Pesticides *

LAW No. 91/19
Hans Ulrich Jessurun d'OLIVEIRA
Class Actions in Relation to Cross-Border Pollution. A Dutch Perspective *

LAW No. 91/20
Luis María DÍEZ-PICAZO/
Marie-Claire PONTHOREAU
The Constitutional Protection of Social Rights: Some Comparative Remarks *

***

LAW No. 92/21
Aidan O'NEILL/Jason COPPEL
The European Court of Justice Taking Rights Seriously?

*out of print

LAW No. 92/22
Massimo LA TORRE
Linguaggio giuridico e realtà sociale. Note sulla critica realistica del concetto di diritto soggettivo

LAW No. 92/23
Renaud DEHOUSSE
Integration v. Regulation?
Social Regulation in the European Community *

LAW No. 92/24
José Engrácia ANTUNES
Le Groupe de Sociétés.
La crise du modèle légal classique de la Société Anonyme

LAW No. 92/25
Christian JOERGES
Geschichte als Nicht-Geschichte: Unterschiede und Ungleichzeitigkeiten zwischen Friedrich Kessler und der deutschen Rechtswissenschaft

***

History as Non-History: Divergences and Time Lag between Friedrich Kessler and German Jurisprudence

LAW No. 92/26
Michael KING/Catherine KRATZ
La Notion d'Intérêt de l'Enfant en Droit: Vecteur de Coopération ou d'Interférence?

LAW 92/27
Massimo LA TORRE
A National-Socialist Jurist on Crime and Punishment - Karl Larenz and the So-Called 'Deutsche Rechtserneuerung'

LAW No 92/28
Diarmuid ROSSA PHELAN
The Application of United States and European Community Domestic Trade Laws to the Imports of Nonmarket Economy GATT Contracting Parties - A Time for Change

LAW No. 92/29
Susanne KALSS
Das Höchststimmrecht als Instrument zur Wahrung des Aktionärseinflusses

LAW No. 92/30
Massimo LA TORRE
Diritto, potere, dominio
Argomenti per una teoria non prescrittivistica del diritto

LAW No. 92/31
Renaud DEHOUSSE/Christian JOERGES/Giandomenico MAJONE/Francis SNYDER
In collaboration with Michelle EVERSON
Europe After 1992
New Regulatory Strategies *

LAW No. 92/32
Renaud DEHOUSSE
Does Subsidiarity Really Matter?*

LAW No. 92/33
Diarmuid ROSSA PHELAN
"It's God we Ought to Crucify"

***

LAW No. 93/1
Massimo LA TORRE
Reglas, instituciones, transformaciones. Consideraciones sobre el paradigma "Evolución del derecho"

*out of print

LAW No. 93/2
Francis SNYDER
European Community Law and International Economic Relations: The Saga of Thai Manioc *

LAW No 93/3
Aidan O'NEILL
The Government of Judges
The Impact of the European Court of Justice on the Constitutional Order of the United Kingdom *

LAW No. 93/4
Francis SNYDER
Law and Anthropology: A Review *

LAW No. 93/5
Francis SNYDER
Soft Law and Institutional Practice in the European Community *

LAW No. 93/6
Jason COPPEL
Individual Enforcement of Community Law: The Future of the *Francovich* Remedy *

LAW No. 93/7
Massimo LA TORRE
Nostalgia for the Homogeneous Community: Karl Larenz and the National Socialist Theory of Contract

LAW No. 93/8
Heike GEHRKE
The Implementation of the EC Milk Quota Regulations in British, French and German Law

***

LAW No. 94/1
Yota KRAVARITOU/Sally SHELDON (eds.)
Abortion: Challenges to the Status Quo

LAW No. 94/2
Sally SHELDON
The British Abortion Act (1967) - A Permissive Reform?

LAW No. 94/3
Renaud DEHOUSSE
Comparing National and EC Law: The Problem of the Level of Analysis *

LAW No. 94/4
A Regulatory Framework for Foodstuffs in the Internal Market. Report on the Conference (6-7 May 1993) organised by Francis SNYDER *

LAW No. 94/5
Christian JOERGES
Rationalization Processes in Contract Law and the Law of Product Safety: Observations on the Impact of European Integration on Private Law

***

Rationalisierungsprozesse im Vertragsrecht und im Recht der Produktsicherheit: Beobachtungen zu den Folgen der Europäischen Integration für das Privatrecht

LAW No. 94/6
Francis SNYDER
Integrità e frontiere del diritto europeo: riflessioni sulla base della politica agricola comune *

*out of print

LAW No. 94/7
Thomas ROETHE
EG-Ausschußwesen und Risikoregulierung: Ein Problem von Handlungsstruktur und Rationalität

LAW No. 94/8
Hanne PETERSEN
On Women and Legal Forms

LAW No. 94/9
Martine SPENSKY
Mary Wollstonecraft, William Thompson: deux voix/voies vers l'égalité, 1792-1825

LAW No. 94/10
Luis María DÍEZ-PICAZO
Sources of Law in Spain: An Outline

LAW No. 94/11
Francis SNYDER
'Out on the Weekend': Reflections on European Union Law in Context *

LAW No. 94/12
Jonathan GOLUB
Rethinking the Role of National Courts in European Integration: A Political Study of British Judicial Discretion

***

LAW No. 95/1
Christian JOERGES
Das Recht im Prozeß der europäischen Integration - Ein Plädoyer für die Beachtung des Rechts durch die Politikwissenschaft

LAW No. 95/2
Karl-Heinz LADEUR
Social Risks, Welfare Rights and the Paradigm of Proceduralisation - The combining of the institutions of the liberal constitutional state and the social state

LAW No. 95/3
Francis SNYDER
The Taxonomy of Law in EC Agricultural Policy: A Case Study of the Dairy Sector

LAW No. 95/4
Francis SNYDER
Interinstitutional Agreements: Forms and Constitutional Limitations *

LAW No. 95/5
Massimo LA TORRE
Democracy and Tensions - Representation, Majority Principle, Fundamental Rights

LAW No. 95/6
Karl-Heinz LADEUR
Post-Modern Constitutional Theory - A Prospect for the Self-Organizing Society

LAW No. 95/7
Massimo LA TORRE
Rules, Institutions, Transformations. Considerations on the "Evolution of Law" Paradigm

***

LAW No 96/1
Silvana SCIARRA
Verso una costituzionalizzazione dei diritti sociali fondamentali nell'Unione europea

*out of print

LAW No. 96/2
Christian JOERGES
The Market Without the State? States Without a Market? Two Essays on the Law of the European Economy

LAW No. 96/3
Massimo LA TORRE
Significato, azioni, giudizi di valore

LAW No. 96/4
Marie-Bénédicte DEMBOUR
Harmonization and the Construction of Europe: Variations away from a Musical Theme

LAW No. 96/5
Karl-Heinz LADEUR
Proceduralization and its Use in Post-Modern Legal Theory

LAW No. 96/6
Silvana SCIARRA
How 'Global' ia Labour Law? The Perspective of Social Rights in the European Union

LAW No. 96/7
Marie-Jeanne CAMPANA
Le droit français des entreprises en difficulté

LAW No. 96/8
Marita KÖRNER
The Impact of Community Law on German Labour Law - The Example of Transfer of Undertakings

*out of print