Grensoverschrijdende overgang van onderneming vanuit rechtsvergelijkend en conflictenrechtelijk perspectief
Haanappel-van der Burg, I.A.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
CONCLUSIONS

Introduction

Purpose of the Transfer of Undertakings Directive

The Transfer of Undertakings Directive of 1977 is based on Article 100 of the EEC Treaty. This Article stated that the Council, acting unanimously on a proposal from the Commission, shall ‘issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market’. Article 100 of the EEC Treaty was initially formulated with the aim of ensuring economic integration. However, with a changing image of the Community as a social as well as an economic entity, Article 100 of the EEC Treaty was increasingly applied to formulate social guidelines, although guidelines based on Article 100 of the EEC Treaty were never solely prompted by social considerations, but were also motivated by internal market considerations. In fact, isolated socio-political guidelines, uninfluenced by any internal market considerations, are almost non-existent in the EU. Economic and social politics are mutually dependent, the Economic Union is also a social union and vice versa.

In my view, based on the Preamble to the Transfer of Undertakings Directive of 1977, it can be inferred that the primary purpose of the Directive is employee protection. The secondary purpose of the Directive is the harmonisation of national laws, which may influence the functioning of the internal market. Harmonisation measures can help counter the effects of various national social provisions that distort the conditions of competition in the common market. Therefore, the Transfer of Undertakings Directive is not prompted solely by social considerations, but is also based on internal market considerations.

1 Now Article 115 of the Treaty on the Functioning of the European Union (TFEU).
4 von Alvensleben 1992, p. 64.
Substantive scope of application clause

In order to achieve its dual purpose, the Transfer of Undertakings Directive addresses the undertaking as a whole; in other words, the transfer of an undertaking is an undertaking-oriented regulation. Graphically represented, the following process takes place during the transfer of an undertaking:

- Article 1 paragraph 1a:
  - Economic operator I
  - Transfer pursuant to agreement or merger
  - Undertaking
  - Undertaking
  - Safeguarding of employees' rights
  - Economic operator II

- Article 1 paragraph 1b:
  - Economic entity*
  - Transfer
  - Retention of identity
  - Safeguarding of employees' rights

* meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

To qualify as a transfer of an undertaking within the meaning of the Directive, an undertaking (economic entity) must be transferred with retention of its identity.

Any sustainable, organised economic entity, irrespective of its legal form and the manner in which it is financed, may be considered an ‘undertaking’. Such an entity may be formed by any set of persons and elements and shall be a sufficiently structured and independent entity through which an economic activity with a specific objective can be performed.

---

To be considered a 'transfer', it is sufficient that, in the context of contractual relations, a change occurs in the natural or legal person that is responsible for the operation of the undertaking and which undertakes obligations, as an employer, with respect to the employees of the undertaking.\(^7\)

For the condition of 'retention of identity' it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets (such as buildings and movable property) are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended.\(^8\) However, all these so-called 'Spijkers factors' are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.

**Cross-border transfer of undertaking**

I understand the concept of 'cross-border transfer of undertaking' to imply both the international transfer of an undertaking, where the parties involved in the transfer (transferor, transferee and employees) are subject to the laws of different countries (EU or third countries\(^9\)) without a relocation of the undertaking itself, as well as the cross-border transfer of an undertaking where the undertaking is relocated from one country to another.\(^10\)

In my view, the fact that there is a cross-border transfer of undertaking does not affect the question whether an undertaking (economic entity) and transfer are involved, but this can have an influence on the retention of identity requirement.\(^11\) In the event of a cross-border relocation of an undertaking, if a majority of personnel refuse to move to the foreign transferee, this might not qualify, particularly in labour-intensive sectors, as a cross-border transfer of undertaking. This factor is less relevant in capital-intensive sectors. In such sectors, if few or no tangible assets are transferred to the foreign transferee (for example, because the transferee is able to provide these tangible assets at a cheaper rate), such a transfer might not qualify as a cross-border transfer of undertaking. Naturally, this is less relevant in labour-intensive sectors.

---

9 Third countries are countries which are not members of the EU or the EEA.
Safeguarding of employees’ rights

One consequence of qualifying as a transfer of undertaking is\(^{12}\) that the rights and obligations of the transferor (the party that loses the status of employer) arising out of the contract of employment or employment relationship existing at the time of the transfer are transferred to the transferee (the party that acquires the status of employer) at the time of the transfer.\(^ {13}\) Hence, the rights of employees are safeguarded by the transferee. In addition, the Transfer of Undertakings Directive stipulates an optional joint and several liability for the transferor and transferee and an optional obligation for the transferor to provide information to the transferee.\(^ {14}\) The transfer of undertaking qualification also implies the transfer of the employment conditions, as laid down in a collective agreement, to the transferee.\(^ {15}\) This does not apply to employees’ entitlements to old-age benefits, disability benefits or survivors’ benefits, unless provided otherwise by the Member States.\(^ {16}\) The transfer of undertaking shall not in itself constitute grounds for dismissal, unless there is question of dismissal due to economic, technical or organisational reasons (hereinafter referred to as: ‘ETO reasons’) that entail changes in the workforce.\(^ {17}\) If the contract of employment or employment relationship is terminated because the transfer involves substantial changes in the 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.\(^ {18}\)

Partial harmonisation, freedom of options and minimum directive

The Transfer of Undertakings Directive is only aimed at a partial harmonisation; it does not aim to introduce uniform protection for the entire Community based on common criteria.\(^ {19}\)

A number of definitions, which are important for determining the scope of application of the Directive, are left to the discretion of the national legislation of the Member States\(^ {20}\) and it also offers the Member States various options.\(^ {21}\)

\(^{12}\) Information and consultation were not included in this doctoral thesis.
\(^{13}\) Article 3, paragraph 1 of the Transfer of Undertakings Directive.
\(^{14}\) Article 3, paragraph 1, subparagraph 2 and Article 3, paragraph 2 of the Transfer of Undertakings Directive.
\(^{15}\) Article 3, paragraph 3 of the Transfer of Undertakings Directive.
\(^{16}\) Article 3, paragraph 4 of the Transfer of Undertakings Directive.
\(^{17}\) Article 4, paragraph 1 of the Transfer of Undertakings Directive.
\(^{18}\) Article 4, paragraph 2 of the Transfer of Undertakings Directive.
\(^{19}\) CJEC 11 July 1985, Dutch Law Reports 1988, 907 with commentary from P.A. Stein (Mikkelsen).
\(^{20}\) See Article 2, paragraph 1(d) for the definition of employee and Article 2, paragraph 2 for the definition of contract of employment or employment relationship.
\(^{21}\) For example, Article 3, paragraph 1, subparagraph 2, Article 3, paragraph 2, Article 3, paragraph 3, subparagraph 2, Article 3, paragraph 4, and Article 4, paragraph 1, subparagraph 2 of the Transfer of Undertakings Directive.
Furthermore, pursuant to Article 8, the Transfer of Undertakings Directive is to be considered as a minimum directive, while the Member States are allowed to introduce provisions that are more favourable to the interests of employees.

Since there is question of partial harmonisation, freedom of options and a minimum directive, it seems logical to expect that the Transfer of Undertakings Directive is implemented differently in the various Member States of the EU. In this context, I have examined how the Directive is implemented in the Netherlands, the United Kingdom and Germany.

**Research question 1**

**Significant differences and recommendations**

The first research question is whether there are significant differences in the national implementing legislation of the Transfer of Undertakings Directive in the Netherlands, the United Kingdom and Germany, and whether any recommendations can be formulated based on this.

In Chapter 6 (Comparative law study of substantive law in the event of the transfer of an undertaking), based on a comparison of the laws regarding the scope of application and safeguarding of employees’ rights in case of the transfer of an undertaking in the Netherlands, the United Kingdom and Germany, I have concluded that there are significant differences between the national implementing legislation of the Directive in these countries. These differences can be particularly seen with regard to the substantive scope of application clause, the concept of employee, right of opposition, assignment of employees to a part of the undertaking, changes due to ETO reasons, the definitions of transferor and transferee, joint and several liability, obligation to provide information, collective agreements, pension and dismissal by reason of the transfer and due to ETO reasons.

The only areas in which there do not seem to be any significant differences are the rights and obligations arising out of the contract of employment or employment relationship, incorporation clauses and dismissal by reason of substantial changes in working conditions.\(^22\)

Despite harmonisation through the Transfer of Undertakings Directive, the applicable legislation does play a role in determining the substantive laws.

Based on the significant differences found, I have formulated recommendations with respect to the assessment of retention of identity, incorporation of the implementing legislation and the concepts of employment relationship and employer, assignment of employees, changes due to ETO reasons, convergence of collective bargaining

\(^22\) Incidentally, the national implementing legislation of the Netherlands and Germany are often similar to one another, while that of the United Kingdom is different from these.
agreements and dismissal by reason of the transfer of an undertaking and due to ETO reasons, all of which are discussed further in the following paragraphs.

Assessment of retention of identity

With respect to the retention of identity requirement, only the Dutch courts appear to focus on the question as to whether it is a labour-intensive or capital-intensive sector; this is not something that is relevant in the United Kingdom and Germany. Neither does the case law of the European Court of Justice stipulate any requirement stating that the nature of the undertaking or business concerned must always be qualified as being either labour-intensive or capital-intensive, where these are two mutually exclusive constants. Rather, the Süzen/Zehnacker and Oy Liikenne/Liskojärvi cases appear to illustrate the extremes within a range of possibilities. In my view, the case law of the European Court of Justice can be interpreted to mean that the national court must start by taking into account all the Spijkers factors, after which it should assess the respective importance of these factors. To this end, the court should particularly take into account the business sector in which an economic entity operates; in this respect, the court must determine which elements are essential and indispensable for the operation of the economic entity and verify whether these elements have been taken over by the transferee. If there are no such elements, then all the Spijkers factors shall be of equal importance.

Hence, with respect to the retention of identity requirement, I would advise the Dutch courts not to focus on whether the sector concerned is a labour-intensive or capital-intensive sector, but to take into account all the Spijkers factors and then assess their respective importance.

Incorporation of the implementing legislation and the concepts of employment relationship and employer

The wording of Article 7:663 of the Dutch Civil Code and § 613a of the German Civil Code and the fact that the Dutch and German implementing legislation of the Transfer of Undertakings Directive are incorporated in the civil regulation of the contract of employment have unduly influenced the concepts of employee and contract of employment...

---

26 Conclusion of AG Léger 12 October 2000, notably Oy Liikenne.
relationship in Germany. In my opinion, for these concepts, it would have been better if the implementing legislation of the Directive had not been incorporated in the civil regulation of the contract of employment; I would instead recommend that these countries should have their own Transfer of Undertaking Act (‘Betriebsübergangsgesetz’). After all, the Directive on Collective Redundancies is also implemented in the Netherlands through a separate Dutch Collective Redundancy (Notification) Act (‘Wet melding collectief ontslag’).  

Moreover, the concept of employment relationship should also be included in the implementing legislation in the Netherlands and Germany, and the concept of ‘employer’ should be replaced by that of ‘transferor’.

Assignment

Comparative law studies reveal significant differences between the Netherlands, the United Kingdom and Germany in terms of which employees can be assigned to a part of an undertaking. In the Netherlands and Germany, a permanently suspended employee cannot be assigned to the undertaking or a part thereof, while in the United Kingdom, an employee who has been suspended due to alleged misbehaviour at the time of the transfer must be assigned to the transferred part of the undertaking. With respect to sick employees, while it seems mandatory for such employees to be assigned to the transferred part of the undertaking in the United Kingdom and Germany, this only occurs in some cases in the Netherlands.

In this context, the question is how the Botzen ruling on the assignment of employees should be explained. As a decisive factor for the transfer of employees’ rights and obligations, the Commission in the Botzen ruling has only taken into consideration ‘whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect’. The European Court of Justice has upheld the Commission’s ruling with the added consideration that an employment relationship is, after all, mainly characterised by ‘the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties’. Hence, the ‘link’ referred to by the European Court of Justice seems to correspond to the Commission’s ‘organisational framework within which their employment relationship

28 In Germany, this is implemented through the Kündigungsschutzgesetz.
32 CJEC 7 February 1985, Dutch Law Reports 1985, 902 with commentary from P.A. Stein (Botzen).
took effect. This ‘organisational framework within which their employment relationship took effect’ can, in my opinion, be described as ‘the organisational procedures that have shaped the employment relationship’.33 Here, I think the relevant factors could be the time spent working in the part of the undertaking in question, the contract of employment specifying the obligations undertaken by the employee and the allocation of wage costs to the various parts of the undertaking. The criterion of whether the employee is actually capable of fulfilling his employment relationship is, in my opinion, irrelevant.34 In the Netherlands and Germany, this has been wrongly taken into account in the assessment. Neither the Transfer of Undertakings Directive nor the case law of the European Court of Justice provides any guidance regarding this. In my view, the fact that the protection offered under the Transfer of Undertakings Directive is withheld in the Netherlands and Germany for suspended employees and sometimes in the Netherlands for disabled employees, is in conflict with the primary purpose of the Transfer of Undertakings Directive, namely employee protection. I would therefore recommend to the Dutch and German courts that the criterion of whether the employee is actually capable of fulfilling his employment relationship should no longer be taken into consideration in the assessment process.

Changes due to ETO reasons

There is a significant difference in terms of changes due to ETO reasons: the United Kingdom allows changes based on ETO reasons under certain conditions, while this is not permitted in Germany and the Netherlands. A problem with changes due to ETO reasons, as allowed in the United Kingdom, is that although the European Court of Justice has not expressly approved this option, it does seem to have provided room for this.35 If the employees have been transferred to the transferee with a safeguarding of their rights and obligations, the Transfer of Undertakings Directive is considered ‘implemented’ and changes should be allowed insofar as the national legislation of the transferee so provides.

Hence, I would recommend that the Dutch and German legislators ensure that both the Dutch and German implementing legislation of the Transfer of Undertakings Directive include an amendment option for which the sole and principal reason is not the transfer itself, but a reason connected to the transfer, i.e. an ETO reason that entails changes in the workforce. In the context of a weighing of interests, such an amendment option can provide more room for change.

33 Sub-district Court of Breda 29 September 2011, Dutch Journal on Labour Case Law 2011/286 with commentary from I.A. Haanappel-van der Burg (Heije/Wiba & Benetra).
34 As also in Zwemmer 2012b with respect to disabled employees, although not with respect to situations in which the employee concerned was suspended at the time of the transfer due to reasons unrelated to the transfer of the part of the undertaking and for whom there is no prospect of returning to the undertaking.
In the Netherlands, the convergence of various collective bargaining agreements (CBA) in case of the transfer of an undertaking regularly causes ambiguities, due to an insufficient alignment between the Transfer of Undertakings Directive and Dutch CBA legislation. The solutions suggested for this convergence issue in the Netherlands always involve the amendment of the Collective Bargaining Agreement Act (Wet Cao) and the Collective Agreements (Declaration of Universally Binding and Non-Binding Status) Act (Wet Avv). I believe that, rather than seeking to amend the above-mentioned Acts, the solution should be sought in implementing the transfer of the working conditions laid down in a CBA through a separate Transfer of Undertakings Act. Just as in Germany, such a Transfer of Undertakings Act could include an enforcement obligation for the transferee with respect to the transferor’s CBA, the deadline for which would be a maximum of one year. In any case, the enforcement obligation would end when the transferor’s CBA is terminated or expires or when another CBA is entered into by the transferor or applied with respect to the transferor. The enforcement obligation in the event of the transfer of an undertaking is a binding sui generis (of its own kind) obligation, which is separate from the Collective Bargaining Agreement Act (Wet Cao) and the Collective Agreements (Declaration of Universally Binding and Non-Binding Status) Act (Wet Avv). Such a special enforcement obligation would also solve the problem of ensuring that the relevant provisions remain in effect. In the Österreichischer Gewerkschaftsbund ruling, the European Court of Justice has held that such an enforcement obligation would fall under Article 3, paragraph 3 of the Transfer of Undertakings Directive.\footnote{CJEU 11 September 2014, Dutch Journal on Labour Case Law 2014/263 with commentary from R.M. Beltzer (Österreichischer Gewerkschaftsbund/Wirtschaftskammer Österreich).}

A dismissal by reason of a transfer of an undertaking is not allowed in the Netherlands, the United Kingdom and Germany, but the legal consequences of such a dismissal differ significantly between these countries. A dismissal by reason of a transfer of an undertaking is voidable in the Netherlands. In the United Kingdom, dismissal by reason of a transfer of an undertaking is not void, but remains in effect. However, this is automatically deemed to be an unfair dismissal within the meaning of the Employment Rights Act 1996 (hereinafter referred to as: ERA 1996) if the sole or principal reason for the dismissal is the transfer itself or a reason related to the transfer, not being an ETO reason that entails changes in the workforce (subject to the qualifying term of two years). In Germany, a dismissal by reason of a transfer of an undertaking is void by operation of law. A dismissal by reason of a transfer of an undertaking was deemed void by the European Court of Justice in the Bork\footnote{CJEC 15 June 1988, Dutch Law Reports 1990, 247 (Bork).} ruling, which is therefore in conflict with the Dutch (Article 7:670, paragraph 8 in conjunction with 7:677, paragraph 5 of...}
the Dutch Civil Code) and English (Article 7(1) of the TUPE Regulations) implementing legislation. I would advise the Dutch and English legislators to change their legislation in accordance with the Directive.

In addition, Article 7(6) of the TUPE Regulations states that Article 7(1) of the TUPE Regulations shall not apply to the dismissal of an employee who is excluded from the right to file a claim against unfair dismissal pursuant to ERA 1996. Hence, Article 7(1) of the TUPE Regulations will not protect a person who is not considered an employee within the meaning of Article 230 of ERA 1996 or anyone who does not fulfil the qualifying two-year term, as specified in Article 108 of ERA 1996. As of now, the United Kingdom takes the position that this possibility is provided for in Article 4, paragraph 1, subparagraph 2 of the Transfer of Undertakings Directive. Moreover, the purpose of the Transfer of Undertakings Directive would not be to put employees in a more favourable position as a result of the transfer. In my opinion, the qualifying period of two years is in conflict with the Transfer of Undertakings Directive, which is why I would recommend that the English legislator removes this clause.

Dismissal due to ETO reasons is applicable in the United Kingdom and Germany, but not in the Netherlands. Dutch courts disagree with one another about when, in the event of the transfer of an undertaking, dismissal due to ETO reasons is allowed. In order to remove the existing ambiguity in the Netherlands with respect to the transfer of an undertaking and dismissal due to ETO reasons is allowed. In order to remove the existing ambiguity in the Netherlands with respect to the transfer of an undertaking and dismissal due to ETO reasons is allowed. I would advise the Dutch legislator to expressly incorporate in their laws the possibility of dismissal, in the event of the transfer of an undertaking, due to additional ETO reasons that entail changes in the workforce.

Research question 2

Problems due to significant differences

The second research question concerns the problems that could arise due to the significant differences in the national implementing legislation of the Transfer of Undertakings Directive in the Netherlands, the United Kingdom and Germany in case of a cross-border transfer of undertaking.

For this, I have made a distinction between the international transfer of an undertaking, where the parties involved in the transfer (transferor, transferee and employees) are subject to the laws of different countries (EU or third countries) without a relocation of the undertaking itself, as well as the cross-border transfer of undertaking where the undertaking itself is relocated from one country to another.

---

38 IDS 2011, p. 276.
39 Article 4, paragraph 1, subparagraph 2 states that the Member States may decide that the prohibition of dismissal by reason of a transfer of an undertaking shall not apply to certain well-defined categories of employees to whom the legal provisions or practice of the Member States in respect of protection against dismissal do not apply.
The significant differences found can lead to problems both in case of an international and in case of a cross-border transfer of undertaking because, in the first case, it may be unclear as to which law is applicable and, in the second case, it may be unclear whether the applicable law changes due to the relocation of the undertaking.

**Research question 3**

*Solution or aggravation due to the conflict of laws?*

As mentioned earlier, despite the harmonisation through the Transfer of Undertakings Directive, the applicable legislation does play a role in helping to ensure that the substantive rights of employees are safeguarded. It is therefore extremely important that, in the event of a cross-border transfer of undertaking, the applicable law can be unequivocally laid down, in order to resolve these ambiguities. The question that then arises is whether this is possible based on the Transfer of Undertakings Directive or the Rome I Regulation and whether this results in a solution or an aggravation of the identified issue (research question 3).

**Transfer of Undertakings Directive**

Article 1, paragraph 2 of the Transfer of Undertakings Directive contains the territorial scope clause (also referred to as the *scope rule*[^41]), which determines the following with regard to the territorial scope of application of the Directive:

> This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.  

[^41]: Strikwerda 2012, p. 27.

Hence, the Directive shall apply if and to the extent that the undertaking being transferred is located within the territorial scope of application of the TFEU.[^42] Hence, the place of business of the undertaking is the criterion for the applicability of the Directive. In my view, the territorial applicability of the Directive is provided if the undertaking being transferred is located within the EU, regardless of whether the undertaking is transferred within the EU or to third countries. As a result, the Directive pertains to ‘outgoing’ traffic from the EU to third countries, rather than to ‘incoming’ traffic from third countries into the EU. In my opinion, the territorial application of the Directive does not require the transferor and transferee to be present in the EU.

Since, according to the territorial scope clause, the Transfer of Undertakings Directive may apply to a cross-border transfer of an undertaking originating from the EU, it is

[^41]: Strikwerda 2012, p. 27.
[^43]: This is also the case if the undertaking is located in the countries within the European Free Trade Association that are members of the European Economic Area, i.e. Norway, Iceland and Liechtenstein (see Annex XVIII of the Agreement on the European Economic Area, OJ 1994, L 1, EEA Joint Committee Decision 57/1999; EEA Joint Committee Decision 159/2001).
important to stipulate the laws applicable to the transfer of an undertaking in such an international situation. The question is: what kind of conflict-of-laws character should be attributed to the territorial scope clause of the Directive? According to the case law of the European Court of Justice, a distinction needs to be made between the external (oriented towards third countries) and internal (intra-EU) working of a directive.

Pursuant to the Ingmar ruling, it can be inferred that, in relation to third countries, the mandatory provisions in the national implementing legislation of the Transfer of Undertakings Directive take precedence as overriding mandatory provisions when there is a close connection with the Community; whereas, pursuant to the Unamar ruling, it can be inferred that, in intra-EU cases, the protection offered under the Directive is essentially a part of the law chosen based on the conflict-of-laws rules (the lex causae). If the Directive is correctly transposed in the Member States concerned, European law does not give any preference to the laws of one country over those of another. In relation to other Member States, the ‘gold-plating’ included in a national implementing legislation of the Transfer of Undertakings Directive shall only be considered as an overriding mandatory provision if the legislator of this Member State, when transposing the Directive, has deemed it essential to offer the employee a more extensive protection than that provided under the Directive. Therefore, there is a fundamental difference between the internal working of the Directive (part of the lex causae, if correctly implemented) and its external working (if necessary, as an overriding mandatory provision). The application of these types of overriding mandatory provisions is conditional, i.e. depending on the content of the otherwise applicable law.

The territorial scope clause of the Transfer of Undertakings Directive offers no answer to conflict-of-laws issues in the intra-EU sphere; but externally (oriented towards third countries), it includes an obligation of result that – in light of the Unamar ruling – appears to be an overriding mandatory provision. Hence, for determining the law applicable to the transfer of an undertaking, one must fall back on the Rome I Regulation.

**Rome I Regulation**

In general, in case of a cross-border transfer of undertaking, the substantive\(^{47}\), formal\(^{48}\) and temporal\(^{49}\) scope of the Rome I Regulation is applicable, which means that the

---


\(^{45}\) There is a question of ‘gold-plating’ when a Member State goes beyond what is strictly necessary based on European regulations, when transposing European regulations into its national laws.

\(^{46}\) van Hoek 2014, p. 474.

\(^{47}\) Article 1 of the Rome I Regulation.

\(^{48}\) Article 2 of the Rome I Regulation.

\(^{49}\) Article 28 of the Rome I Regulation.
law applicable to the contract-law consequences of a cross-border transfer of undertaking must be determined based on the Rome I Regulation.

This then gives rise to the question as to which conflict-of-laws rule in the Rome I Regulation the transfer of an undertaking can be classified under. For this, there are three possibilities under the Rome I Regulation: the conflict-of-laws rules for the transfer agreement (Articles 3 and 4 of the Rome I Regulation), the conflict-of-laws rule for individual contracts of employment (Article 8 of the Rome I Regulation) or the overriding mandatory provisions (Article 9 of the Rome I Regulation).

Comparative law study

Following a comparative law study of the conflict of laws related to the implementation of the Transfer of Undertakings Directive in the Netherlands, the United Kingdom and Germany, I have found that there are different classifications for the transfer of an undertaking. In the Netherlands and Germany, the transfer of an undertaking is classified under the conflict-of-laws rule for individual contracts of employment, while in the United Kingdom, there is question of an overriding mandatory provision.

In this context and with respect to the conflict-of-laws application of the Transfer of Undertakings Directive, I have answered the following questions:

1. Does the national implementing legislation of the Transfer of Undertakings Directive provide external coverage?
2. Is the national implementing legislation of the Transfer of Undertakings Directive internally consistent (Entscheidungsharmonie)?
3. Does the applicable law change in case of relocation (Statutenwechsel)?

From the comparative law study, it appears that classifying the transfer of an undertaking under the conflict-of-laws rule for individual contracts of employment (as in the Netherlands and Germany) does not lead to any external coverage but instead a Statutenwechsel (an artificial Statutenwechsel in case of a choice of law); while classification as an overriding mandatory provision (as in the United Kingdom), leads to external coverage but no Statutenwechsel, because the reference date is fixed at the time of the transfer. Hence, the different classification of the transfer of an undertaking has different effects on the external working and the Statutenwechsel. In any case, due to a harmonisation problem, there is no question of internal consistency.

Hence, the conflict of laws aggravates the earlier identified problems in the event of a cross-border transfer of undertaking.
Research question 4

Solution

The fourth and final research question is how to resolve the fact that the conflict of laws aggravates the earlier identified problems in the event of a cross-border transfer of undertaking.

In the Rome I Regulation, the transfer of an undertaking can be classified under the conflict-of-laws rules for the transfer agreement, individual contracts of employment or the overriding mandatory provisions. If a single conflict-of-laws rule is chosen, internal consistency (Entscheidungsharmonie) is automatically ensured, but does this also lead to external coverage and a Statutenwechsel? In addition, other interests must also be considered when selecting a specific conflict-of-laws rule. The primary purpose of the Transfer of Undertakings Directive is employee protection, where the greatest importance is given to the employee. The secondary purpose of the Directive is the harmonisation of national laws, which may influence the functioning of the internal market. Harmonisation measures can help counter the effects of various national social provisions that distort the conditions of competition in the common market. Pursuant to Recital 6 of the Preamble to the Rome I Regulation, the contribution of private international law with respect to the internal market includes predictability, legal certainty and Entscheidungsharmonie. I have already assessed the Entscheidungsharmonie, but the aspects of predictability and legal certainty are mainly translated into the interests of transferor and transferee. It seems obvious, therefore, that the interests of the employees, transferor and transferee must be weighed against one another.

Transfer agreement

If the transfer of an undertaking is classified under the conflict-of-laws rules for the transfer agreement (Articles 3 and 4 of the Rome I Regulation), the law designated by the objective conflict-of-laws rule of Article 4 of the Rome I Regulation usually coincides internally with the law of the country where the place of business of the undertaking is located; taking the habitual place of residence of the transferor as the connecting factor does not, in any case, lead to a Statutenwechsel, since Article 19, paragraph 3 of the Rome I Regulation only considers the time of the conclusion of the agreement as a determining factor for this. Problems may arise due to the right of choice of law granted by Article 3 of the Rome I Regulation, where both a choice of law in favour of the law of another Member State as well as a choice of law in favour of the law of a third country are problematic: in case of a choice of law in favour of the law of another Member State, the legal position of the employees is influenced by a choice of law in which they play no part, whereas in case of a choice of law in favour of the law of a third country, external coverage needs to be guaranteed through special connection rules. It is not necessary for the chosen law to coincide with the law of the country where the place of business of the undertaking is located, in which case a weighing of interests would be required.
In the context of the weighing of interests, I believe that, since the primary purpose of the transfer of an undertaking is employee protection and since the freedom of choice of law of the transferor and transferee can lead to unpredictability and legal uncertainty for the employees, the option of classifying the transfer of an undertaking under the conflict-of-laws rules for the transfer agreement should be rejected.\textsuperscript{50} No arguments can be found in the relevant literature in favour of classifying the transfer of an undertaking under the conflict-of-laws rules for the transfer agreement.

**Individual contract of employment**

By classifying the transfer of an undertaking under the conflict-of-laws rule for individual contracts of employment, it is possible that the law designated by the subjective conflict-of-laws rule in Article 8, paragraph 1 of the Rome I Regulation and the objective conflict-of-laws rule in Article 8, paragraphs 2 to 4 of the Rome I Regulation results in the ‘abundance of norms’ (Normenhäufung). External coverage is guaranteed if the law of a third country is chosen and the objective conflict-of-laws rule in Article 8, paragraphs 2 to 4 of the Rome I Regulation refers to the law of an EU Member State. However, if the objective conflict-of-laws rule also refers to the law of a third country, then the Ingmar ruling comes into effect, thus guaranteeing external coverage.\textsuperscript{51} Taking the habitual place of work as the connecting factor can result in a Statutenwechsel. By taking the engaging place of business as the connecting factor, there is no Statutenwechsel (since engagement occurs only once). If the engaging place of business is located in an EU Member State other than the Member State where the place of business of the undertaking is located, the law of the other EU Member State shall apply. If the engaging place of business is located in a third country, the Ingmar ruling comes into effect, thus guaranteeing external coverage. If the closer-connection argument indicates a closer relationship with an EU Member State other than the Member State where the place of business of the undertaking is located, the law of this other EU Member State shall apply. If the closer-connection argument indicates a closer relationship with a third country, the Ingmar ruling again comes into effect, thus guaranteeing external coverage. It is not necessary for the subjectively and objectively applicable law to coincide with the law of the country in which the place of business of the undertaking is located, in which case a weighing of interests would be required.

In the context of the weighing of interests, I believe that, since the transfer of an undertaking is an undertaking-oriented regulation targeted at the entire undertaking and since the transfer of an undertaking aims not only at safeguarding individual rights but also collective rights, classifying the transfer of an undertaking under the conflict-of-laws rule for individual contracts of employment should be rejected. Moreover, this


\textsuperscript{51} CJEC 9 November 2000, Dutch Law Reports 2005, 332 with commentary from Th.M. de Boer (Ingmar).
conflict-of-laws rule may lead to a fragmentation of the legal consequences, since the individual contracts of employment in an undertaking may be subject to different laws based on the principles of choice of law, habitual place of work, engaging place of business or closer connection. In addition, taking the habitual place of work as the connecting factor can result in a Statutenwechsel. Hence, the transfer of an undertaking may be subject to different legal systems, which leads to unpredictability and legal uncertainty (internal market considerations).

**Partly transfer agreement, partly contract of employment**

The Sub-district Court in Eindhoven has classified the transfer of an undertaking under the conflict-of-laws rules for the transfer agreement (now Articles 3 and 4 of the Rome I Regulation), while ruling that the consequences thereof must be assessed according to the conflict-of-laws rule for individual contracts of employment (Article 8 of the Rome I Regulation). With this, the Sub-district Court has detached the transfer of an undertaking from the consequences thereof. This accumulates the disadvantages of both solutions, which is why this solution should also be rejected.

**Overriding mandatory provisions**

If all EU Member States would classify the national implementing legislation of the Transfer of Undertakings Directive as an overriding mandatory provision and harmonise this with the territorial scope clause of the Transfer of Undertakings Directive, there would be no internal or external conflicts. The scope rule should then stipulate that, if the undertaking is located in an EU Member State, the national implementing legislation of the Directive in effect in the country in which the place of business of the undertaking is located shall apply. This is in fact – in internal cases – an exceptionally multilateral conflict-of-laws rule. Taking the place of business of the undertaking as the connecting factor may, however, result internally in a Statutenwechsel, unless (as in the Transfer of Undertakings Directive and in the United Kingdom), only the location of the undertaking at the time of the transfer is focused on.

All things considered, I believe that the national implementing legislation of the Transfer of Undertakings Directive in intra-EU cases can only be regarded as an overriding mandatory provision, within the meaning of Article 9 of the Rome I Regulation, as an exception, while this is more the rule than the exception in external cases (oriented towards third countries). In addition, the classification as an overriding mandatory provision may lead to problems if the protection provided under the Transfer of Undertakings Directive is to be derived from foreign law (pursuant to Article 9, paragraph 3 of the Rome I Regulation). Hence, the classification of the national implementing legislation of the Transfer of Undertakings Directive as an overriding mandatory provision should be rejected.

---

52 Sub-district Court of Eindhoven 25 June 2009, National Case-Law Number ([LJN]: BJ9652.)
Intermediate conclusion

I have demonstrated that both the classification of the transfer of an undertaking under the conflict-of-laws rules for the transfer agreement and individual contracts of employment and as an overriding mandatory provision should be rejected. The Transfer of Undertakings Directive contains a scope of application clause that deviates from the Rome I Regulation, which may lead to conflicts with the reference categories provided for in the Rome I Regulation. I have solved this problem with the help of the Bündelungsmodell.

Bündelungsmodell

The question as to the particular conflict-of-laws rule under which the transfer of an undertaking should be classified can, in my opinion, be best answered based on the Bündelungsmodell – translated as the ‘bundling model’ – developed by Klaus Schurig in 1976-1977. The ‘basic elements’ of the Bündelungsmodell are formed by the so-called Element-Kollisionsnormen. For every substantive norm of every legal system, there is an Element-Kollisionsnorm, which relies on this concrete substantive norm. This Element-Kollisionsnorm is necessarily unilateral because, according to the definition, it can only rely on a single substantive legal norm of a single legal system.

If these Element-Kollisionsnormen can be vertically (i.e. nationally) bundled, they pertain to similar conflict-of-laws interests of systematic-substantive coherent provisions of a single national legal system:

‘Das allein entscheidende Kriterium ist vielmehr, daß sie auf einer vergleichbaren kollisionsrechtlichen Interessenabwägung beruhen, welche stets zu demselben Ergebnis (zu derselben abstrakten Anknüpfung) führt.’

The concepts derived from substantive law are only used for the characterisation of the bundling, in case of doubt one must fall back on the conflict-of-laws interests.

Closed, unilateral conflict-of-laws rules are Element-Kollisionsnormen, which solely pertain to a single legal norm of a single legal system and which cannot be vertically (i.e. nationally) bundled with rules pertaining to similar conflict-of-laws interests of the systematic-substantive coherent provisions of a single national legal system. Open, unilateral conflict-of-laws rules are also Element-Kollisionsnormen, which solely pertain to a single legal norm of a single legal system, which can be vertically (i.e. nationally) bundled with rules pertaining to similar conflict-of-laws interests of systematic-substantive coherent provisions of a single national legal system, but which cannot be horizontally (i.e. at the European level or internationally) bundled.

54 Mankowski 2012, p. 159.
Where the vertical bundling of *Element-Kollissionsnormen* results in the bundling of certain theoretically characterised, business-related substantive norms of one and the same legal system, the *horizontal* (i.e. European or international) bundling combines those *Element-Kollissionsnormen* that – with the same abstract connecting factor – pertain to similar conflict-of-laws interests of systematic-substantive coherent provisions of different legal systems within the EU or at an international level. An initial horizontal (i.e. European or international) bundling makes the conflict-of-laws rule multilateral.

The concepts derived from substantive law serve only as linguistic tools to identify the bundling, and this occurs more clearly in case of a horizontal (i.e. European or international) bundling rather than a vertical (i.e. national) bundling. The actual bundling criteria can be found in the corresponding conflict-of-laws interests, to which one must revert in case of doubt.

Pursuant to the *Bündelungsmodell*, the traditional multilateral conflict-of-laws rule (such as Article 8 of the Rome I Regulation) is the result of a vertical and horizontal bundling (in my opinion, better referred to as ‘national’ and ‘European or international’ bundling).

In the *Bündelungsmodell*, classification means the assessment of whether an *Element-Kollissionsnorm*, which is associated with a specific substantive norm based on similar conflict-of-laws interests (which are also influenced by the objective of the substantive norm), is part of a bundle or whether it falls outside the established bundles.\(^{57}\) Similar conflict-of-laws interests are placed within the same bundle.\(^{58}\) Hence, the classification pertains to the question whether an *Element-Kollissionsnorm*, which leads to a specific substantive norm, belongs to a bundle or not. Conversely: a bundle has a precise set of contents. Whatever is not included in it, because it regulates a different conflict of interests, does not in any case belong to this bundle, but perhaps to another bundle:

> ’Normen, die verschiedene Interessen verfolgen, gehören verschiedenen Bündeln an. Normen, die gleiche Interessen verfolgen, gehören denselben Bündel an.’

\(^{57}\) Kuckein 2008, p. 39.  
\(^{58}\) Mankowski 2012, p. 161.
Bündelungsmodell and the transfer of an undertaking

Till today, for the classification of the transfer of an undertaking, the main connecting factor was the purpose of the Transfer of Undertakings Directive. The transfer of an undertaking is classified under the conflict-of-laws rule for individual contracts of employment (Article 8 of the Rome I Regulation) because the Directive aims to ensure an equivalent level of protection for employees’ rights in the different Member States, while the classification as an overriding mandatory provision (Article 9 of the Rome I Regulation) is based on the internal market objectives of the Directive. However, the Directive has a dual purpose: both employee protection and internal market objectives. In terms of its purpose, the transfer of an undertaking could fall under both Article 8 of the Rome I Regulation as well as under Article 9 of the Rome I Regulation.

According to the Bündelungsmodell, the concepts derived from substantive law serve only as linguistic tools to identify the bundling. The actual bundling criteria can be found in the corresponding conflict-of-laws interests, to which one must revert in case of doubt.

In order to achieve its dual purpose (employee protection and internal market objectives), the Transfer of Undertakings Directive focuses on the undertaking and, in line with this, includes a territorial scope clause in Article 1, paragraph 2, which provides that the Directive shall become applicable if the undertaking is located within the EU.

In my view, the transfer of an undertaking should be independent in terms of conflict of laws. For a special reference category such as the transfer of an undertaking, it should therefore be possible to solve the coordination problem in the EU by providing these rules within the Directive with their own, separate conflict-of-laws rule.

Own conflict-of-laws rule

If an objective connecting factor were to be chosen for the transfer of an undertaking, this would be the place of business of the undertaking or part of the undertaking; since the undertaking or part of the undertaking is the linchpin of the transfer of an undertaking. The place of business of the undertaking or part of the undertaking forms the natural connecting factor for the transfer of an undertaking (the Sitz). The territorial scope clause of the Transfer of Undertakings Directive, deemed applicable by the Directive if the undertaking being transferred is located within the EU, is in line with this.

Party autonomy is the cornerstone of the Rome I Regulation, but the Regulation includes various provisions for protecting the rights of third parties (for example, in Article 3, paragraph 2, subparagraph 2 of the Rome I Regulation) and weaker contracting parties (for example, for employees in Article 8 of the Rome I Regulation). In my view, the transfer of an undertaking, where the primary purpose is the safeguarding of the acquired rights of employees, does not fit into the model of the free
choice of law. Such a transfer concerns the acquired rights of third parties, which are also employees warranting protection. If the place of business of the undertaking is taken as the connecting factor for the transfer of an undertaking, this does not mean that the transferor and transferee should be allowed, by virtue of a choice of law, to choose the applicable law and thereby possibly deprive employees of their acquired rights. A subjective connecting factor for the transfer of an undertaking should, therefore, be rejected.

Own conflict-of-laws rule: unilateral or multilateral?

If the transfer of an undertaking is to have its own conflict-of-laws rule, for which the connecting factor is the place of business of the undertaking, the question that arises next is whether a unilateral or multilateral conflict-of-laws rule is indicated. Pursuant to the Bündelungsmodell, the vertical (i.e. national) bundling of Element-Kollisionsnormen results in the bundling of certain theoretically characterised, business-related substantive norms of one and the same legal system, while the horizontal (i.e. European or international) bundling combines those Element-Kollisionsnormen that – with the same abstract connecting factor – pertain to similar conflict-of-laws interests of the systematic-substantive coherent provisions of different legal systems within the EU or at an international level. An initial horizontal (i.e. European or international) bundling makes the conflict-of-laws rule multilateral.

Within the EU, the Transfer of Undertakings Directive is set out in the national implementing legislation. As a result, the legal systems within the EU are considered to be equally valid in the matter of the transfer of an undertaking, even if only a minimum level of protection is prescribed. In other words, in the matter of the transfer of an undertaking, the legal systems within the EU are mutually interchangeable. Hence, within the EU, it is sufficient to apply the legal system of a Member State, through which the minimum level of protection prescribed by the Directive is achieved. Pursuant to the Bündelungsmodell, it must be concluded that the transfer of an undertaking within the EU can be bundled both vertically (nationally) and horizontally (in this case, at the European level) and hence, there is question of a multilateral conflict-of-laws rule within the EU.

However, the Transfer of Undertakings Directive also pertains to ‘outgoing’ traffic from the EU to third countries. Analogous to the Ingmar ruling59, it can be stated that, in relation to third countries, the national implementing legislation of the Transfer of Undertakings Directive can usually be bundled only vertically (nationally) and not horizontally (in this case, internationally) and that there is question of an overriding mandatory provision within the meaning of Article 9 of the Rome I Regulation. Since, in the third country, there is usually no regulation similar to the Transfer of Undertakings Directive; hence, with regard to third countries, an overriding mandatory provision is involved.

Hence, the Ingmar⁶⁰ and Unamar⁶¹ rulings are in line with the Bündelungsmodell.

Should the national implementing legislation of the Transfer of Undertakings Directive be assigned the status of an overriding mandatory provision within the EU? Not if it offers the minimum protection prescribed by the Transfer of Undertakings Directive. Only when Member States offer more protection than that prescribed by the Directive (a so-called ‘gold-plating’), is the situation different. In the context of the transposition of the Directive, the legislator must have thought it fundamentally important that employees who are engaged in undertakings in countries with the relevant legal system should be offered more extensive protection than that provided for under the Transfer of Undertakings Directive. Only then can the national implementing legislation be bundled only vertically (nationally) and not horizontally (at the European level) and only then is there a question of an overriding mandatory provision within the meaning of Article 9 of Rome I Regulation.⁶²

Considering the transfer of an undertaking, pursuant to the Bündelungsmodell, as a multilateral conflict-of-laws rule if the transfer takes place within the EU, and as an overriding mandatory provision if the transfer is to a third country, creates a significant departure from the dogma that a strictly two-pronged approach should exist with respect to multilateral conflict-of-laws rule and overriding mandatory provisions.

Statutenwechsel

If the transfer of an undertaking is to have its own conflict-of-laws rule, for which the connecting factor is the place of business of the undertaking, the relocation of the undertaking to another country may result in a Statutenwechsel. Usually, the relocation of the undertaking shall take place after the undertaking has been transferred. In this case, from the time of the transfer of undertaking to its relocation, the law of country where the place of business of the undertaking of the transferor is located shall apply, after which the relocation of the relevant connecting factor (the undertaking) shall result in a Statutenwechsel. This gives rise to the question as to which legal system is applicable, i.e. the old or the new legal system. If it is the latter, then it must be determined which rights and obligations fall under the old and the new legal system – hence, transitional law.

60 CJEC 9 November 2000, Dutch Law Reports 2005, 332 with commentary from Th.M. de Boer (Ingmar).
Transitional law

Transitional law does not regulate the validity of the law. After the relocation of the undertaking, the new law is applicable. Transitional law only distinguishes between different effects, which makes the enforcement of the applicable law variable. Three main groups can be distinguished in this respect: retrospective effect (ex tunc), remaining in effect/compliant and immediate/exclusive effect (ex nunc).

In applying transitional law, a distinction is made between closed, open and mixed legal facts. Here, it must be specifically examined whether the last part of the transaction, which is required for completion of the substantive legal position and for the change of the legal status, has already commenced (positive, closed), has definitely not commenced (negative, closed), is still open or a combination of both. A closed legal fact (both positive and negative) arises when a right or legal relationship is created, removed or changed in terms of content before the Statutenwechsel. The old law remains applicable to closed legal facts, on which the Statutenwechsel has no effect. An open legal fact arises if, at the time of the Statutenwechsel, not all the requirements for a right or legal relationship to be created, removed or changed in terms of content have yet been fulfilled. The new law decides whether a right or legal relationship shall be created, removed or changed in terms of content and to what extent it recognises earlier acquired rights. A mixed legal fact arises if a right or legal relationship has been created before the Statutenwechsel, but the specific effect only occurs after the Statutenwechsel. In case of mixed legal facts, two principles apply: a right that has arisen under the old law continues to exist under the new law and the new law accepts the existing right. However, the new law determines how the right that is created can be exercised under the new law; in other word, it must be transposed into the new law.

Temporal dimension of the transfer of an undertaking

It is questionable how the transfer of an undertaking should be treated in terms of transitional law. The transfer of an undertaking creates a situation where employees’ rights are safeguarded. The continuation of the legal consequences which have come about under the earlier connection is known as the honouring of acquired rights. Hence, in case of a Statutenwechsel at the time of the transfer of an undertaking, the new law cannot become automatically applicable. On the other hand, the application of a uniform statute facilitates legal transactions. In the event of the transfer of an undertaking, there is a clear friction between the honouring of acquired rights of employees and a quick integration with the legal system applicable in the place where the undertaking is relocated.

63 Haazen 2001, p. 386.
64 Haazen 2001, p. 387.
65 Haazen 2001, p. 385-404. Asser & Vonken 2013, p. 138, Vonken argues that there can only be a question of compliant and exclusive effect, as well as a combination of both.
The transfer of an undertaking does not lend itself to easy classification within the categories of closed or open legal facts. When the transfer of an undertaking takes place, there is always question of a (positive or negative) closed legal fact, but what is lawful with respect to the consequences of the transfer of an undertaking, and more specifically, the safeguarding of employees’ rights? The right of opposition, joint and several liability, obligation to provide information and pension provisions are, in my view, closed legal facts that are subject to the old law, while the collective agreements and dismissal are open legal facts subject to the new law. Based on the solution that I have evaluated, a number of general rules relating to the temporal dimension of the transfer of an undertaking can be derived:

– The content of the contract of employment or employment relationship is governed by the new law after relocation of the undertaking and the change in the habitual place of work, and there is a Statutenwechsel;

– The obligations of the transferor are to be regarded as closed legal facts and are governed by the old law, and there is no Statutenwechsel after the relocation of the undertaking;

– The obligations of the transferee are to be regarded as open legal facts and are governed by the new law, and there is a Statutenwechsel after the relocation of the undertaking.

Pursuant to these general rules related to the temporal dimension of the transfer of an undertaking, I do not find it logical that the reference to the law of the country where the place of business of the undertaking is located is a time-constrained reference. An addendum to the separate conflict-of-laws rule, determining the exact time of the connecting factor concerned (the so-called ‘reference date’), should therefore be rejected.

68 Neither does the system in the United Kingdom, which is solely focused on the location of the undertaking at the time of the transfer, seem logical to me.

69 Asser & Vonken 2013, p. 111-114.