Development Round should see their protection enhanced.[55] Indeed, there has been consistent advocacy that geographical indications should be addressed in the context of the AoA as well as the TRIPS Agreement; and that the AoA should be amended to include a list of those to be protected.[56]

Before the Panel it was argued by both the United States and Australia that Article 12 of Council Regulation 2081/92 is inconsistent with WTO obligations.[57] Under this Article, protection of geographical indications and designations of origin as conferred by the Regulation is also applied to agricultural products or foodstuffs from a third country, provided that certain equivalence and reciprocity conditions are satisfied. Although the complainants by no means succeeded on all grounds, the equivalence and reciprocity conditions were found to be not fully consistent with either the TRIPS Agreement or GATT 1994. Further, the Panel specifically suggested that the Council Regulation be amended so that the conditions do not apply to the procedures for registration of geographical indications located in other WTO members.[58]

Accordingly, there is a strong sense that the development of Community agricultural policy is becoming ever more driven by WTO considerations. A recent example, as indicated, is provided by the sugar regime. Reform may have been already on the agenda;[59] but a clear catalyst was provided by the decisions of the Dispute Settlement Body in *European Communities—Export Subsidies on Sugar*. It would also seem to be the case that, notwithstanding its radical effect upon the CAP, the Mid-term Review is failing to provide the anticipated benefits in the Doha Development Round negotiations. Indeed, for the time being it seems to be generating among other WTO members an appetite for further reform, with the focus on reducing the amount of domestic support, however it might be packaged. A consequence would seem to be a degree of exasperation in Brussels. Thus, as the Hong Kong Ministerial approached, Commissioner Fischer Boel could rue that '[t]he EU is still cast as the villain', even though the Mid-term Review had allowed the Community to accept or propose 'things which would have been unthinkable a few years ago.'[60]

MICHAEL CARDWELL*

III. SOCIAL POLICY

A. New Policy

Social policy is undergoing review, the aim being to consolidate the fragmented nature of social policy law, and to provide for the integration of *all* Community policies. This

[55] See eg IP/03/1178 *WTO Talks: EU Steps Up Bid for Better Protection of Regional Quality Products* (Brussels 28 Aug 2003).

[56] See eg European Commission *The EC's Proposal for Modalities in the WTO Agriculture Negotiations* Ref 625/02 (European Commission Brussels 2002) 4.

[57] OJ (1992) L208/1.

[58] See generally M Handler 'The WTO Geographical Indications Dispute' (2006) 69 Modern Law Review 70. For the proposed legislation to address the decisions of the Panel, see European Commission Com (2005) 694 and COM (2005) 698/2.

[59] See eg European Commission *Mid-term Review of the Common Agricultural Policy* COM(2002)394, 19–20.

[60] Speech/05/516 *Agricultural Talks in the Doha Round* (Washington, DC 16 Sept 2005).

* University of Leeds.

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erika.szyszcak@leicester.ac.uk

is part of a larger project where the EU is attempting to provide a holistic approach towards all policies, ensuring that they meet the demands placed upon governments, as well as private undertakings, in the enlarged single market. Of particular significance is the interaction between social policy law and competition law, especially in relation to state aid and merger policy. The Lisbon Process, now at mid-term, has not been successful in delivering the projected results. Thus, throughout 2005 the European Union focused upon revitalizing the Lisbon agenda with the focus upon improving the *quality* of work as well as combating unemployment.[1]

Under the mid-term review of the Lisbon Process, the Commission has created a number of strategic objectives. The *Communication from the Commission on the Social Agenda*[2] is a component of the implementation of the Commission's strategic objectives 2005–9[3] where employment objectives, alongside equal opportunities and inclusion, play a central role. There is the promise of a new dynamic for industrial relations, with greater emphasis upon transnational bargaining.

In 2006 a Green Paper will be produced on the development of labour law, the focus being on analysing new work patterns and tackling these developments by providing a more secure environment to encourage efficient transitions on the labour market. Given the new constitutional emphasis upon fundamental rights and social law the Commission should address the issue of how far Community labour law rights should be seen as fundamental rights. Another challenge for the Green Paper will be how far it addresses the problems encountered at the national level, of the need to rationalize certain areas of Community law which have developed in different contexts and at a different pace. For example, the various provisions relating to worker participation, employee information and consultation, the interaction of anti-discrimination provisions and employment law, as well as mainstreaming anti-discrimination provisions through all Community policies. Another issue will be whether the Commission is willing to address the extra-territorial scope of Community law and whether there is the legal capacity (and political will) to extend employee protection where work is outsourced, not only to other Member States, but also outside of the EU.

Corporate re-structuring is another issue on the policy agenda. The Commission began the first phase of the consultation between Community cross-industry and sectoral social partners, published as *Anticipating and Managing Change: a dynamic approach to the social aspects of corporate restructuring*.[4] The Commission proposes establishing a 'growth adjustment' fund to provide support to areas affected by restructuring. It also proposes that Member States hold a reserve for unforeseen restructuring consequences of up to one per cent of the 'convergence' and three per cent of the 'competitiveness' budgets (around €2.6bn and €1.7bn respectively). Over the period 2007–13, the cumulative possible contribution from these sources is up to €11.3bn. Structural funding will focus on key objectives such as increasing adaptability or workers and enterprises, preventing unemployment and promoting partnership. In the least prosperous regions, the Structural Funds will concentrate on promoting growth, job creation and dealing with structural adjustment. This is likely to make an impact upon

[1] EC Commission *Working Together for Growth and Jobs* COM(2005) 24.

[2] Communication from the Commission on the Social Agenda COM(2005) 33 final <http://europa.eu.int/comm/employment_social/social_policy_agenda/ spa_en pdf.

[3] COM(2005) 12.

[4] <http://europa.eu.int/comm/employment_social/labour_law/docs/anticipatingandmanagingchange_en.pdf>.

how employees are protected when firms are restructured and whether public sponsorship of jobs is caught by the transfer of undertakings rules.

In the Communication, *Restructuring and Employment Anticipating and Accompanying Restructuring in Order to Develop Employment: the role of the European Union*[5], the Commission argues that the best way to effectively anticipate economic change is through social dialogue, involving the social partners. The Commission urges European social partners to be pro-active in tackling restructuring. Its Communication asks them to focus on adopting, applying and developing their best practice guidelines on restructuring and to look further at how the European Works Councils can improve their effectiveness and take a lead role in managing restructuring changes. The Commission's Communication highlights three areas where EU action can help: first, more focused coordination between EU policies (notably employment, industrial and enterprise, trade and competition policies); secondly, adapting the regulatory framework including a Green Paper on the Evolution of Labour Law in 2006; and thirdly, developing partnerships notably through the establishment of a European 'Restructuring Forum' comprising the main stakeholders.

A Commission Services' Working Document, *Memorandum on Rights of Workers in Cases of Transfers of Undertakings* was adopted in 2004.[6] The purpose of this document is to update the 1997 Memorandum[7] taking into account recent case law of the Court of Justice and the implications of the consolidation of Community Law in Directive 2001/23. Arguably, the document has an interpretative value but does not create legally binding rights. The document summarizes the case law of the Court, as well as explaining the scope of the Directive. The Commission notes that most of the cases which have been considered by the Court are preliminary rulings and that an increasing number of cases are being handed down by the EFTA court.

The Commission will analyse the effects of the Transfers Directive and under the obligation provided for in Article 10 of Directive 2001/23, must report to the Council before 17 July 2006. On the basis of this review, the Commission may make proposals for the amendment of the Directive. It is unclear whether this review will be a stand alone review, to fulfil the obligations of Directive 2001/23, or whether the Commission will attempt an overhaul and rationalization of Community social law through the use of the Green Paper on modernizing labour law, described above.

Other measures which form part of the current policy agenda include proposals[8] to amend the Working Time Directive.[9] Proposed changes to the existing law include retaining the individual opt-out from the 48 hour week but making the opt-out subject to stricter conditions to prevent abuse and to allow the opt-out to be made by a collective agreement as well as individual consent. In response to the case law of the Court[10]

[5] COM(2005) 120 final <http://europa.eu.int/comm/employment_social/news/2005/apr/com_restruct_en.pdf

[6] <http://europa.eu.int/comm/employment_social/labour_law/docs/transfer_memorandum_2004_en.pdf.

[7] COM(97)85 final.

[8] COM(2004)607.

[9] Working Time Directive 93/104, amended by Directive 2000/34 and consolidated into Directive 2003/88, OJ (2002) L80/35.

[10] Case C-303/98 *Simap* [2000] ECR I-7963; Case C-241/99 CIG [2001] ECR 5139; Case C-151/02 *Jaeger* [2003] ECR I-8389; Joined Cases C-397/01 to C-403/01 *Pfeiffer and others* [2004] ECR I-8835; Case C-52/04 *Personalrat der Feuerwehr Hamburg* Order of the President, OJ C-217/23, Case 14/04 *Abdelkader Dellas and others* judgment of 1 Dec 2005.

the Commission proposes to insert two new definitions. 'On-call time' will be an active period in which the worker must stay at the workplace and which is considered as working time. The 'inactive part of on-call time' is not considered as working time unless otherwise stipulated by national law. The reference period for calculating the average weekly working time will remain four months, but with the possibility for Member States to extend it by up to one year, provided they consult the social partners concerned and encourage social dialogue. There is also the possibility of introducing measures to promote the work/life balance.

B. Case Law

There continues to be a steady stream of infringement actions taken against the Member States,[11] but of greater significance is the rise in Article 234 EC references across a broad range of employment law issues, using a mix of legislative provisions. In *Mangold* a challenge was made to the German law on part-time work and fixed term contracts which permitted fixed-term contracts for workers over the age of 52.[12] The purpose of the law was to facilitate the integration of older workers into the labour market in so far as such workers may have difficulty finding employment. The Court ruled that the German law went beyond what was necessary and appropriate to achieve this aim. The Court examined the aims of the Framework Agreement on fixed term work[13] and Council Directive 2000/78, the general framework agreement for equal treatment in employment and occupation.[14] At the date when the contract of employment had been entered into the transitional period for the implementation of Directive 2000/78 had not expired. The Court makes the point that Member States are bound by the terms of a Directive from the date of its publication and during the transitional period for implementation a Member State may not adopt measures that may seriously compromise the aims and obligations imposed by the Directive. A national court is under a duty to give effect to the legal protection offered to individuals by Community law and to set aside any provision of national law which may conflict which such a rule of Community law. Of significance in the ruling are the references to the fundamental rights principles underpinning modern social policy law (paragraph 7) and the recognition by the Court that 'The principle of non-discrimination on grounds of age must . . . be regarded as a general principle of Community law.'[15]

In *Junk* the Court was asked to rule on the date when a redundancy took effect. Mrs Junk was employed by AWO which lodged a request to open insolvency proceedings and with effect from 1 February 2002 released all of its employees from their obligation to work and did not make any remuneration payments for January 2002.[16] On 5 February 2002 a liquidator was appointed and the number of employees was gradually reduced until by mid-June 2002 when the liquidator informed the chairman of the

[11] Most recently, Case C-70/05 *Commission v Luxembourg* judgment of 25 Nov 2005; Case C-22/05 *Commission v Belgium*; Case C-378/04 *Commission v Austria*; Case C73/05 *Commission v France* judgment of 17 Nov 2005

[12] Case C-144/04 *Werner Mangold v R¸diger Helm* judgment of 22 Nov 2005.

[13] Council Directive 1999/70, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ (1999) L175/43.

[14] Council Directive 2000/78, OJ (2000) L303/16.

[15] (n 12) para 75.

[16] Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* [2005] ECR I-885.

Works Council that he intended to terminate all remaining contracts of employment in compliance with the maximum three-month period of notice set out in the insolvency proceedings, and to implement a collective redundancy. A compensation agreement and a social plan had been agreed with the Works Council on 23 May 2002. Mrs Junk was informed of the termination of her contract of employment with effect from 30 September 2002 by a letter from the liquidator on 27 June 2002. Mrs Junk challenged the redundancy as being ineffective. The Labour Court of Berlin took the view that under German law the provisions relating to collective redundancies do not refer to the termination of the contract of employment but to the date on which the workers actually leave the undertaking (ie the expiry of the periods of notice of redundancy).

The Court ruled that for the purposes of Articles 2–4 of Council Directive 98/59 the event constituting redundancy is the declaration by the employer of his or her intention to terminate the contract of employment. On the question of whether an employer may carry out collective redundancies before the *end* of the consultation and notification procedure the Court ruled that the purpose of the consultation procedure is to impose an obligation to negotiate in order to cover ways and means of avoiding collective redundancies or reducing the number of redundancies and of mitigating the consequences by involving social measures. Thus the effectiveness of this obligation would be compromised if the employer was entitled to terminate contracts of employment during the consultation procedure. The employer can only terminate the contract of employment after the obligations of Article 2 of the Directive have been complied with. It would be 'significantly more difficult for workers' representatives to achieve the withdrawal of a decision that has been taken than to secure the abandonment of a decision being contemplated'.[17] However, in relation to the notification of the collective redundancy to the competent public authority, the purpose behind this provision is to allow the authority a period of thirty days (which may be varied) to seek solutions to any problems raised by the collective redundancy. It is only after this period has expired that the termination of contracts of employment may take effect. The Court pointed out that there is an express proviso contained in Article 4(1) of the Directive governing individual rights with regard to notice of dismissal stating that termination of contracts may only take place after the expiry of the period granted to the public authority to manage the outcomes of the collective redundancy. Thus, the Directive contemplates a situation where contracts of employment have already been terminated, triggering the period for the competent authority to act. From this, the Court was willing to conclude that Articles 3 and 4 of the Directive do *not* preclude the termination of contracts of employment during the course of the notification procedure, provided that the termination occurs after the projected collective redundancies have been notified to the competent public authority.

Boor addressed the issue of whether there was a transfer involving economic activity when the obligations of a private body providing employment for people who were unemployed were taken over by the Luxembourg State.[18] New contracts of employment were entered into and the amount of pay was reduced. The Luxembourg government questioned whether the activities of the undertakings concerned could be regarded as economic in nature since they involve combating unemployment, an activity which may come under the exercise of public power. It was also argued that the

[17] ibid para 44.

[18] Case C-425/02 *Johanna Maria Boor (née Delahaye) v Ministre de la Fonction Republique et de la Réforme administrative* [2004] ECR I-10823.

change in the status of Mrs Boor conferred new benefits such as career development and job stability. The appeal court of Luxembourg raised the question of whether the Directives 98/50 and 2001/23 applied. The Advocate General pointed out that the main proceedings took place *before* the transitional period for Directive 98/50 had passed (17 July 2001) and before its transposition in Luxembourg law on 19 December 2003. The same was true of Directive 2001/23, which was intended to codify Directive 77/187. Since Directives 98/50 and 2001/23 reproduce the provisions of Directive 77/187 it was necessary to interpret only Article 3(1) of this Directive. The Court held that Council Directive 77/187 did not preclude in principle, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as the new employer, from reducing the amount of the pay of the employees concerned for the purpose of complying with the national rules in force for public employees. The competent authorities responsible for applying and interpreting the rules are obliged to do so as far as possible in the light of the purpose of that Directive, taking into account in particular the employee's length of service, in so far as the national rules governing the position of State employees take a State employee's length of service into consideration for calculating pay. If such a calculation leads to a substantial reduction in the employee's pay, such a reduction constitutes a substantial change in working conditions to the detriment of the employees concerned by the transfer, so that the termination of their contracts of employment for that reason must be regarded as resulting from the action of the employer, in accordance with Article 4(2) of Directive 77/187.

A central and recurring question under the Transfer of Undertakings Directive is when is the 'date of the transfer'? The House of Lords sought clarification of this question in a situation involving a complex privatization process taking place over a period of time. *Celtec* concerned Training and Enterprise Councils (TECs) which were gradually privatized with the TECs ultimately becoming the employers of staff who were formerly civil servants seconded to the TECs.[19] After a period of secondment at a TEC the civil servant could choose between staying on with the TEC, thus changing his or her status, or return to the civil service and be re-deployed. The case concerned three civil servants who were seconded to a TEC, Newtec in 1993 and then by Celtec, Newtec's successor, and became its employees. In 1998 one employee, Ms Hawkes, was dismissed by Celtec, which refused to recognize that her period of employment commenced when she became a civil servant in 1985. The Court, departing from the approach taken by Advocate General Poiares Maduro, ruled that there must be a certain date for the transfer and this is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. This date cannot be postponed to another date at the will of the transferor or transferee. Regardless of what has been agreed between the parties, contracts of employment (or employment relationships) existing on the date of the transfer are deemed to be transferred.

ADS Anker GmbH[20] concerned the interpretation of Articles 4 and 11 of the Works

[19] Case C-478/03 *Celtec Ltd v John Astley and Julie Owens and Deborah Lynn Hawkes* [2005] ECR I-4389.

[20] Case C-349/01 *Betriebsrat der Firma ADS Anker GmbH v ADS Anker GmbH* [2004] ECR I-6803.

Council Directive.[21] The Works Council of ADS Anker GmbH had asked the company to supply certain information with a view to forming a European Works Council. The Court ruled that Article 4(1) and Article 11 of Council Directive 94/45 must be interpreted as meaning that Member States are required to impose on undertakings established within their territory and constituting the central management of a Community-scale group of undertakings for the purposes of Article 2(1)(e) and Article 3(1) of the Directive, or the deemed central management under the second subparagraph of Article 4(2), the obligation to supply to another undertaking in the same group established in another Member State the information requested from it by its employees' representatives, where that information is not in the possession of that other undertaking and it is essential for opening negotiations for the creation of a European Works Council.

Data protection issues relating to employment are emerging in the case law. In *Österreichischer Rundfunk and Others*[22] the Court interpreted the Data Protection Directive, Directive 95/46,[23] in the context of the obligation of public bodies subject to the control of the Austrian Court of Audit to communicate to it the salaries and pensions exceeding a certain level paid by them to their employees and pensioners together with the names of the recipients, for the purpose of drawing up an annual report which would be made available to the general public. The Court ruled that the provisions of Directive 95/46 in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures. The ECJ interpreted the Directive in the light of Article 8 ECHR which, while stating the principle that the public authorities must not interfere with the right to respect for private life, accepts that such interference is possible where it is in accordance with the law and pursues one or more of the legitimate aims set out in Article 8(2) ECHR and is necessary in a democratic society for achieving that aim or aims. Applying such principles the Court held that: 'the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 [ECHR]'.[24] The Court went further:

> the communication of that data to third parties, in the present case a public authority, infringes the right of persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 of the [ECHR].[25]

The Court pointed out that such interference can only be justified in so far as the wide disclosure not merely relates to amounts of income above a certain threshold but also the names of the recipients of that income where it is both necessary for, and appropriate to,

[21] Council Directive 94/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ (1994)†L254/64.

[22] Joined Cases C-465/00, C-138/01, and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989.

[23] Directive 95/46 of the European Parliament and of the Council of 24 Oct 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ (1995) L281/31.

[24] (n 22) para 73.

[25] ibid para 74.

the aim of keeping salaries within reasonable limits. This was a matter for the national courts to decide.

Lindquist involved criminal proceedings against a Swedish national accused of publishing on her internet site personal data concerning people working with her on a voluntary basis in a parish of the Swedish Protestant Church.[26] In relation to the Data Protection Directive, Directive 95/46[27] the Court ruled that the act of referring to various persons and identifying them by name or by any other means on an internet page constitutes 'the processing of personal data wholly or partly by automatic means' within the meaning of the Data Protection Directive 95/46. Such processing of data for the purposes of charitable or religious activities does not fall within any of the exceptions set out in Article 3. The Court addressed the concept of 'transfer' of data to a 'third country' within the meaning of Article 25. The Court noted that Chapter IV of the Directive contains no provision concerning the use of the internet. But given the development of the internet at the time the Directive was adopted it could not be presumed that the Community legislature intended the expression 'transfer' of data to a 'third country' to cover prospectively the case where an individual in a Member State 'loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.'[28]

The Court addressed the compatibility of the Directive with the general principle of freedom of expression and with other rights and freedoms corresponding to the right enshrined in Article 10 ECHR. The Court ruled that while the Directive does not in itself create a restriction of Article 10 ECHR it is for the national authorities and courts responsible for applying national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order. The Court held that measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between the free movement of personal data and the protection of private life. But a Member State is not prevented from extending the scope of national legislation implementing the Directive to areas not included in the scope of the Directive provided that no other provision of Community law precludes it.

ERIKA SZYSZCZAK*

[26] Case C-101/01 *Linqvist* [2003] ECR I-12971.

[27] Directive 95/46 of the European Parliament and of the Council of 24 Oct 1995 on the protection of individuals with regard to the processing data and on the free movement of such data, OJ (1995) L281/31.

[28] (n 26) para 71.

* Centre for European Law and Integration, Faculty of Law, University of Leicester.

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