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DIVERGENCES BETWEEN SWISS AND EUROPEAN LAW ON THE PROTECTION OF WORKERS:

A SICL COMPARATIVE REPORT ON SPECIFIC INSTRUMENTS FROM THE EU SOCIAL ACQUIS AND ITS NATIONAL IMPLEMENTATION IN France, Germany, The Netherlands, The United Kingdom and Denmark

Current to: 03.04.2023

AND CORRESPONDING ANALYSIS OF SWISS LAW IN LIGHT OF THE EU SOCIAL ACQUIS WRITTEN BY THE VARIOUS SWISS FEDERAL AUTHORITIES CONCERNED

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MANAGEMENT SUMMARY

In 1992, Switzerland refused to join the European Economic Area (EEA) following a referendum. In the wake of these events, the country autonomously adapted certain parts of Swiss labour law to correspond to the European Union's law. Meanwhile, EU labour law has continued to evolve. Propelled by the European Pillar of Social Rights from 2017, the EU has been particularly active of late in reinforcing the EU the body of directives and other instruments defining the social policy of the EU (the *social acquis*). Swiss labour law does not yet reflect these more recent developments.

Despite the absence of an obligation to incorporate the EU *social acquis*, various EU directives have directly inspired the Swiss legislature in the past. This report sketches the similarities and differences between EU labour law and Swiss labour law to inform a debate about potential elements of EU labour law worth taking into consideration under Swiss law.

EU labour law has expanded significantly over the last thirty years. The current report therefore only covers a subset of it, looking at twelve EU directives and a recommendation. The selection was based on the questions posed in *postulat* 22.3872. The report analyses how and to what extent France, Germany, the Netherlands, and the United Kingdom (or, where the United Kingdom has not transposed a directive due to its withdrawal from the EU, Denmark) have transposed the selected instruments. The comparative discussion provides additional information on EU labour law practice and on how the respective directives influence the domestic systems. SICL chose these countries in consultation with SECO because of their different legal traditions and approaches to EU labour law, while at the same time being largely comparable to the Swiss socio-economic context.

The study makes the following key findings:

- EU law has significantly influenced Swiss labour law in some regards, especially as part of the autonomous adaptation of Swiss law to EU law in the 1990s. Such approximation between EU and Swiss law has impacted, for example, employees' rights in the event of transfers of undertakings and collective redundancies, and, to some extent, employees' information and consultation rights. These areas of EU labour law have been amended since Swiss law was initially adapted to EU law and Swiss law does not necessarily reflect these EU law amendments.

- EU labour law must consider many different legal systems and employment practices. Where taking up sensitive issues, therefore, the EU pursues minimum harmonization and uses versatile terminology with which all Member States can work. Given the vagueness of the terms used in the laws, the European Court of Justice plays a key role in elaborating and interpreting labour law directives, particularly the more technical among them. The Court's interpretations are decisive and can compel Member States to make legislative changes decades after the initial transposition of a directive. Although this study refers to such Court rulings, it neither thoroughly explores the impact of the Court's rulings, nor does it investigate the dynamics between the European Court of Justice and the Swiss Federal Supreme Court.

- Some areas of EU labour law cannot be easily replicated in domestic Swiss law because Switzerland is not an EU Member State and the relevant bilateral agreements are lacking. This is particularly so where the fact that Swiss companies do not originate from an EU Member State prevents their operation within the uniform framework put forth by specific EU instruments. This structural issue manifests itself most notably in relation to Directive 2001/86/EC about employee involvement in European Companies. It also matters, albeit to a lesser extent, for the protections afforded in the context of cross-border mergers (Directive 2017/1132) and European works councils (Directive 2009/38/EC).

- More recent EU directives have conferred significant individual employment rights to workers. In particular, the Transparent and Predictable Working Conditions Directive (2019/1152) and the

Work-Life Balance Directive (2019/1158) contain a raft of clearly formulated rights. From a comparative labour law perspective, such norms would be the simplest to incorporate into the Swiss legal context. Furthermore, several of the more established EU directives, such as the Occupational Safety and Health Directive (89/391/EEC), Employee Information and Consultation Directive (2002/14/EC), Working Time Directive (2003/88/EC) and, on a case-by-case basis, Public Procurement Directive (2014/24/EU), may contain employee protections and principles worth drawing on.

- Some EU instruments are only applicable in full to Member States that meet certain criteria. Switzerland may not fulfil these criteria, leaving the instruments inapplicable here. For example, although the Minimum Wage Directive's (2022/2041) rules on the promotion of collective bargaining on wage-setting would apply, the rules on statutory minimum wages only apply to Member States that have freely decided to set statutory minimum wages in the first place, which is not the case for Switzerland at the federal level. Furthermore, the Council Recommendation reinforcing the Youth Guarantee (2020/C 372/01) is important as a benchmark to obtain EU funding to tackle youth unemployment. Since Switzerland would be considered a country with low youth unemployment rates, it would likely not receive such funding.

- Certain EU directives are transposed similarly in all EU Member States because the instruments' aims require the Member States to take highly coordinated action. However, examples of such far-reaching harmonization are rare and major structural differences between domestic labour law systems persist, stemming from each Member State's domestic legal tradition and legal institutions. Although the EU institutions influence domestic labour law to a great extent, Member States retain considerable room for maneuver under the directives and those Member States studied continue to place a different emphasis when transposing directives.

- Finally, the Member States analyzed in this report frequently provide greater protections to employees than what the EU directives demand. This is illustrated, for example, in the chapters on collective redundancies, employee information and consultation, working time and work-life balance

EU DIRECTIVES ON COMPANY RESTRUCTURING: The Directives on Cross-Border Mergers, Transfers of Undertakings and Collective Redundancies

1. Employees' Rights in the Framework of Cross-Border Mergers

A. Directive 2017/1132 of 14 June 2017

i. The Objectives

Directive 2005/56/EC of 26 October 2005 aimed to harmonize the procedures taking place prior to cross-border mergers to enhance the EU's single market. Predominantly concerned with the company law aspects of such mergers, the Directive nonetheless had a mechanism to increase the likelihood that the post-merger company would confer employee participation rights to employees.[1]

Directive 2017/1132 (EU Company Law Directive – hereinafter: CLD), in force throughout the EEA[2], combines Directive 2005/56/EC with other company law instruments, including an EU Directive from 2019,[3] which strengthened provisions on the required information and consultations about employment matters in the framework of cross-border mergers.

ii. The Content

The CLD is a European corporate code that deals with numerous company law issues. This report only covers the articles related to securing employees' interests during cross-border mergers between limited liability companies from different EU and EEA Member States.[4]

§ 1 Information and consultation on the cross-border merger

The CLD imposes some information obligations. First, the merging companies' management must draft the common terms of the cross-border merger to provide, *inter alia*, information on the likely repercussions of the cross-border merger on employment.[5] Each company's management must also draft a report explaining and justifying the cross-border merger's legal and economic aspects, including a section on the implications of the merger for employees.[6] Employee representatives can submit comments concerning the draft terms before the general meeting.[7]

The CLD emphasizes that employees' rights to information and consultation must be respected more broadly, too. Employee consultation must occur before the common draft terms of the cross-border merger or the report are decided upon. Employees are to be given a reasoned response to their comments prior to the formal approval of the cross-border merger.[8]

§ 2 Employee participation rights in the post-merger company

Because a post-merger company is, in principle, subject to the employee participation rules applicable in its place of registration, differences in Member State rules regarding participation rights could be exploited by companies to minimize the influence of employees' representatives in the company's supervisory or administrative organ. To prevent this, the CLD sets out to ensure, predominantly through a negotiating procedure, that pre-merger participation rights are the minimum level of rights enjoyed by post-merger employees ("before-and-after principle").[9] Article 133 requires a negotiation procedure on employee participation if one of three conditions is fulfilled, each of which arguably indicates a risk of backsliding on employee participation[10] (first, the number of employees affected;[11] second, the level of participation rights offered in the post-merger jurisdiction;[12] or, third, the right to exercise participation rights from abroad[13]).

§ 3 The negotiation procedure on employee participation rights

NEGOTIATIONS ARE THE MAIN MECHANISM – If one of the conditions requiring negotiation procedures exists, it will trigger a procedure that is, to some extent, similar[14,15] to the procedure required for establishing a *Societas Europaea* (SE).[16] Thus, at the time the merging companies draw up the merger plan, a "special negotiating body" must be created representing the employees of the merging companies and discussing future employee participation. The special negotiating body and the competent organs of the participating companies are meant to determine future employee participation in the company's supervisory or administrative organ.[17]

"ALTERNATIVES" TO NEGOTIATIONS – The special negotiating body may decide to apply the rules on employee participation of the Member State where the post-merger company will be situated.[18] The CLD obliges the Member States also to establish domestic rules such that if certain conditions are fulfilled, the competent organs of the merging companies can also decide (to avoid genuine negotiations and) to apply the "subsidiary rules"[19] under domestic law for employee participation in the post-merger company.

Therefore, negotiations are the standard course of action, but conditional alternatives exist that ensure that a cross-border merger will not be obstructed indefinitely by the failure to reach an agreement about employee participation.[20]

B. Domestic Implementation of Directive 2017/1132

France

IMPLEMENTING THE DIRECTIVES – The Law of 3 July 2008 implemented Directive 2005/56/EC, including its provision on employee participation.[21] This Law and its associated decrees[22] introduced new articles to the French Labour Code.[23] With one limited exception,[24] the provisions of the Labour Code that were introduced in 2008 have not been substantively amended. Amendments to domestic French law are expected soon, however, due to Directive 2019/2121.[25] The Law of 9 March 2023 has instructed the government to reform French law within three months to implement the 2019 Directive.[26]

GOING BEYOND THE DIRECTIVES – It is hard to say to what extent a country goes beyond what is required by Directive 2005/56/EC and the CLD. Such discussions become very technical, dealing with the procedural contours of the negotiations and the necessary conditions for alternative outcomes. That said, while French law on employee participation is not particularly rigorous, it has been expanding participation rights in the past decade.[27]

Germany

IMPLEMENTING THE DIRECTIVES – The Law of 21 December 2006 implemented Article 16 of Directive 2005/56/EC, dealing specifically with employee co-determination in a company arising from a cross-border merger.[28] The Law of 2006 did not receive any significant amendment until recently. In view of Directive 2019/2121, the Law of 4 January 2023 advanced a series of changes, including section 19a on mandatory information about the outcome of the negotiations and section 30a about the Law's applicability in case of a second cross-border merger.[29]

GOING BEYOND THE DIRECTIVES – It is hard to say to what extent a country goes beyond what is required by Directive 2005/56/EC and the CLD. Such discussions become very technical, dealing with the procedural contours of the negotiations and the necessary conditions for alternative outcomes. Generally speaking, Germany is a leader in employee participation in company decision-making.[30]

The Netherlands

IMPLEMENTING THE DIRECTIVES – The Law of 27 June 2008 amended book 2 of the Civil Code to implement Directive 2005/56/EC.[31] Article 2:333k of the Civil Code has since governed the participation rights in

the company spawning from a cross-border merger. Despite a few minor amendments[32], the CJEU ruled in 2013 that the Netherlands had failed to transpose the Directive adequately.[33] In response, the Dutch authorities replaced Article 2:333k with a Law from 11 February 2015.[34] Recently, a legislative bill has been in the works to implement Directive 2019/2121.[35]

GOING BEYOND THE DIRECTIVES – It is hard to say to what extent a country goes beyond what is required by Directive 2005/56/EC and the CLD. Such discussions become very technical, dealing with the procedural contours of the negotiations and the necessary conditions for alternative outcomes. Generally speaking, the Dutch system is considered to confer significant employee participation rights.[36]

The United Kingdom

IMPLEMENTING THE DIRECTIVES – Although the United Kingdom had implemented Directive 2005/56/EC in 2007[37], the Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019 revoked the applicable regulations. Because of this, as the explanatory memorandum puts it: "*After exit day the UK will no longer have access to the regime* [for mergers between limited liability companies established in different EEA States] *and EEA States will no longer be required to give effect to mergers involving a UK company.*"[38]

GOING BEYOND THE DIRECTIVES – It is hard to say to what extent a country goes beyond what is required by Directive 2005/56/EC and the CLD. Such discussions become very technical, dealing with the procedural contours of the negotiations and the necessary conditions for alternative outcomes. In general, no strict obligation exists for UK companies to confer employee participation rights.[39]

C. Comparative Table

	France	Germany	Netherlands	United Kingdom
Source determining employee participation rights upon cross-border merger	Labour Code[40]	Act on the Co-determination of Employees in the Event of a Cross-Border Merger[41]	Civil Code[42]	Companies (Cross-Border Mergers) Regulations 2007 (Revoked)
Main legal reference for general employee participation rights (outside context cross-border mergers)	Commercial Code[43]	One-Third Participation Act[44] and Co-determination Act[45]	Civil Code[46]	Corporate Governance Code[47]
The threshold for general employee participation rights	Company, including its subsidiaries, employs at least 1000 permanent employees in France or at least 5000 permanent employees globally.[48]	Company with usually more than 500 employees.[49] Stronger employee participation rights once the company generally employs more than 2000 employees.[50]	Company, including its dependent companies, employs, as a rule, at least 100 employees in the Netherlands.[51]	Premium listed company[52]
Result of meeting the threshold	One director representing employees (if the *conseil d'administration*	One-third of the members of the company's supervisory board are made up of employee representatives.[54]	One-third of the supervisory board members are strongly recommended by (i.e., more or less appointed by) the works council (which is made	In principle, a director appointed from the workforce, a formal workforce

	has up to eight directors) or two (if the board has more than eight directors).[53]	This becomes a 50/50 split once the threshold of 2000 employees is met.[55]	up of employee representatives).[56]	advisory panel, or a designated non-executive director.[57]

D. Comparative Perspective on Employee Participation Rights

SIMILAR MECHANISMS FOR EMPLOYEE PARTICIPATION IN THE TRANSNATIONAL POST-MERGER COMPANY – Directive 2005/56/EC and the CLD aim to ensure that cross-border mergers do not result in a post-merger lowering of standards for employee participation. All countries examined here have implemented this mechanism, albeit the Dutch transposition was initially flawed, and the United Kingdom has abolished it post-Brexit. The differences between these countries' respective transpositions are technical and relatively unimportant.

SIGNIFICANT DIFFERENCES BETWEEN COUNTRIES REGARDING REGULAR EMPLOYEE PARTICIPATION RIGHTS – More important are the significant differences between EU Member States' general laws on employee participation. While France, Germany and the Netherlands require employees to be represented in the management or supervisory board of large companies, the UK does not.[58] Because of this diversity[59] among countries in terms of general employment participation rights, Member States perceive the relevant EU provisions on employee participation after cross-border mergers differently.

THE DIFFERENT NATIONAL ATTITUDE TOWARDS EMPLOYEE PARTICIPATION RIGHTS MATTERS – Whether at the policymaking or company level, discussions in a country such as Germany, known for its employee participation rights, will diverge from the talking points in a country like the United Kingdom, where there are no comparable rights. If the post-merger company is incorporated in the UK, verifying whether employee participation rights were exercised in the merging companies is key. The individuals establishing the post-merger company in the UK will be wary of granting excessive employee participation rights through negotiations because it clashes with domestic beliefs. In contrast, if the post-merger company is incorporated in Germany, the negotiations take place in a very different environment. German law prescribes far-reaching employee participation rights. The exercise becomes quite different. The employee participation rights that used to govern the merging companies, e.g., in France or the Netherlands, are not necessarily more favourable to employees than the rights in Germany, which, as a general rule, should apply in the first place. The individuals establishing the post-merger company in Germany can be expected to be less opposed to employee participation because the German business community is more familiar with such rights. Whereas UK entrepreneurs might fear importing employee participation practices from France, Germany or the Netherlands through a cross-border merger, German and Dutch entrepreneurs might fear that their companies are no longer interesting partners to merge with. Merging a German or Dutch company might entail having to establish strong employee participation arrangements in the post-merger company.

E. Conclusion

The EU institutions have found it necessary to strengthen the procedures to inform[60] and consult[61] workers during cross-border mergers through Directive 2019/2121. The mechanism to prevent employee participation rights from deteriorating because of a cross-border merger is also reinforced.[62] Member States have implemented or are in the process of implementing these changes; the United Kingdom is not. The differences between Member States regarding this mechanism are relatively minor.

The opposite is true when looking at general employee participation rights. Germany and the Netherlands have a tradition of employee participation rights but operate different systems. France has historically not been so keen on this kind of worker representation, yet a significant step was taken

in 2013. Employee representation rights further gained importance in 2019. The UK does not meaningfully allocate these rights.

Droit suisse dans le cadre des fusions transfrontalières

La directive (UE) 2005/56/CE, qui a, pour l'essentiel, été reprise dans la directive (UE) 2017/1132 qui l'a abrogée, n'a pas été transposée par la Suisse de manière autonome, ni ne fait partie de l'acquis communautaire que la Suisse a repris dans le cadre des accords bilatéraux conclus entre la Confédération suisse et la Communauté européenne.

La directive (UE) 2005/56/CE se rapporte aux fusions transfrontalières. Le titre II de la directive (UE) 2017/1132 traite des transformations, fusions et scissions transfrontalières. Le but de la réglementation de l'UE est d'établir des règles lorsqu'une pluralité d'Etats membres (et donc de réglementations nationales) est concernée, dans un but de coordination et de maintien des droits de participation, lorsque plusieurs régimes nationaux de participation sont concernés. Comme pour la directive sur les entreprises ou groupes d'entreprises de dimension communautaire,[i] une application à la Suisse de ce régime destiné aux Etats membres visant des fusions transfrontalières, et donc des situations de nature transnationale, impliquerait un accord avec l'UE. Un tel accord aurait pour effet de considérer la Suisse comme un Etat associé et l'intégrerait au système établi par la directive européenne ou aux parties de la directive faisant l'objet de l'accord entre la Suisse et l'UE. Comme la directive (UE) 2017/1132 traite de tous les aspects de droit des sociétés réglés par le droit de l'UE, la reprise de l'entier de la directive impliquerait une intégration de la Suisse dans le système réglementaire de l'UE dans tout le domaine du droit des sociétés. En tout état de cause, l'analyse qui suit n'a pas cette approche (reprise de l'entier de la directive). L'option d'un accord avec l'UE en vue de faire de la Suisse un Etat associé relativement à l'entier ou à certaines parties de la directive n'est pas non plus envisagée ici, étant noté que cette matière ne fait pas partie des discussions actuelles avec l'UE et qu'en l'état des discussions, de nouveaux accords ne sont pas envisageables.

Nous allons bien plus aborder les règles sur la participation des travailleurs en cas de fusions transfrontalières en ayant en vue une éventuelle transposition autonome de ces règles, dans la mesure où une telle transposition ferait sens. Pour ce faire, nous allons d'abord présenter les règles du droit suisse sur la participation des travailleurs en cas de fusion. Nous les comparerons ensuite aux règles de l'UE. Nous examinerons enfin, du point de vue de la Suisse, les règles prévues à l'art. 133 de la directive pour la phase postérieure à la fusion.

A. Cadre juridique

La loi fédérale du 3 octobre 2003 sur la fusion, la scission, la transformation et le transfert de patrimoine (Loi sur la fusion, LFus)[ii] a réglé expressément les droits de participation des travailleurs en cas de fusion. L'art. 28, al. 1, LFus prévoit ainsi l'application de l'art. 333a CO, qui règle les droits de participation en cas de transfert de l'entreprise ou d'une partie de celle-ci.[iii] Ce qui est désigné sous le terme de "consultation" à l'art. 28, al. 1, LFus, englobe tant le droit à l'information prévu à l'art. 333a, al. 1, CO que la consultation à proprement parler, prévue à l'art. 333a, al. 2 si des mesures concernant les travailleurs (comme des licenciements) sont envisagées. L'art. 28 LFus prévoit au surplus des règles spéciales par rapport à l'art. 333a CO. Les droits de participation bénéficient ainsi tant aux travailleurs de la société transférante qu'à ceux de la société reprenante (art. 28, al. 1, LFus) et ce, même si la société reprenante a son siège à l'étranger (art. 28, al. 4, LFus). Le moment de la consultation est réglé

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[i] Voir le chapitre sur la directive (UE) 2009/38 instituant un Comité d'entreprise européen.

[ii] RS 221.301.

[iii] Voir le chapitre sur les directives (UE) 77/187/CEE et 2001/21/CE.

à l'art. 28, al. 2, LFus. Le principe est que la consultation doit avoir lieu avant que la fusion ne soit décidée par la société[iv]. Cette décision, prévue à l'art. 18 LFus, revient à l'assemblée générale dans les sociétés qui disposent d'une telle assemblée et, à défaut, à l'ensemble des associés (art. 18, al. 1 et 2, LFus). Cette décision consiste en l'approbation du contrat de fusion, réglé à l'art. 12 LFus. L'assemblée générale doit être informée du résultat de la consultation au moment de la décision (art. 28, al. 2, LFus). La consultation doit ainsi être close au moment de la décision de fusion, mais elle peut avoir lieu après la conclusion du contrat de fusion, ceci afin de préserver le secret des négociations[v]. Font exception les cas où une décision d'approbation n'est pas prévue (fusion simplifiée selon l'art. 23 LFus). Dans ces cas, la fusion est décidée avec la conclusion du contrat de fusion, si bien que la consultation doit avoir lieu avant[vi]. Dans les cas où une consultation n'est pas requise, l'information selon l'art. 333a, al. 1, CO pourra avoir lieu, selon la doctrine majoritaire, après la décision de l'assemblée générale mais avant la réalisation de la fusion[vii].

S'agissant du contenu et de la portée de l'information et de la consultation, les considérations générales sur l'art. 333a CO valent ici aussi.[viii] L'information portera ainsi sur les motifs de la fusion et sur ses conséquences juridiques, économiques et sociales pour les travailleurs[ix]. Pour le reste, nous rappelons ici que le législateur a voulu, avec l'art. 333a CO, reprendre le droit de l'UE en matière de transfert d'entreprises.

S'agissant de la sanction, l'art. 28, al. 3, LFus va nettement plus loin que l'art. 333a CO, car il prévoit la possibilité d'interdire l'inscription de la fusion au registre du commerce si les obligations prévues aux al. 1 et 2 ne sont pas respectées.

B. Comparaison entre le droit suisse et la directive (UE) 2017/1132

Le droit suisse peut être évalué comme suit en regard de la directive (UE) 2017/1132, telle que modifiée, en dernier lieu, par le règlement (UE) 2021/53:

- Le renvoi effectué à l'art. 28 LFus, et le fait que la loi sur la participation s'applique en tant que loi-cadre générale, font qu'il y a correspondance avec l'art. 126 quater, par. 1 de la directive, qui se réfère aux directives sur l'information et la consultation des travailleurs et sur le maintien des droits des travailleurs en cas de transferts d'entreprises[x]. Nous renvoyons à l'examen de ces directives pour les détails.[xi] Le droit suisse va même plus loin que le droit de l'UE car l'application de l'art. 333a CO à une fusion ne dépend pas du fait que cette fusion soit un transfert au sens de l'art. 333 CO, ce que l'art. 126 quater de la directive prévoit. En dehors des règles spécifiques prévues par la directive, examinées ci-après, le droit suisse équivaut au droit de l'UE.

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iv Ce n'est qu'avec l'inscription au registre du commerce (et la publication dans la FOSC) qu'une fusion, même simplifiée selon l'art. 23 LFus, prend effet (Art. 22, al. 1, LFus, Art. 936a, al. 1, 2e phr., CO).

v Message du Conseil fédéral, du 13 juin 2000, concernant la loi fédérale sur la fusion, la scission, la transformation et le transfert de patrimoine (Loi sur la fusion; LFus), FF 2000 3995, 4082, et entre autres, WYLER/HEINZER, 580; WILDHABER, Isabelle, Kapitel 20: Umstrukturierungen, in PORTMANN, Wolfgang/VON KAENEL, Adrian (éds.), Fachhandbuch Arbeitsrecht, 2018, 854 ss, n. 20.194.

vi Message, 4082.

vii WILDHABER, n. 20.198; BSK-FusG BAUMGARTNER/OERTLE, N 8 ad art. 28 LFus et références.

viii Voir le chapitre sur les directives (UE) 77/187/CEE et 2001/21/CE ainsi que les développements sur l'obligation de consulter en lien avec les licenciements collectifs, comme décrit dans le chapitre sur la directive (UE) 98/59/CE.

ix Message, 4081-4082.

x A noter que l'art. 126quater, par. 1 se réfère également à la directive concernant l'institution d'un comité d'entreprise européen.

xi Voir le chapitre sur les directives (UE) 77/87/CEE et 2001/23/CE ainsi que le chapitre sur la directive (UE) 2002/14/CE.

- L'art. 123, par. 1, let. b de la directive prévoit une obligation pour les sociétés qui fusionnent de publier un avis informant les représentants des travailleurs, ou à défaut les travailleurs eux-mêmes, qu'ils peuvent présenter des observations sur le projet commun de fusion transfrontalière jusqu'à 5 jours avant l'assemblée générale. De plus, l'organe d'administration ou la direction de chacune des sociétés qui fusionnent doit établir un rapport à l'intention des travailleurs expliquant et justifiant les aspects juridiques et économiques de la fusion transfrontalière et expliquant les implications de cette fusion pour les travailleurs (art. 124, par. 1). Les informations aux travailleurs sont détaillées à l'art. 124, par. 5, de la directive (UE) 2017/1132. Le rapport est remis au moins six semaines avant la date de l'assemblée générale (art. 124, par. 6). Un avis sur le rapport de la part des représentants des travailleurs, ou à défaut les travailleurs eux-mêmes, est possible (art. 124, par. 7). Les obligations générales d'information et de consultation prévues à l'art. 126 quater, par. 1 doivent avoir lieu avant que le projet commun de fusion ou le rapport prévu à l'art. 124 soient arrêtés de sorte à ce que les travailleurs reçoivent une réponse motivée avant l'assemblée générale qui va approuver le projet de fusion (art. 126 quater, par. 2).

  L'interaction entre obligations spécifiques et générales d'information et de consultation n'est pas tout à fait explicitée par la directive. Il est très probable qu'une bonne partie des obligations spécifiques sont déjà couvertes par les obligations générales. Si l'on considère maintenant les obligations d'information et de consultation prévues en droit suisse, l'on constate aussi qu'elles couvrent une partie des obligations spécifiques prévues aux art. 123 et 124 de la directive (UE) 2017/1132. Ainsi, si bien l'avis que le rapport, de même que leur contenu, feront l'objet d'informations équivalentes en droit suisse. De même, les observations que les travailleurs peuvent faire suite à l'avis ou l'avis qu'ils peuvent donner sur le rapport sont des possibilités que l'obligation de consulter inclut. Enfin, en droit suisse, le délai de consultation de 30 jours (avant l'assemblée générale) prévu pour les associés à l'art. 16, al. 1, LFus est pris comme référence pour le délai de consultation de la représentation des travailleurs[xii]. Ce délai correspond au délai d'un mois avant l'assemblée générale prévu pour la remise de l'avis (art. 123, par. 1 de la directive), étant toutefois noté que le rapport prévu à l'art. 124, par. 1 de la directive doit être remis au moins six semaines avant la date de l'assemblée générale (art. 124, par. 6). Le délai en droit suisse est fondamentalement à déterminer de cas en cas et peut suivant les situations être inférieur à 30 jours.

  Tant et si bien qu'il faut noter sur ce point une divergence entre le droit suisse et la directive (UE) 2017/1132. Cette divergence est un aspect d'une différence plus générale qui a trait au moment et aux modalités de l'information et de la consultation des travailleurs. Les obligations sont en effet plus précisément fixées et formalisées dans la directive, avec un avis et un rapport à remettre à la représentation des travailleurs ou à défaut aux travailleurs. L'implication des travailleurs ou de leur représentation intervient aussi plus en amont du processus de fusion. Il s'agit en effet d'un moment où le projet commun de fusion transfrontalière n'est pas encore arrêté, alors qu'en droit suisse, le contrat de fusion aura déjà été conclu. De même, si l'art. 14, al. 1, LFus impose d'établir un rapport écrit sur la fusion, qui doit indiquer " les répercussions de la fusion sur les travailleurs des sociétés qui fusionnent ainsi que des indications sur le contenu d'un éventuel plan social" (art. 14, al. 3, let, i, LFus), le rapport n'est pas soumis à la représentation des travailleurs, alors qu'il doit être vérifié par un expert-réviseur (art. 15, al. 1, LFus) et qu'il peut être consulté par les associés (art. 16 LFus)[xiii].

- Au final, le droit suisse est dans l'ensemble conforme aux exigences du droit de l'UE, mais des divergences ponctuelles sont tout de même à noter. Une différence reste toutefois à relever entre la LFus et la directive de l'UE : cette dernière se limite aux fusions transfrontières, qui peuvent s'avérer plus complexes qu'une bonne partie des fusions de dimension purement

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[xii] BSK-FusG BAUMGARTNER/OERTLE, N 6 ad art. 28 LFus.

[xiii] Les PME (art. 2, let. e, LFus) peuvent renoncer à un rapport avec l'accord de tous, de même qu'à une vérification (art. 15, al. 2, LFus). Le rapport et la vérification ne sont également pas prévus dans les fusions selon l'art. 23 LFus (art. 24, al. 1, LFus).

interne. Cela peut expliquer que la LFus soit plus flexible. Mais il va sans dire que des fusions transfrontalières peuvent également être soumises au droit suisse selon les art. 161 ss LDIP. C'est le cas de fusions de l'étranger en Suisse (art. 163a LDIP) et en partie de fusions de Suisse vers l'étranger (art. 163b LDIP). Il faut noter que la doctrine suisse rattache les questions de participation des travailleurs en cas de fusion au droit du travail, si bien que le droit applicable est régi par l'art. 121 LDIP[xiv].

Les obligations de consulter et d'informer sont également prévues en droit suisse en cas de scission (art. 50 LFus), de transfert de patrimoine (art. 77 LFus) et de fusion et transfert de patrimoine de fondations (art. 85, al. 4, LFus). La directive (UE) 2017/1132 garantit également l'information et la consultation des travailleurs en cas de scission transfrontalière (art. 160 duodecies).

C. Phase postérieure à la fusion (art. 133 de la directive (UE) 2017/1132)

La LFus ne contient pas de règles équivalentes à celles prévues à l'art. 133, par. 2 à 8 de la directive, destinées à régler la participation dans l'entreprise qui naîtra de la fusion transfrontalière. Cela est explicable par le fait que la LFus est une loi suisse qui s'applique avant tout (mais pas uniquement) à des situations internes. Il est clair dans ces cas que le droit suisse s'appliquera à la participation des travailleurs une fois la fusion réalisée. Dans les cas où la fusion implique une entreprise située à l'étranger, l'entité qui ressortira de la fusion sera soumise au droit du lieu de son siège. Il en va de même des droits de participation, qui relèveront donc du droit suisse si cette entité est située en Suisse ou du droit étranger correspondant si elle est située à l'étranger. La portée d'une reprise en droit suisse du système mis en place à l'art. 133 de la directive serait limitée aux entreprises issues de fusions qui auront leur siège en Suisse. En effet, la Suisse ne saurait influencer de manière unilatérale les droits de participation dans des entités situées en dehors de son territoire. En revanche, une reprise de ces règles est bien plus effective dans le cadre d'un accord avec l'UE qui aurait pour effet d'intégrer pleinement la Suisse dans le système de la directive ou aux parties de celle-ci visées par l'accord, la Suisse étant considérée comme un Etat associé relativement à la directive ou aux règles visées. Se poserait alors la question de savoir s'il faut envisager la reprise de la totalité de la directive, qui concerne divers aspects du droit des sociétés, ou uniquement les aspects relatifs à la participation des travailleurs.

[xiv] Voir BSK-FusG OERTLE/BAUMGARTNER, N 55 ss Vor Art. 27, notamment N 58 et 60, et références citées.

[1] Art. 16 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

[2] Annex XXII on Company law to the EEA Agreement

[3] Recitals 11-13 and 26-32 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

[4] Art. 119-121 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

[5] Art. 122 Directive (EU) 2017/1132 of 14 June 2017.

[6] Art. 124 Directive (EU) 2017/1132 of 14 June 2017; recital 13 Directive (EU) 2019/2121 of 27 November 2019.

[7] If there are no such representatives, employees themselves may supply comments. Art. 123 Directive (EU) 2017/1132 of 14 June 2017.

[8] Art. 126c Directive (EU) 2017/1132 of 14 June 2017.

[9] Note that this procedure is limited to participation rights and does not affect information and consultation rights in the post-merger company (contrary to negotiations under the SE-Directive, Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees).

[10] K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 749-750.

[11] A negotiation procedure is due where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger, an average number of employees equivalent to four-fifths of the applicable domestic threshold for triggering the participation of employees. For example, consider a Dutch company that is involved as a merging company in a cross-border merger. Once a Dutch company has 100 employees, the company might have to confer employee participation rights to employee representatives. Four-fifths of this threshold equals 80 employees. Therefore, the parties must start negotiations if a Dutch company with 80 employees or more enters into an outbound cross-border merger. Art. 133(2) Directive (EU) 2017/1132 of 14 June 2017; Art. 2 (k) Council Directive 2001/86/EC of 8 October 2001; Art. 2:153 (2) and 2:263 (2) *Burgerlijk wetboek*; J. Roest, Grensoverschrijdende mobiliteit: medezeggenschap van werknemers, 2022 (65) Ondernemingsrecht.

[12] A negotiation procedure also commences where the national law applicable to the post-merger company does not provide the same level of employee participation as exercised in the relevant merging companies. The "level of employee participation" is measured by the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group, which covers the profit units of the company. Art. 133(2)(a) Directive (EU) 2017/1132 of 14 June 2017.

[13] A negotiation procedure is likewise initiated where the national law applicable to the post-merger company does not provide employees of establishments in other Member States the same entitlement to exercise participation rights (e.g., active and passive voting rights) as the employees employed in the Member State where the post-merger company is registered. This third exception will regularly come into play. The regulation of employee participation is primarily national and thus territorially limited to the relevant Member State at the expense of employees of establishments in other Member States. Art. 133(2)(b) Directive (EU) 2017/1132 of 14 June 2017; J. Roest, Grensoverschrijdende mobiliteit: medezeggenschap van werknemers, 2022 (65) Ondernemingsrecht.

[14] For cross-border mergers, the negotiation procedure from the SE-Directive, which serves as a blueprint, is subject to some modifications. Recital 66 Directive (EU) 2017/1132 of 14 June 2017.

[15] Some consider the choice to model the negotiation procedure for cross-border mergers on the SE-Directive regrettable arguing, for example, that it made the procedure excessively cumbersome. P. François & J. Hick, Employee participation: rights and obligations, in D. Van Gerven (ed.), Cross-Border Mergers in Europe, Cambridge 2010, p. 29 *et seq*, p. 33; T. Papadopoulos, Reviewing the Implementation of the Cross-Border Mergers Directive, in T. Papadopoulos (ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Cham 2019, p. 3 *et seq*, p. 19.

[16] K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 751.

[17] Art. 133 (3) and (4) Directive (EU) 2017/1132 of 14 June 2017.

[18] A two-thirds majority of the body is required for this decision. Art. 133 (4) (b) Directive (EU) 2017/1132 of 14 June 2017.

[19] These subsidiary rules are tailored to the rules found in the Annex of the SE-Directive. Art. 133 (4) (a) Directive (EU) 2017/1132 of 14 June 2017; part 3 (b) of the Annex to the Council Directive 2001/86/EC of 8 October 2001.

[20] Art. 133 (3) Directive (EU) 2017/1132 of 14 June 2017; Art. 12 Council Directive 2001/86/EC of 8 October 2001; K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 754.

[21] *Loi n° 2008-649 du 3 juillet 2008 portant diverses dispositions d'adaptation du droit des sociétés au droit Communautaire*; Art. L. 2371-1 – L. 2381-2 *code du travail*.

[22] *Décret n° 2008-1116 du 31 octobre 2008 relatif à la participation des salariés dans les sociétés issues de fusions transfrontalières; Décret n° 2008-1117 du 31 octobre 2008 relatif à la participation des salariés dans les sociétés issues de fusions transfrontalières; Décret n° 2009-11 du 5 janvier 2009 relatif aux fusions transfrontalières de sociétés.*

[23] Art. L. 2371-1 – L. 2375-1 and D. 2371-1 – R. 2373-5 *code du travail*.

[24] The penalty that applies for obstructing the establishment or regular operation of a special negotiating body or committee increased. Art. L. 2375-1 *code du travail*.

[25] B. Lecourt, Droit des sociétés de l'Union européenne, Dalloz 2021, para. 191-196.

[26] Art. 13 *loi n° 2023-171 du 9 mars 2023 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture*.

[27] Historically, France is not a country with strong employee participation rights. Only "*[s]ince the* [loi n° 2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi], *more French companies must appoint employee representatives on their board of directors. As a result, a Special Negotiation Group is more likely to be required* [since 2013] *when a large French company is involved in a cross-border merger.*" B. François, Cross-Border Mergers in France, in T. Papadopoulos (ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Cham 2019, p. 295 *et seq*, p. 311. The initial threshold for mandatory employee representatives on the board of directors (*conseil d'administration*) was lowered in 2019. Instead of a company needing 5000 employees domestically or 10000 employees internationally (since 2013), from 2019 onwards, employee participation rights are mandatory once the company employs at least 1000 employees domestically or 5000 internationally. Art. L. 225-23 and L. 225-27-1 *code de commerce*. More broadly, employee participation is implemented in accordance with Art. L. 225-28 to L. 225-56, L. 225-79 to L. 225-93, L. 22-10-8 to L. 22-10-17 and L. 22-10-23 to L. 22-10-30 of the Commercial Code. Art. L. 2372-1 *code du travail.* The result is one (if the board has up to eight directors) or two (if the board has more than eight directors) employee representatives on the board. Art. L. 225-27-1 *code de commerce*. This has been changed in 2019. Before the legislative amendment, the limit was not eight directors but twelve. Art. 184 *loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises.*

[28] Section 1 *Gesetz vom 21. Dezember 2006 über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung*. For a discussion: T. Müller-Bonanni, A. Jenner & K. Thomas, Mitbestimmungsrechtliche Folgen grenzüberschreitender Verschmelzungen, Umwandlungen und Spaltungen nach der RL (EU) 2019/2121, 2021 (18) Neue Zeitschrift für Gesellschaftsrecht, p. 764 *et seq*.

[29] *Gesetz vom 4. Januar 2023 zur Umsetzung der Bestimmungen der Umwandlungsrichtlinie über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Umwandlungen, Verschmelzungen und Spaltungen*. See also G. Thüsing & S. Y. Peisker, Mitbestimmung bei grenzüberschreitenden Vorhaben – eine verpasste Zusammenführung?, 2022 (45) Neue Juristische Online-Zeitschrift, p. 1377 *et seq*.

[30] In Germany, employee representatives are significantly involved on larger companies' supervisory boards (*Aufsichtsrates*) (the company has more than 500 employees), having the right to one-third of the seats. *Gesetz vom 18. Mai 2004 über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat (Drittelbeteiligungsgesetz - DrittelbG)*. If the company has 2000 employees or more, co-determination may apply, with the employee representatives holding up to half of the supervisory board positions. *Gesetz vom 4. Mai 1976 über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz - MitbestG)*; A. Wuesthoff, Germany, in D. Van Gerven (ed.), Cross-Border Mergers in Europe, Cambridge 2010, p. 197 *et seq*, p. 206. The latter amounts to a remarkable situation from a comparative perspective. As noted by Weiss and Schmidt in 2008, "*stimulated by the discussion on the European Company, by the case law of the European Court of Justice on freedom of establishment and by the fact that German board-level co-determination is rather unique within the European Union, there are strong political forces striving for a general restriction of board-level employee representation to a third of board members.*" M. Weiss & M. Schmidt, Labour Law and Industrial Relations in Germany, 4th ed., Alphen aan den Rijn: Kluwer 2008, p. 256. Such a far-reaching restriction has not happened yet. Nevertheless, the Co-Determination Act and its compatibility with EU law has been repeatedly questioned. M. Weiss, M.

Schmidt & D. Hlava, Labour Law and Industrial Relations: Germany, Alphen aan den Rijn: Wolters Kluwer 2023, p. 273-275.

31 *Wet van 27 juni 2008 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de implementatie van richtlijn nr. 2005/56/EG van het Europese Parlement en de Raad van de Europese Unie betreffende grensoverschrijdende fusies van kapitaalvennootschappen*.

32 *Wet van 20 mei 2010 tot wijziging van het Burgerlijk Wetboek en enkele andere wetten in verband met lastenverlichting voor burgers en bedrijfsleven*; *wet van 14 juni 2014 tot wijziging van verschillende wetten in verband met de hervorming van het ontslagrecht, wijziging van de rechtspositie van flexwerkers en wijziging van verschillende wetten in verband met het aanpassen van de Werkloosheidswet, het verruimen van de openstelling van de Wet inkomensvoorziening oudere werklozen en de beperking van de toegang tot de Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers (Wet werk en zekerheid)*.

33 CJEU 20 June 2013, Case C-635/11, *European Commission v. Kingdom of the Netherlands*. The Court held that the country had not adopted the rules necessary to ensure that the employees of establishments outside of the Netherlands of a company resulting from a cross-border merger which has its registered office in the Netherlands, enjoy participation rights identical to those enjoyed by the employees employed in establishments in the Netherlands.

34 *Wet van 11 februari 2015 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de wijziging van de regels voor werknemersmedezeggenschap in geval van grensoverschrijdende fusie van kapitaalvennootschappen*.

35 *Wijziging van Boek 2 van het Burgerlijk Wetboek en de Wet op het notarisambt in verband met de implementatie van Richtlijn (EU) 2019/2121 van het Europees Parlement en de Raad van 27 november 2019 tot wijziging van Richtlijn (EU) 2017/1132 met betrekking tot grensoverschrijdende omzettingen, fusies en splitsingen (PbEU 2019, L 321/1) (Wet implementatie richtlijn grensoverschrijdende omzettingen, fusies en splitsingen)*.

36 Employee participation rights are part of a range of Dutch provisions applicable to larger companies, i.e., companies that fulfil the three conditions of the so-called "structure regime" (*structuurregime*). M. A. Verbrugh, Implementation of the Cross-Border Merger Directive in the Netherlands, in T. Papadopoulos (ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Cham 2019, p. 411 *et seq*, p. 421-422. One of the three conditions is that the company and its dependent companies collectively employ, as a rule, at least 100 employees in the Netherlands. Art. 2:153(2) and 2:263(2) *Burgerlijk wetboek*. If the other conditions are also met, the works council obtains a right of nomination, more accurately described as an enhanced right of recommendation, for one-third of the supervisory board members (*Raad van commissarissen*). Art. 2:158(5)-(7) and 2:268 (5)-(7) *Burgerlijk Wetboek*. Contrary to Germany, where employees and trade unionists are elected to sit on the board, the Dutch system wants independent members on the board, hence no employees or trade unionists. C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, p. 674. Nevertheless, Verbrugh mentions that "*[a]ccording to the Dutch legislator, in a comparison between the level of employee participation systems in the Member States, the* [Dutch] *structure regime will always win. The reason is that the relevant Dutch law perceives (Dutch) [enhanced] recommendation rights at the same level as (foreign) appointment rights and the structure regime has relatively many recommendation rights*". M. A. Verbrugh, Implementation of the Cross-Border Merger Directive in the Netherlands, in T. Papadopoulos (ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Cham 2019, p. 411 *et seq*, p. 421.

37 In 2007, it implemented the Directive through the Companies (Cross-Border Mergers) Regulations 2007. Part 4 of the Regulations contains detailed sections on organizing employee participation rights in the company resulting from the cross-border merger. These sections seem not to have undergone many changes since their initial adoption. The Agency Workers Regulations 2010 made some adjustments to favour the interests of temporary agency workers.

38 It notes, further, that "*cross-border mergers will still be able to be structured through private contractual arrangements*". Explanatory Memorandum to the Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019, 2019 No. 348.

39 The United Kingdom's laws do not foresee mandatory employee participation rights at the board level. Nonetheless, the UK's Corporate Governance Code, which applies to companies with a premium listing on the London Stock Exchange, does contain a relevant provision: to engage the workforce, "*one or a combination of the following methods should be used: • a director appointed from the workforce; • a formal workforce advisory panel; • a designated non-executive director. If the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective.*" UK Corporate Governance Code 2018, p. 5. Listed companies need to

comply with the Code or explain their alternative approach, including for what concerns employee participation. This is part of their obligations under the UK Listing Rules. That said, the Code is not an enforceable rulebook. To the extent that "*explanations* [about, for example, alternative arrangements for employee participation are provided but] *are weak, investors should engage with companies and hold directors to account in order to improve governance practices and reporting.*" Financial Reporting Council, UK Corporate Governance Code, available at: https://www.frc.org.uk/directors/corporate-governance/uk-corporate-governance-code (13.03.2023).

40 Art. L. 2371-1 – L. 2375-1 and D. 2371-1 – R. 2373-5 *code du travail*.

41 *Gesetz vom 21. Dezember 2006 über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung.*

42 Chapter 3A of book 2 *Burgerlijk wetboek.*

43 Art. L. 225-23 and L. 225-27-1 *code de commerce*. More broadly, employee participation is implemented in accordance with Art. L. 225-28 to L. 225-56, L. 225-79 to L. 225-93, L. 22-10-8 to L. 22-10-17 and L. 22-10-23 to L. 22-10-30 of the Commercial Code. Art. L. 2372-1 *code du travail*.

44 *DrittelbG*.

45 *MitbestG*.

46 Art. 2:158(5)-(7) and 2:268 (5)-(7) *Burgerlijk wetboek*.

47 UK Corporate Governance Code 2018, p. 5.

48 Art. L. 225-23 and L. 225-27-1 *code de commerce*.

49 *DrittelbG*.

50 *MitbestG*.

51 Art. 2:153(2) and 2:263(2) *Burgerlijk wetboek*.

52 UK Corporate Governance Code 2018, p. 3.

53 Art. L. 225-27-1 *code de commerce*.

54 Section 4 *DrittelbG.*

55 Section 7 *MitbestG*.

56 Art. 2:158(5)-(7) and 2:268 (5)-(7) *Burgerlijk wetboek*.

57 UK Corporate Governance Code 2018, p. 5.

58 M. Kyriakides & F. Fournari, Procedural Harmonisation in Cross-Border Mergers, in T. Papadopoulos (ed.), Cross-Border Mergers: EU Perspectives and National Experiences, Cham 2019, p. 209 *et seq*, p. 216.

59 Bech-Bruun & Lexidale, Study on the application of the cross-border mergers directive, Brussels: European Union 2013, p. 49.

60 Art. 124 Directive (EU) 2019/2121 of 27 November 2019.

61 Art. 126c Directive (EU) 2019/2121 of 27 November 2019.

62 Art. 130 Directive (EU) 2019/2121 of 27 November 2019.

2. Employees' Rights in the Framework of Transfers of Undertakings

A. Directive 77/187/EEC and Directive 2001/23/EC

i. The Objectives

Council Directive 2001/23/EC of 12 March 2001, the Transfers of Undertakings Directive (hereinafter: TUD), or Acquired Rights Directive, safeguards the employee rights that existed prior to a transfer of an undertaking (or parts thereof).[1] The TUD harmonises Member States' domestic laws on the employment rights implications of transfers, rationalizing the European single market by removing employment protection considerations from determining whether any particular transfer occurs in the EU.

TUD consolidated the provisions of Directive 77/187/EEC and the amendments of Directive 98/50/EC,[2] and was subsequently amended in 2015 to apply to transfers of seagoing vessels.[3]
It is in force in the EEA.[4]

ii. The 1998 Amendment

The initial Directive 77/187/EEC was significantly amended in 1998 in view of the impact of the internal market, the legislative tendencies of the Member States (including their demand for increased flexibility), and, perhaps most of all, the Court of Justice's case law.[5] A primary concern was to better articulate the individual rights already created in 1977 in relation to commercial transactions that were problematic to place under the initial Directive (e.g., contracting-out services and insolvent transferors). In this respect, Directive 98/50/EC does not so much create new rights as clarify existing ones.[6]

Along these lines, the Directive clarified: (i) the legal concept of transfer, (ii) the concept of an employee, and (iii) its applicability to private and public undertakings carrying out economic activities not for gain. Also, the protection of acquired rights in the framework of liquidation proceedings was reconsidered, as well as the preservation of the function and status of employee representatives subject to transfer (and the information obligations to employees in the absence of representatives). Another clarification occurred in relation to the information and consultation requirements if the decision leading to the transfer comes from an undertaking controlling the employer. Lastly, a failure to fulfil the transferor's duty to notify the transferee of all transferred rights and obligations under domestic law does not affect a transferred employee's rights against the transferee and/or transferor. The TUD from 2001 consolidated the Directives from 1977 and 1998 in the interests of clarity and rationality.[7] The 2015 amendment of the CRD relates to seafarers.[8]

iii. The Content

§ 1 Directive 2001/23/EC's scope of application

TUD applies when an employee's legal employer changes due to a legal transfer or merger, calling for national laws to ensure that such employees are (semi-)automatically transferred from the transferor (i.e. former employer) to the transferee (i.e. new employer), retaining their "acquired" employment rights.

TUD's complexity[9] stems partly from the definitions used, which contain numerous vague terms scattered throughout Article 1. The CJEU is still called upon frequently to provide domestic courts with guidance on TUD's scope of application in light of a specific set of facts.[10] The CJEU has often interpreted TUD's concepts in a manner that provides the Directive with a broad scope, going beyond traditional transfers and mergers[11], whereas domestic (case) law might tend to restrain TUD's sphere of influence, having to conform itself to the CJEU's view.[12]

§ 2 Safeguarding employees' acquired rights

TUD offers several protections to transferred employees: (i) rights and obligations arising from a contract of employment or an employment relationship existing on the date of a transfer shall *automatically* be transferred to the new employer;[13,14] (ii) a transfer of an undertaking cannot constitute grounds for dismissal; (iii) an employment relationship that the employee terminates because the transfer involves a substantial change in working conditions to the detriment of the employee shall be regarded as having been terminated by the employer;[15] (iv) Article 6 TUD aims to embed the transferred employees' prior employee representation at the transferee, or at least ensure the transferred employees remain adequately represented during the period necessary for the reconstitution or reappointment of the employee representation at the transferee.

The automatic transferal of rights and obligations has significant consequences. Still, the dismissal protections are less consequential in practice because Article 4 TUD also clarifies that TUD does not stand in the way of dismissals for "economic, technical or organisational reasons" (ETOR).[16]

§ 3 Informing and consulting employee representatives

Article 7 TUD calls for the involved employers to inform the employee representatives "in good time"[17] of the transfer. Consultations may also be required: if either the transferor or transferee envisages measures that will result in legal, economic or social changes for the employees, the entity needs to consult its employee representatives.[18]

B. Domestic Implementation of Directive 77/187/EEC and Directive 2001/23/EC

France

IMPLEMENTING THE DIRECTIVES – Automatic transfers of employment contracts have existed in French labour law since 1928.[19] The Law of 28 June 1983 transposed Directive 77/187/EEC.[20] It added (what is now) Article L. 1224-2 of the Labour Code, ensuring that the transferee is bound by the obligations of the transferor. The Law of 28 October 1982 transposed what is now described in Article 6 TUD.[21] Since then, the provisions have been slightly amended occasionally, driven mainly by domestic considerations rather than TUD. Nonetheless, the Directives and CJEU's case law have so significantly influenced the interpretation of the domestic articles[22] that one can view TUD as having been "transposed" through case law rather than statutory law.

GOING BEYOND THE DIRECTIVES – French law does not evidently go beyond TUD's requirements. The CJEU's broad interpretation of TUD's provisions has meant that French courts had to adjust their domestic case law to benefit transferred employees.[23]

Germany

IMPLEMENTING THE DIRECTIVES – Germany's main provision on transfers of undertakings was added to the Civil Code as part of the 1972 Works Constitution Act (*Betriebsverfassungsgesetz*[24]).[25] Subsequently, the Labour Law EC Adjustment Act of 13 August 1980 transposed Directive 77/187/EEC, clarifying what happens with obligations deriving from a collective bargaining agreement and guaranteeing persons cannot be dismissed because of the transfer.[26] The Law of 23 March 2002 came about in the wake of Directive 98/50/EC, affecting the obligation to inform employees and granting each the right to personally object to being transferred.[27]

GOING BEYOND THE DIRECTIVES – German law does not evidently go beyond TUD's requirements. Like France, the CJEU's broad interpretation of TUD's provisions has meant the Federal Labour Court has made significant changes to its case law due to the CJEU's rulings.[28]

The Netherlands

IMPLEMENTING THE DIRECTIVES – Based on Directive 77/187/EEC, the Law of 15 May 1981 added a new subchapter to the Civil Code.[29] It also amended the laws on collective bargaining agreements, clarifying the consequences of a transfer for the associated rights.[30] Subsequently, the Law of 18 April 2002 transposed Directive 98/50/CE, updating the definitions of the relevant concepts, clarifying its application to the public sector, adding detailed rules on the consequences of a transfer for occupational pension schemes, adding a provision on informing employees in the absence of employee representatives, and highlighting that persons cannot be dismissed because of the transfer.[31] Both Directives have strongly influenced the Dutch rules.

GOING BEYOND THE DIRECTIVES – Similar to the other countries, The Netherlands does not notably go beyond what TUD expects, with CJEU's case law enlarging the sphere of influence of the Dutch rules on transfers of undertaking.[32]

The United Kingdom

IMPLEMENTING THE DIRECTIVES – The Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 contain the UK's rules on transfers of undertaking. These rules were initially introduced to implement Directive 77/187/EEC.[33] Nonetheless, in 1992 the European Commission initiated infringement proceedings against the UK for failing to fulfil its obligations under the initial Directive.[34]

The Trade Union Reform and Employment Rights Act 1993 was issued to resolve some of these problems. In a subsequent step, the 2006 Regulations came about partly to implement Directive 98/50/CE and partly for domestic reasons.[35] These Regulations have been amended frequently (most notably in 2014).[36] Post-Brexit, commentators suspect that the UK's authorities will reduce employees' protections under TUPE. However, this has not yet happened.[37]

GOING BEYOND THE DIRECTIVES –British authors consider the 2006 Regulations to go beyond what TUD requires.[38] Since the UK was subject to infringement proceedings in the past, such a position is remarkable, but the detailed TUPE regulations, for example, explicitly cover certain arrangements that the TUD does not explicitly cover (perhaps implicitly through CJEU case law).[39]

C. Comparative Table

	France	Germany	Netherlands	United Kingdom
Definitions for transfers of under-taking	Almost no definition, except for some illustrations, is reliant on case law.[40]	Almost no definition, reliant on case law.[41]	A brief definition of transfer and economic entity.[42]	Extensive definitions, among other things, of transfer of an undertaking, "a service provision change", and an economic entity.[43]
Joint and several liabilities between new and old employers for pre-transfer obligations	The transferee is bound by the obligations incumbent on the transferor on the date of the transfer. The transferor is responsible for reimbursing the sums paid by the transferee.[44]	Yes, for obligations which arose before the date of the transfer and fall due before the expiry of one year after that date. Clarification exists for pre-transfer obligations that fall due after transfer.[45]	For one year after the transfer, the transferor is jointly and severally liable alongside the transferee for the performance of the obligations under the employment contract which arose before that time.[46]	The transferor must provide the transferee with a specified set of information called "employee liability information" in relation to the transferred employees. The transferee has a remedy against the transferor for the failure to notify this information.[47]
The lasting effect of collective	If the application of a *convention* or *accord* is called into question	Rights and obligations from a *Tarifvertrags* or *Betriebsvereinbarung*	Transferred rights and obligations from collective agreements terminate: (i) once the	A collective agreement between a transferor and a recognised trade union continues to exist after the

bargaining agreements	because of a transfer, this *convention/accord* continues to have effect until the entry into force of a substitute *convention/accord*. Failing that, for a period of one year from the expiry of the period of notice (Art. L. 2261-9), unless a clause provides for a longer period.[48]	are, in principle, unalterable to the detriment of the employee for one year after the transfer; however, derogations exist, in particular, if the transferee has another collective agreement on the same issue.[49]	transferee becomes bound by another such agreement concluded after the transfer; (ii) once the transferee becomes obliged to comply with the provisions of a universally binding collective agreement by virtue of a decree, passed after the transfer; (iii) once the period of validity of the collective agreement in force at the time of the transition expires.[50]	transfer, binding the transferee.[51] However, because UK collective agreements are usually not enforceable, these agreements can easily be terminated, including by the transferee. The outcome is different if collective provisions are incorporated into the employment contract.[52]
Individual employees objecting to the transfer	French case law persists that, in principle, an employee cannot refuse the transfer. Regular dismissal law will have to be applied.[53]	German law provides a specific procedure for employees to object to transfers. The employment relationship remains with the transferor; refusing employees often get dismissed.[54]	According to the Dutch Supreme Court, an employee can object to the transfer. The employment contract will terminate *ipso jure* (no dismissal).[55]	The law acknowledges the possibility of objecting. The employee's contract of employment with the transferor is terminated by operation of law (no dismissal).[56]
Insolvent transferor[57]	Rules on transfers of undertaking do not apply in case of a procedure of safeguard (*sauvegarde*), recovery (*redressement*) or judicial liquidation.[58]	Rules on transfers of undertaking apply even in the event of bankruptcy. However, case law softens the legal consequences associated with these rules (e.g. no right to reinstatement).[59]	Rules on transfers of undertaking do not apply if: (i) the employer has been declared bankrupt; (ii) the employer is an entity found in Art. 3A:2 or 3A:78 Financial Supervision Act[60] (and other conditions are also fulfilled).[61]	Rules on transfers of undertaking do not apply in case of liquidation. In the event of non-terminal insolvency proceedings, the transferor/transferee obtains more freedom to make variations to the contract.[62]

D. Comparative Perspective on Transfers of Undertaking

EU AND DOMESTIC CASE LAW ARE IMPORTANT – The CJEU's case law has strongly influenced EU Member States' laws and regulations on transfers of undertakings. Germany is the most notable example of a country with only minor legislative provisions on the matter (1 core article), relying significantly on EU and domestic case law to govern the more complicated or situation-specific issues. France and the Netherlands likewise have few provisions (5 and 7 core articles, respectively). Because of this, even critical matters like the possibility for an employee to individually object to being transferred are essentially governed by domestic French and Dutch case law (leading to different results). The UK's TUPE regulations are very detailed compared to the continental systems. Due to this, the country most evidently goes beyond what TUD requires, advancing interesting provisions.

COUNTRIES HAVE THEIR PARTICULARITIES WITHIN EU LAW BOUNDARIES – All countries have certain unusual legislative provisions. For example, specific French provisions govern transitions from a private to a public employer and vice-versa (CJEU acknowledges the particularity of public-private transfers)[63].[64] Contrary to the derogation in Article 3 (4) TUD, the Dutch Civil Code states, as a general rule (with exceptions), that pension promises made by the transferor are transferred to the transferee.[65] Germany is the only country that genuinely enables an employee to object to being transferred without this automatically terminating the employment relationship (CJEU allows for a country to establish such a mechanism)[66].[67] The number of such peculiar legislative provisions is limited in these three countries. The UK has more provisions worth highlighting, such as the definition of service

provision changes, the notification of employee liability information (see Art. 3 (2) TUD), and the derogation for information and consultation in a micro-business (see Art. 7 (5) TUD).[68]

DETAILS MATTER – Minor legal differences can have significant implications. For example, legislative provisions on dismissal protection look similar across countries, prohibiting employers from dismissing workers because of the transfer, but protections may differ in practice. French case law is quite strict, significantly scrutinizing dismissals before and at the time of the transfer (but leaving room for dismissals after the transfer).[69] German law seemingly implements a narrower restriction.[70] Some scholarship seems to suggest that dismissals are only prohibited if the transfer is the main reason and ultimate cause of the dismissal.[71] Other commentators mention, however, that the Federal Labour Court applies the prohibition strictly, "*if there is any indication that the transfer could have caused the dismissal it is considered to be invalid.*"[72] The Dutch legislative provision is similar to the German one, imposing a narrow scope of protection.[73] Yet, as Spoelder argues based on Dutch case law, "*[t]he question is: without the takeover, would the employer also have had the desire to terminate the employment contract as soon as possible?*"[74] This approach to evaluating whether a dismissal is "because of" the transfer could arguably lead to quite a broad scope of protection. The Dutch approach, as worded by Spoelder, seems to differ from the more classic inquiry, such as that under UK law, looking to whether the sole or principal reason for the dismissal is the transfer itself.[75] The latter offers much room for an ETOR defence, arguing something else is the main reason.[76]

E. Conclusion

Safeguarding employment rights in a transfer of undertaking is a technical matter that can only be superficially regulated in statutes (largely based on principles). It raises many complex issues likely to be clarified in case law. The CJEU sets the tone in this regard.

Furthermore, even if the principles adopted among countries are the same, countries will vary in terms of the effective level of protection provided. It is also clear that within the boundaries drawn by EU law, countries include certain unusual provisions in their laws (among other things, to address national sensitivities).

Droit suisse dans le cadre des transferts d'entreprises

A. Cadre juridique

Le maintien des rapports de travail en cas de transfert d'entreprise est réglé aux art. 333 à 333*b* CO. L'art. 333 CO a été introduit lors de la révision totale du droit du contrat de travail en 1972. Il a été modifié en 1994 dans le cadre de l'adaptation autonome du droit suisse au droit de l'UE, le but de cette modification étant de mettre le droit suisse en conformité avec la directive (UE) 77/187/CEE[i]. Pour ce faire, cette révision a introduit le transfert automatique des rapports de travail, le maintien pendant un an des obligations découlant de conventions collectives et, à l'art. 336, al. 3, CO, le maintien de la protection des représentants du personnel contre le licenciement jusqu'au moment où leur mandat aurait expiré si le transfert n'avait pas eu lieu (art. 336, al. 2, let. b, CO)[ii]. La révision a de même introduit l'art. 333*a* CO, qui prévoit l'obligation d'informer la représentation des travailleurs ou, à défaut, les travailleurs en temps utile avant la réalisation du transfert (al. 1) et une obligation de consulter si des mesures concernant les travailleurs sont envisagées suite au transfert (al. 2). L'art. 333*b* CO enfin, entré

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[i] Voir le message du 24 février 1993 sur le programme consécutif au rejet de l'Accord EE, FF 1993 I 757, ch. 252 et 252.1, qui reprend les modifications adoptées à l'origine en vue de l'adhésion à l'EEE; voir à ce sujet le message I du 27 mai 1992 sur l'adaptation du droit fédéral au droit de l'EEE (Message complémentaire I au messsage relatif à l'Accord EEE), FF 1992 V 1, 393 ss.

[ii] Message complémentaire I, FF 1992 V 1, 396s.

en vigueur en 2014, vise à clarifier la situation en cas de transfert pour cause d'insolvabilité. Il exclut le transfert automatique des contrats de travail en cas de transfert durant un sursis concordataire, dans le cadre d'une faillite ou dans celui d'un concordat par abandon d'actifs. Cela signifie que l'acquéreur peut choisir de reprendre ou non les contrats de travail, respectivement choisir lesquels il souhaite reprendre. Toutefois, s'il reprend des contrats de travail, l'art. 333 CO s'applique par analogie, à l'exception de la responsabilité solidaire prévue à l'al. 3. L'acquéreur devra donc maintenir les conditions de travail prévues dans les contrats repris et respecter pendant une année les obligations découlant de CCT. L'art. 333a CO s'applique également par analogie dans ces cas, si bien que l'employeur qui procède au transfert devra informer et consulter les représentants des travailleurs ou à défaut, ceux-ci directement. L'exception en cas de transfert pour cause d'insolvabilité, prévue à l'art. 333b CO, correspond à l'art. 5, par. 1 de la directive (UE) 2001/23/CE, celle-ci ayant abrogé et remplacé la directive (UE) 77/187/CEE.

B. Comparaison entre le droit suisse et la directive (UE) 2001/23/CE

Au vu de cet historique législatif, le droit suisse est, dans l'ensemble, conforme au droit de l'UE[iii]. Ce constat est renforcé par le fait que le Tribunal fédéral a jugé "qu'il convient de prendre en considération..." la directive (UE) 2001/23/CE, "qui est le résultat de l'évolution du droit européen avec lequel une harmonisation a été souhaitée en cette matière par le législateur fédéral faut prendre en compte les évolutions postérieures de la législation européenne..."[iv].

Pour compléter cet exposé général du droit suisse, certains points particuliers sont à mentionner :

- *Notion de transfert d'entreprise :* Le Tribunal fédéral caractérise le transfert d'entreprise par la poursuite de l'exploitation par l'acquéreur, ce qui est le cas lorsqu'elle conserve son identité, à savoir son but et son organisation[v]. Cette définition ne présente pas de divergences avec celle de l'art. 1, al. 1, let. b de la directive (UE) 2001/23/CE. Par ailleurs, la loi fédérale du 3 octobre 2003 sur la fusion, la scission, la transformation et le transfert de patrimoine[vi] prévoit l'application des art. 333 et 333a CO en cas de fusion (art. 27, al. 1 et 28, al. 1), de scission (art. 49, al. 1 et 50) et de transfert de patrimoine (art. 76, al. 1 et 77, al. 1). Il en va de même de la fusion et du transfert de patrimoine de fondations (art. 85, al. 4). Ces dispositions sont traitées plus en détails dans la partie relative aux fusions transfrontalières.[vii]

- *Droit du travailleur de refuser le transfert* : L'art. 333, al. 1, CO permet au travailleur de s'opposer au transfert de son contrat. Dans ce cas, les rapports de travail prennent fin à l'expiration du délai de congé légal (art. 333, al. 2, CO). Ce droit n'est pas prévu dans la directive (UE) 2001/23/CE. La CJUE a reconnu le droit des Etats membres de prévoir un droit des travailleurs de s'opposer au transfert de leurs contrats de travail au cessionnaire [viii]. Un tel droit n'est donc pas incompatible avec les exigences de la directive (UE) 2001/23/CE. Selon certains avis, le droit suisse peut être considéré comme étant plus favorable au travailleur sur ce point[ix], étant relevé que l'art. 8 de la directive autorise les Etats membres à adopter des règles légales ou à autoriser des accords plus favorables aux travailleurs. Ce constat peut être étayé par le fait que le droit suisse offre une protection au travailleur qui refuse le transfert, en ce qu'il garantit le maintien du contrat jusqu'au terme du délai de congé légal.

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iii Voir à ce sujet, WYLER/HEINZER, 556 ss.

iv ATF 132 III 32, c. 4.1; voir aussi ATF 137 III 487, c. 4.6.

v ATF 136 III 552, c. 2.1; ATF 132 III 32, c. 4.1.

vi Loi sur la fusion, LFus; RS 221.301.

vii Voir le chapitre sur la directive 2017/1132.

viii CJUE, C-132/91, C-138/91 et C-139/91, 16.12.1992, N 37.

ix WYLER/HEINZER, 557.

- *Responsabilité solidaire de l'ancien employeur et de l'acquéreur :* L'art. 333, al. 3, CO institue une responsabilité solidaire de l'ancien employeur et de l'acquéreur pour les créances échues avant le transfert et ce jusqu'au terme du délai de congé contractuel calculé dès le moment du transfert ou, si le travailleur s'oppose au transfert, au terme du délai de congé légal[x]. L'art. 3, par. 1, 2[e] al., de la directive (UE) 2001/23/CE donne la faculté aux Etats membres de prévoir une telle règle.

- *Protection contre les congés* : Le législateur, lors de la révision de 1993, n'avait pas jugé nécessaire d'introduire une règle particulière afin que la protection contre le licenciement reste intacte malgré le transfert, car cela découlait déjà des règles en vigueur[xi]. Ainsi, un licenciement avec effet immédiat fondé sur le transfert serait injustifié, car le transfert de l'entreprise ne constitue pas un juste motif au sens de l'art. 337 CO. Le Tribunal fédéral a de même reconnu que la résiliation du contrat qui a "uniquement pour but d'empêcher le transfert des rapports de travail ou ses conséquences" est contraire à l'art. 333 CO, mais qu'une résiliation qui serait fondée sur des motifs économiques est admissible[xii]. Cette interprétation se fonde en particulier sur l'art. 4, par. 1 de la directive (UE) 77/187/CEE, qui est resté identique dans la directive (UE) 2001/23/CE. Cette disposition autorise les licenciements pour des raisons économiques, techniques ou d'organisation.

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x ATF 137 III 487, c. 5.2.

xi Message complémentaire I, FF 1992 V 1, 398.

xii ATF 136 III 552, c. 3.3.

[1] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

[2] At the origins of Directive 2001/23/EC lays Directive 77/187/EEC, which already set out to achieve the abovementioned objectives. However, it soon became apparent that transfers of undertakings are a complex subject matter. Directive 98/50/EC, therefore, amended the initial Directive. The primary concern was to better articulate the individual rights already created in 1977 in relation to commercial transactions that were problematic to place under the initial Directive (e.g., contracting-out services and insolvent transferors). Consequently, Directive 98/50/EC does not really create new rights; it clarifies existing ones. P. Davies, Amendments to the Acquired Rights Directive, 1998 (4) Industrial Law Journal, p. 365 *et seq*, p. 365-366.

[3] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses; Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses; Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

[4] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the EEA Agreement.

[5] Recital 3 Council Directive 98/50/EC of 29 June 1998; C. Wynn-Evans, The Law of TUPE Transfers, Oxford: OUP 2022.

[6] P. Davies, Amendments to the Acquired Rights Directive, 1998 (4) Industrial Law Journal, p. 365 *et seq*, p. 365-366.

[7] Recital 1 Council Directive 2001/23/EC of 12 March 2001.

[8] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers

[9] Article 1 (a) TUD stipulates that its protections "*shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.*" The most crucial concept is that of a "transfer". TUD thus clarifies the meaning of this concept based on the, at times contentious, case law of the CJEU that appeared before 2001. Article 1 (b) TUD states that "*there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*" Art. 1 Council Directive 2001/23/EC of 12 March 2001; N.S. Ghosheh Jr. & C. Gill, Transfer of Undertakings Directive: The History of a European Union Social Policy Directive, 2002 (1) International Journal of Employment Studies, p. 45 *et seq*, p. 53-55.

[10] S. Rainone, Labour rights in the making of the EU and in the CJEU case law: A case study on the Transfer of Undertakings Directive, 2018 (3) European Labour Law Journal, p. 299 *et seq*, p. 312-319. As Davies remarks, "*[t]he development of this guidance has generated considerable litigation.*" A.C.L. Davies, EU Labour Law, Cheltenham: Edward Elgar, 2012, p. 229.

[11] Therefore, TUD potentially covers many business operations and new forms of business restructuring. A recent overview of the CJEU's case law can be found in Case C-675/21. CJEU 16 February 2023, Case C-675/21, *Strong Charon – Soluções de Segurança SA v. 2045 – Empresa de Segurança SA and FL*. K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 573; J. McMullen, Some Problems and Themes in the Application in Member States of Directive 2001/23/EC on Transfer of Undertakings, 2007 (3) The International Journal of Comparative Labour Law and Industrial Relations, p. 335 *et seq*, p. 342-345. See, for example, the argument of Luca Ratti not to apply the Framework Directive to social rehire clauses "*that oblige incoming service providers, while taking over a service, to employ all or part of outgoing providers' personnel or at least give these workers priority future hiring.*" L. Ratti, To hire or not to hire: the ambivalent impact of social rehire clauses on the Transfer of Undertakings Directive, 2020 (2) European Labour Law Journal, p. 225 *et seq*, p. 225.

[12] E.g., raising discussions in France: CJEU 14 April 1994, Case C-392/92, *Christel Schmidt v. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen*; F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, Paris: LGDJ 2020, p. 272; B. Teyssié, J.-F. Cesaro & A. Martinon, Droit du travail: Relations

individuelles, 3rd ed., Paris: LexisNexis 2014, p. 698. In the Netherlands: CJEU 21 October 2010, Case C-242/09, *Albron Catering BV v. FNV Bondgenoten and John Roest*; *Gerechtshof Arnhem-Leeuwarden* 16 February 2021, Case ECLI:NL:GHARL:2021:1471; *Rechtbank Gelderland* 24 November 2022, Case ECLI:NL:RBGEL:2022:7228.

13 In principle, from the moment of the transfer, transferors are discharged from all their obligations towards the transferred employees. As an exemption, TUD allows Member States to impose joint and several liabilities between the former employers and new employers in relation to transferred employees' acquired benefits. CJEU 5 May 1988, Case 144/87 and 145/87, *Harry Berg and Johannes Theodorus Maria Busschers v. Ivo Martin Besselsen*.

14 As a default rule, the employee will automatically transfer to the transferee irrespective of the parties' will. However, employees do have a right to refuse the transfer if domestic law grants this right. CJEU 7 March 1996, Case C-171/94 and C-172/94, *Albert Merckx and Patrick Neuhuys v. Ford Motors Company Belgium SA*.

15 Art. 4 Council Directive 2001/23/EC of 12 March 2001.

16 National courts have the difficult task of deciding whether a dismissal is directly linked to the transfer or based on ETOR instead. In this regard, there seem to be some differences regarding the level of protection in the Member States. CJEU 15 June 1988, Case C-101/87, *P. Bork International A/S v. Foreningen af Arbejdsledere I Danmark, and Jens E. Olsen and others v. Junckers Industrier A/S*; C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, p. 614-615.

17 "*The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out. The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.*" Art. 7 Council Directive 2001/23/EC of 12 March 2001.

18 This duty to consult is "*the rule rather than an exception.*" K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 601. See also N. Bruun & S. Laulom, Restructuring of Companies, in T. Jaspers, F. Pennings & S. Peters (eds.), European Labour Law, Cambridge 2019, p. 309 *et seq*, p. 359.

19 B. Teyssié, J.-F. Cesaro & A. Martinon, Manuel Droit du travail Relations individuelles, 3rd ed., Paris: LexisNexis 2014, p. 696.

20 *Loi n° 83-528 du 28 juin 1983 portant mise en oeuvre de la directive du conseil des communautes europeennes n0 77-187/cee du 14-02-1977 concernant le rapprochement des legislations des états membres relatives au maintien des droits des travailleurs en cas de transfert d'entreprises, d'établissements ou de parties d'établissement.*

21 *Loi n° 82-915 du 28 octobre 1982 relative au développement des institutions représentatives du personnel. Loi dite loi Auroux.* The contemporary Article can be found in Art. L. 2314-35 *code du travail*.

22 G. Auzero, D. Baugard & E. Dockès, Droit du travail, 33th ed., Paris: Dalloz 2020, p. 427.

23 F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, Paris: LGDJ 2020, p. 272; B. Teyssié, J.-F. Cesaro & A. Martinon, Droit du travail: Relations individuelles, 3rd ed., Paris: LexisNexis 2014, p. 698.

24 Section 122 *Betriebsverfassungsgesetz vom 15. Januar 1972*.

25 Section 613a *Bürgerliches Gesetzbuch*.

26 *Gesetz vom 13. August 1980 über die Gleichbehandlung von Männern und Frauen am Arbeitsplatz und über die Erhaltung von Ansprüchen bei Betriebsübergang (Arbeitsrechtliches EG-Anpassungsgesetz).*

27 Art. 4 *Gesetz vom 23. März 2002 zur Änderung des Seemannsgesetzes und anderer Gesetze.*

28 *Küttner Personalbuch 2022 29. Auflage 2022*, *Betriebsübergang Rn. 10, 11*, beck-online.

29 Art. 7:662 – 7:666 *Burgerlijk wetboek*.

30 *Wet van 15 mei 1981 tot aanpassing van de wetgeving aan de Richtlijn van de Raad van de Europese Gemeenschappen inzake het behoud van de rechten van werknemers bij overgang van ondernemingen, vestigingen of onderdelen daarvan, van 14 februari 1977*.

31 *Wet van 18 april 2002 tot uitvoering van de Richtlijn 98/50/EG van de Raad van de Europese Unie van 29 juni 1998 tot wijziging van de Richtlijn 77/187/EEG inzake de onderlinge aanpassing van de wetgevingen der lidstaten betreffende het behoud van de rechten van de werknemers bij overgang van ondernemingen, vestigingen of onderdelen van ondernemingen of vestigingen*; R.M. Beltzer & M. Holtzer, Het wetsvoorstel overgang van onderneming: de niet teonderschatten invloed van Richtlijn 98/50 EG, 2001 SMA, p. 299 *et seq*.

32 See, e.g., the *Albron* case. CJEU 21 October 2010, Case C-242/09, *Albron Catering BV v. FNV Bondgenoten and John Roest*. A Dutch court asked whether an employee who was legally employed by one enterprise of Heineken (1) but factually working for another enterprise of Heineken (2) was protected under the rules on transfers of undertaking if the Heineken (2) company, i.e. the factual

employer, outsourced catering operations to Albron. In other words, due to the disconnect between the legal and factual employer, the question arose whether the mere factual employment relationship between the transferor and employee sufficed for the employee to transfer to the transferee. According to the CJEU, considering the intra-group circumstances, this disconnect did not stand in the way of applying TUD. Subsequently, the Dutch Supreme Court agreed with the domestic court's assessment that in light of the CJEU's ruling, also the Dutch rules on transfers of undertaking, which are not easily compatible with the CJEU's Albron-judgment, had to be interpreted as automatically transferring and protecting the factual employee in question. To what degree the CJEU's reasoning in the Albron-ruling can be applied to other factual matrices beyond intra-group circumstances is unclear, leading to other Dutch case law. E.g. *Hoge Raad* 5 April 2013, Case ECLI:NL:HR:2013:BZ1780; *Gerechtshof Arnhem-Leeuwarden* 16 February 2021, Case ECLI:NL:GHARL:2021:1471; *Rechtbank Gelderland* 24 November 2022, Case ECLI:NL:RBGEL:2022:7228.

33 The Transfer of Undertakings (Protection of Employment) Regulations 1981.

34 The Commission argued that:
"*First, the UK Regulations do not ensure that the representatives of employees will be informed and consulted in all the cases envisaged by the directive since neither the UK Regulations nor any other provision of United Kingdom law provide for the designation of employee representatives where an employer refuses to recognize them. Second, the scope of the UK Regulations is limited to situations in which the business transferred is owned by the transferor. Third, the UK Regulations do not apply to non-profit-making undertakings. Fourth, the UK Regulations do not require a transferor or transferee who is contemplating measures in respect of his employees to consult their representatives in good time with a view to seeking agreement. Fifth, the UK Regulations do not provide for effective sanctions against an employer who fails to comply with the obligation to inform and consult employee representatives as required by the directive.*"
The CJEU agreed with the Commission's first, third, fourth and fifth complaint. CJEU 8 June 1994, Case C-382/92, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*.

35 S. Deakin & G. S. Morris, Labour Law, 5th ed., Oxford: Hart Publishing 2009, p. 197.

36 The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 are, according to the Explanatory Memorandum "*generally intended to provide employers and employees with more clarity and flexibility when involved in a transfer.*"

37 The Regulations are considered "*by many commentators to be high on the list as a likely target for deregulatory reform*". Although it is expected that some changes will occur, no concrete details are known. C. Wynn-Evans, Bringing it all back home: TUPE reform after Brexit, available at: https://uklabourlawblog.com/2021/09/22/bringing-it-all-back-home-tupe-reform-after-brexit-by-charles-wynn-evans%EF%BF%BC/ (23.03.2023); S. Dillon & C. Ashton, The employment laws facing change under the Retained EU Law Bill, available at: https://esphr.co.uk/news/the-employment-laws-facing-change-under-the-retained-eu-law-bill/ (23.03.2023).

38 S. Deakin & G. S. Morris, Labour Law, 5th ed., Oxford: Hart Publishing 2009, p. 197.

39 For instance, the UK's rules offer a specific definition for "service provision changes". This definition aims to specify under which circumstances the protections in the TUPE regulations cover subcontracting and outsourcing arrangements. Section 3 The Transfer of Undertakings (Protection of Employment) Regulations 2006; H. Collins, K.D. Ewing & A. McColgan, Labour Law, 2nd ed., Cambridge: CUP 2019, p. 957.

40 Art. L. 1224-1 *code du travail*.

41 Section 613a *Bürgerliches Gesetzbuch*.

42 Art. 7:662 *Burgerlijk wetboek*.

43 Section 2 The Transfer of Undertakings (Protection of Employment) Regulations 2006.

44 Art. L. 1224-2 *code du travail*.

45 Section 613a *Bürgerliches Gesetzbuch*.

46 Art. 7:663 *Burgerlijk wetboek*.

47 Sections 11-12 The Transfer of Undertakings (Protection of Employment) Regulations 2006.

48 Art. L. 2261-14 *code du travail*.

49 Section 613a *Bürgerliches Gesetzbuch*.

50 Art. 14a *Wet van 24 december 1927, houdende nadere regeling van de Collectieve Arbeidsovereenkomst*.

51 Section 5 The Transfer of Undertakings (Protection of Employment) Regulations 2006.

52 Bredin Prat, Hengeler Mueller, and Slaughter and May, Business Transfers and Collective Agreements, Available at: https://www.hengeler.com/fileadmin/news/BF_Letter/08_BusinessTransfers-CollectiveAgreements_2014-02.PDF (28.03.2023).

[53] F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, Paris: LGDJ 2020, p. 277; B. Teyssié, J.-F. Cesaro & A. Martinon, Droit du travail: Relations individuelles, 3rd ed., Paris: LexisNexis 2014, p. 708.

[54] Section 613a *Bürgerliches Gesetzbuch*; J. Kirchner & M. Magotsch, Business Transfers, in J. Kirchner *et al.* (eds.), Key Aspects of German Employment and Labour Law, Heidelberg 2010, p. 253 *et seq*, p. 266-267; S. Lingemann, R. von Steinau-Steinrück & A. Mengel, Employment & Labor Law in Germany, München: C.H. Beck 2008, p. 46-47.

[55] *Hoge Raad* 7 October 1988, Case ECLI:NL:PHR:1988:AB9979; W.H.A.C.M. Bouwens & D.M.A. Bij de Vaate, Arbeidsovereenkomstenrecht, Deventer: Kluwer 2020, p. 352.

[56] Sections 4 (7) and (8) The Transfer of Undertakings (Protection of Employment) Regulations 2006; S. Brittenden, Transfer of Undertakings (TUPE) Regulations 2006, Westlaw UK.

[57] Art. 5 Council Directive 2001/23/EC of 12 March 2001.

[58] Art. L. 1224-2 *Code du travail*.

[59] *MüKoBGB/Müller-Glöge*, 9. Aufl. 2023, BGB § 613a Rn. 177.

[60] *Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop (Wet op het financieel toezicht)*.

[61] Art. 7:666 *Burgerlijk wetboek*. These rules are likely to be changed in the near future. Legislative Bill: *Wijziging van Boek 7 van het Burgerlijk Wetboek en enige andere wetten in verband met de introductie van een regeling betreffende de rechten van de werknemer bij overgang van een onderneming in faillissement (Wet overgang van onderneming in faillissement*.

[62] Sections 8 and 9 The Transfer of Undertakings (Protection of Employment) Regulations 2006.

[63] CJEU 11 November 2004, Case C-425/02, *Johanna Maria Delahaye, née Delahaye v. Ministre de la Fonction publique et de la Réforme administrative*.

[64] Art. L. 1224-3 and L. 1224-3-1 *code du travail*; F. Debord, Agents publics et personnels des entreprises du secteur public, Dalloz 2018, para. 201-225.

[65] Art. 7:663 and 7:664 *Burgerlijk wetboek*; J.M. van Slooten, M.S.A. Vegter & E. Verhulp, Arbeidsrecht, Alphen aan den Rijn: Kluwer 2022, p. 197-198. See also German case law stating that if a part of the business is transferred, a previously established right to supplementary pension does not cease. *Bundesarbeitsgericht* 18 September 2001, Case No. 3 AZR 689/00.

[66] CJEU 7 March 1996, Case C-171/94 and C-172/94, *Albert Merckx and Patrick Neuhuys v. Ford Motors Company Belgium SA*.

[67] Section 613a *Bürgerliches Gesetzbuch*.

[68] Sections 3, 11 and 13A The Transfer of Undertakings (Protection of Employment) Regulations 2006.

[69] F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, Paris: LGDJ 2020, p. 278. See also B. Teyssié, J.-F. Cesaro & A. Martinon, Droit du travail: Relations individuelles, 3rd ed., Paris: LexisNexis 2014, p. 704-705.

[70] Section 613a *Bürgerliches Gesetzbuch*.

[71] J. Kirchner & M. Magotsch, Business Transfers, in J. Kirchner *et al.* (eds.), Key Aspects of German Employment and Labour Law, Heidelberg 2010, p. 253 *et seq*, p. 261-262; S. Lingemann, R. von Steinau-Steinrück & A. Mengel, Employment & Labor Law in Germany, München: C.H. Beck 2008, p. 47.

[72] M. Weiss, M. Schmidt & D. Hlava, Labour Law and Industrial Relations: Germany, Alphen aan den Rijn: Wolters Kluwer 2023, p. 154.

[73] Art. 7:670 (8) *Burgerlijk wetboek*.

[74] S.R. Spoelder, Opzegverbod wegens overgang van onderneming: Hebbes!, 2010 (22) ArbeidsRecht.

[75] Section 7 The Transfer of Undertakings (Protection of Employment) Regulations 2006.

[76] H. Collins, K.D. Ewing & A. McColgan, Labour Law, 2nd ed., Cambridge: CUP 2019, p. 951.

3. Collective Redundancies Law

A. Directive 98/59/EC of 20 July 1998

i. The Objectives

The EU's Council Directive 98/59/EC of 20 July 1998 (hereinafter: CRD), as amended in 2015[1], in force throughout the EEA[2], is the consolidated version of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, amended in 1992.[3] The EU's desire to harmonize collective redundancy proceedings lay not only in employee protection[4] but also in the reduction of market distortions[5] made possible by the differences between the Member States' regulatory frameworks in this area. Employers' ability to exploit such differences – by pursuing redundancies in one country and not in another based on the legal ease with which it could do so[6] – was limited by the CRD.

ii. The 1992 Amendment

The initial Directive 75/129/EEC was significantly amended in 1992, aiming to give the Directive a more transnational dimension and to add clarifications.[7] The changes concerned: (i) the definition of collective redundancies, equating certain forms of termination to redundancies *sensu stricto*; (ii) the application of collective redundancy law when the establishment stops due to a judicial decision; (iii) the possibility for representatives to call upon technical experts; (iv) a strengthening of information and consultation duties, including stressing the need for consultation in good time, laying out in detail the information that has to be provided, and highlighting the importance of accompanying social measures; (v) an emphasis on the application of the law even if the redundancies are incited by an undertaking controlling the employer; and (vi) the duty to have judicial and/or administrative procedures for the enforcement of collective redundancy law available to the workers' representatives and/or workers.[8]

The CRD from 1998 consolidated the Directives from 1975 and 1992 for reasons of clarity and rationality.[9]

The 2015 amendment of the CRD relates to seafarers.[10]

iii. The Content

The CRD provides a common procedural framework with two main sets of demands on Member States' domestic law: it must require that employers hold consultations with worker representatives, and it must require that employers notify the authorities of their plans to ensure that the social consequences of the resulting unemployment are addressed.[11] The structure of the CRD is straightforward: Article 1 defines "collective redundancy"; Article 2 contains the employer's information and consultation duties; and Articles 3 and 4 establish the broad lines of the notification procedure.

§ 1 Definition and thresholds for collective redundancies

DEFINING A REDUNDANCY – Article 1 CRD defines "redundancies" broadly, as clarified in EU case law. Accordingly, the Directive targets any dismissal that occurs "*for one or more reasons not related to the individual workers concerned*".[12] The CJEU tends to view dismissals without the individual's consent as a "redundancy".[13]

SETTING THE THRESHOLD FOR COLLECTIVE REDUNDANCIES – Article 1 CRD leaves the Member States the choice of defining a *collective* redundancy either as a number of workers released within 30 days (exact number dependent on the size of the establishment's workforce)[14] or 20 workers released within 90

days. Various clarifications have been made by the EU legislature and the CJEU about how these thresholds must be calculated.[15]

§ 2 Workers' representatives' information and consultation

Article 2 obliges Member States to ensure consultation between the employer and workers' representatives and imposes minimum requirements on the information the employer must provide. Furthermore, prior to the employer's final decision regarding the collective redundancies[16], the parties must consult with a view to reaching an agreement about the need for it and its consequences.[17]

§ 3 Notifying the public authorities

Article 3 CRD obliges employers to notify the competent public authority in writing of any projected collective redundancies.[18] Workers' representatives have the right to send any comments they might have to the public authorities. In principle, the public authorities have a "cooling-off" period of 30 days "*to seek solutions to the problems raised by the projected collective redundancies.*"[19] Member States can establish longer cooling-off periods.
Member States must provide effective remedies for enforcing the procedural requirements deriving from the CRD.[20]

B. Domestic Implementation of Directive 98/59/EC

France

IMPLEMENTING THE DIRECTIVES – The law of 3 January 1975[21], issued around the same time as Directive 75/129/EEC, drastically changed French collective redundancy law by clearly defining "economic dismissals", requiring consultation of the workers' representatives on the envisioned dismissals, and subjecting such dismissals to prior authorization by the administration.[22] The further changes to *licenciements pour motifs économique* in subsequent decades seem to have been[23] due to domestic politics rather than positive attempts to implement the EU rules.

GOING BEYOND THE DIRECTIVES – French collective dismissal law is more protective across the board than what the CRD's minimum requirements demand[24]: it has a broader scope, deeper consultation requirements, and more consequential notification procedures.[25]

Germany

IMPLEMENTING THE DIRECTIVES – Directive 75/129/EEC was inspired by German law, and only minor corrections were made to implement it. Section 17 of the Dismissal Protection Act (*Kündigungsschutzgesetz*), which contains the most relevant provisions, remains largely unamended.[26] It was mainly with the *Junk* ruling from the CJEU that notable differences appeared between German and EU law[27], and as a consequence, the Federal Labour Court changed its case law.[28]

GOING BEYOND THE DIRECTIVES – The scope of application of German collective redundancy law is broader than what the CRD demands,[29] and there is an elaborate legal system in place for social dialogue (mainly through the provisions of the Works Constitution Act (*Betriebsverfassungsgesetz*) that far surpasses what the CRD demands in terms of consultation and notification).[30]

The Netherlands

IMPLEMENTING THE DIRECTIVES – The initial Directive 75/129/EEC led to the Collective Redundancy Notification Law (*Wet melding collectief ontslag*) of 24 March 1976, systematically institutionalizing consultations with unions and the notification to the public authorities in the event of collective redundancies.[31] A 2012 amendment was the most significant of a number of changes to the law, making Dutch law more CRD compliant and more broadly applicable by broadening the law's scope, essentially obliging employers to consult the unions irrespective of how they want to terminate the employment contract.[32]

GOING BEYOND THE DIRECTIVES – Arguably going beyond what the CRD expects in terms of the consultation requirements[33], the most remarkable part about the Dutch system has to do with the preventive strategy that is adopted by Dutch dismissal law in general. In the context of collective redundancies, this requires the employer not only to notify[34] but also to obtain a "dismissal permit" (*ontslagvergunning*)[35], usually from the Institute for Employee Benefit Schemes[36].

The United Kingdom

IMPLEMENTING THE DIRECTIVES – The initial Directive 75/129/EEC gave rise to the Employment Protection Act 1975 (EPA), but this was deemed an insufficient transposition of the Directive in 1994.[37] Around the time of the infringement proceedings, the UK advanced the Trade Union Reform and Employment Rights Act 1993,[38] revising provisions from the EPA that would eventually become part of sections 188-198B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Post-Brexit, the UK is no longer bound by the CRD. No changes have taken place so far. UK collective redundancy law does not manifestly go beyond what the CRD requires.

C. Comparative Table

	France	Germany	Netherlands	United Kingdom
Threshold collective redundancy	2 dismissals or more in 30 days.[39] 10 or more in 30 days.[40]	More than 5 in 30 days (establishments 20-60 employees). 10 per cent or more than 25 in 30 days (establishments 60-500 employees). 30 or more in 30 days (establishments 500 employees and more).[41]	Dismiss at least 20 employees in one work area within 3 months.[42]	Dismiss 20 or more employees at one establishment within a period of 90 days or less.[43]
Public authority involved	Regional Directorates for the Economy, Employment, Labour and Solidarity (*Directions régionales de l'économie, de l'emploi, du travail et des solidarités – DREETS*)	Federal Agency for Employment (*Bundesagentur für Arbeit*).	Institute for Employee Benefit Schemes (*Uitvoeringsinstituut Werknemersverzekeringen*)	Secretary of State for Business, Innovation and Skills
Public authority's powers	Many powers. Most significantly, validate collective agreements or approve an employer's unilateral document containing a job protection plan.[44]	Decide to temporarily suspend redundancies from taking effect and temporarily authorize short-time work (*Kurzarbeit*).[45]	Provide dismissal permits if the economic reasons the employer invokes legitimate collective redundancies.[46]	Ask for further information.[47]
Dominant actor for information and consulta-tion	Social and economic committee (*comité social*	Works council (*Betriebsrat*)	Concerned employees' associations (*belanghebbende verenigingen van werknemers*)[48]	Union representatives, or in the absence thereof, elected

	et économique)			employee representatives.[49]
The core component of negotiations	Job protection plan (*plan de sauvegarde de l'emploi*)[50]	Social plan (*Sozialplan*)[51]	Agreement on social measures (*sociale begeleidingsmaatregelen*)[52]	Agreement on avoiding dismissals, reducing the number, and mitigating consequences.[53]

D. Comparative Perspective on Collective Redundancy Law

Notwithstanding the CRD, collective redundancy law remains highly domestically driven, and, therefore, its implementation is very different in each of the countries examined.

THE SCOPE – The German definition of redundancies is particularly broad compared to other countries. The numerical threshold in France is particularly low compared to other countries. Some legal systems stick closer to the CRD's framework, such as the Netherlands and the United Kingdom. However, even in those instances, small differences between Dutch and UK law can lead to varied outcomes.

THE INFORMATION AND CONSULTATION REQUIREMENTS – France and Germany both rely heavily on employee representative bodies (the social and economic committee and the works council, respectively), but those bodies have very different compositions, with German works councils being made up of only employee representatives. The Netherlands and the United Kingdom mostly rely on trade union representatives for information and consultation. The Netherlands has a specific mechanism to identify concerned employee associations, and the works council also has a subsidiary but significant role in the consultations. In the UK, a specific mechanism exists to appoint/elect employee representatives if there are no union representatives in the company.

THE DUTY TO CONSULT – This obligation is implemented very differently in all countries. In France, under certain circumstances, the duty results in a job protection plan. That plan is partially formed through negotiations with the employee representatives (social and economic committee). However, since it is also verified by the public authorities and must comply with various conditions prescribed by law, the employee representatives do not always significantly influence the content of the plan. In comparison, the contribution to the social plan by the works council in Germany can be expected to generally be more significant. Compared to France, the German public authorities are far less involved, and the law is less strict in terms of what the social plan needs to contain. Therefore, the responsibility falls more squarely on the shoulders of the German works council to influence the social plan. Compared to France and Germany, the duty to consult with a view of reaching an agreement is less prominent in the Netherlands and the United Kingdom. Negotiations are obligatory in both countries, in accordance with the CRD, but the laws are not as purposefully designed to ensure that a negotiated outcome will be achieved.

THE NOTIFICATION TO THE PUBLIC AUTHORITIES – The German and UK system limit the public authority's intervention to notification, information and potentially mediation (especially in Germany). These authorities' role is minimal. In contrast, *DREETS* in France can play a very important role, most notably as it will generally evaluate whether the collective dismissal proceedings have been appropriately applied. The Institute in the Netherlands is likewise strongly involved. It will often have to confer the necessary dismissal permits to the employer and analyzes the economic reasons driving the collective redundancy.

E. Conclusion

Directive 75/129/EEC had a significant impact on the countries studied in this report in the 1970s. The CRD's impact in subsequent decades has been more limited. The broader structural changes had already occurred in the 1970s. France, Germany, and the Netherlands have, for the most part,

considered their collective redundancy law to meet the minimum requirements of the CRD ever since the 70s. This is true to a large extent, as these countries' domestic laws are indeed stricter/more protective than required by the CRD. Therefore, discrepancies between domestic law and the CRD are of a more technical/limited nature, necessitating only small amendments in domestic (case) law (that can have major impacts, however – e.g., *Junk*). The UK is an outlier, having been found not to have properly implemented the CRD in the 1990s. Significant changes have been advanced in response; however, the country has never really gone beyond what is required by the CRD.

Droit suisse sur les licenciements collectifs

A. Cadre juridique

Le législateur suisse a repris la directive (UE) 75/129/CEE aux art. 335d ss CO[i]. L'art. 335d CO définit le licenciement collectif selon l'une des deux options prévues dans la directive (UE) 98/59/CE (art. 1, ch. 1, let. a, i). L'application aux contrats de durée déterminée qui prennent fin avant la durée convenue, prévue à l'art. 335e, al. 1, CO, correspond à l'art. 1, ch. 2, let. a de la directive (UE) 98/59/CE. L'art. 335e, al. 2 exclut les cas de cessation d'activité sur ordre du juge, de faillite ou de concordat par abandon d'actifs du champ d'application. Ces exceptions ne sont plus prévues dans la directive (UE) 98/59/CE, quand bien même des allègements sont possibles dans ces cas concernant la notification à l'autorité qui peut n'intervenir que sur demande de celle-ci (art. 3, ch. 1, par. 2), et la fin des contrats résiliés au minimum 30 jours après la notification à l'autorité, règle que les Etats membres peuvent exclure (art. 4, ch. 4). L'art. 335f CO, qui prévoit une obligation de consulter la représentation des travailleurs ou, à défaut, les travailleurs, reprend l'art. 2 de la directive (UE) 98/59/CE[ii]. L'art. 335g CO règle la procédure devant l'office cantonal du travail: ce dernier reçoit une notification écrite du projet de licenciement (al. 1 et 2) et tente de trouver des solutions (al. 3). Ces dispositions correspondent aux règles prévues à l'art. 3 de la directive (UE) 98/59/CE. L'art. 335g, al. 4, CO fixe le terme minimal des contrats résiliés par le licenciement collectif à 30 jours après la notification à l'office cantonal, conformément à l'art. 4, ch. 1 de la directive (UE) 98/59/CE.

B. Comparaison entre le droit suisse et la directive (UE) 98/59/CE

Vu que les art. 335d ss CO reprennent la directive (UE) 75/129/CEE, modifiée par la directive (UE) 92/56/CE et remplacée par la directive (UE) 98/59/CE, sans qu'elle n'ait fait l'objet de modifications matérielles fondamentales par rapport au droit de l'UE en vigueur, l'on peut aisément en conclure que le droit suisse est pour l'essentiel conforme aux exigences de l'UE. Ce constat est renforcé par le fait que le Tribunal fédéral tient compte de la volonté du législateur suisse et interprète le droit suisse conformément au droit et à la pratique européens[iii]. Les évolutions subséquentes pourraient également être prises en compte, le Tribunal fédéral ayant parfois envisagé une approche dynamique dans la prise en compte du droit de l'UE[iv]. Toutefois, dans un arrêt récent concernant les art. 335d ss CO, il a laissé cette question ouverte, considérant que la prise en compte d'une jurisprudence de l'UE

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[i] Voir ATF 137 III 27, c. 3.2

[ii] L'art. 2, par. 3, pts. v et vi exceptés.

[iii] *Ibid.*

[iv] Ainsi, concernant la directive 77/187/CEE sur les transferts d'entreprise, l'ATF 129 III 335, c. 6 précise: " Die Angleichung in der Rechtsanwendung darf sich dabei nicht bloss an der europäischen Rechtslage orientieren, die im Zeitpunkt der Anpassung des Binnenrechts durch den Gesetzgeber galt. Vielmehr hat sie auch die Weiterentwicklung des Rechts, mit dem eine Harmonisierung angestrebt wurde, im Auge zu behalten." Dans ce sens, concernant la directive 98/59/CE, BK-REHBINDER/STÖCKLI, n 1 ad art. 335d; contra, CS-BRUCHEZ/DONATIELLO/SCHWAAB, n. 2 ad art. 335d CO et WYLER/HEINZER, Droit du travail, 665.

postérieure dépend d'une volonté du législateur suisse exprimée dans ce sens [v]. Quant aux droits nationaux des Etats membres décrits à la let. B ci-dessus, ils vont volontairement plus loin que les minimas fixés par la directive, si bien que les différences entre droit suisse et droits nationaux des Etats membres ne reflètent pas une incompatibilité avec le droit de l'UE. Il n'en reste pas moins que des différences avec la directive actuelle existent sur certains points, comme l'application des règles aux cessations d'activités ordonnées par le juge[vi].

[v] ATF 149 III 98, c. 5.7: "...la question de l'admissibilité de la prise en compte de la jurisprudence européenne postérieure à l'entrée en vigueur de l'art. 335d CO peut ici rester ouverte, dans la mesure où le législateur n'a pas clairement exprimé sa volonté de continuer à adapter le droit suisse au droit de l'Union européenne...".

[vi] Voir WYLER/HEINZER, Droit du travail, 665-666.

[1] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

[2] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the Agreement on the European Economic Area.

[3] Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies.

[4] Recital 2 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[5] Recitals 3 and 4 Council Directive 98/59/EC of 20 July 1998.

[6] J. Heinsius, The European Directive on Collective Dismissals and its Implementation Deficits: Six ECJ Judgements as a Potential Incentive for Amending the Directive, 2009 (3) The International Journal of Comparative Labour Law and Industrial Relations p. 261 *et seq*, p. 262.

[7] L. Dolding, Collective Redundancies and Community Law, 1992 (4) Industrial Law Journal, p. 310 *et seq*.

[8] Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies.

[9] S. Laulom, Directive 89/59/EC on the approximation of the laws of the Member States relating to collective redundancies, in E. Ales *et al.* (eds.), International and European Labour Law, Baden-Baden 2018, p. 982.

[10] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers

[11] Report by the Commission to the Council on progress with regard to implementation of the Directive on the approximation of the laws of the Member States relating to collective redundancies, SEC(91) 1639 final, p. 4.

[12] Art. 1 Council Directive 98/59/EC of 20 July 1998.

[13] CJEU 7 September 2006, Case C-187/05 to C-190/05, *Georgios Agorastoudis and Others v. Goodyear Hellas AVEE*.

[14] The redundancies have to affect "*at least 10* [workers] *in establishments normally employing more than 20 and less than 100 workers, at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,* [or] *at least 30 in establishments normally employing 300 workers or more*". Art. 1 Council Directive 98/59/EC of 20 July 1998.

[15] For instance, the CJEU had to clarify what is meant by an "establishment" because this is the relevant reference point for counting the number of redundant workers. CJEU 30 April 2015, Case C-80/14, *Union of Shop, Distributive and Allied Workers (USDAW), B. Wilson v. WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd, Secretary of State for Business, Innovation and Skills*.

[16] The consultation procedure must be started once a strategic or commercial decision has been taken that compels the employer to contemplate or plan collective redundancies. CJEU 10 September 2009, Case C-44/08, *Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy*.

[17] Those consultations must "*at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.*" Art. 2 Council Directive 98/59/EC of 20 July 1998.

[18] CJEU 27 January 2005, Case C-188/03, *Irmtraud Junk v. Wolfgang Kühnel*.

[19] Art. 4 Council Directive 98/59/EC of 20 July 1998.

[20] Art. 6 Council Directive 98/59/EC of 20 July 1998.

[21] F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, 7th ed., Paris: LGDJ 2020, p. 596.

[22] *Loi n° 75-5 du 3 janvier 1975 relative aux licenciements pour cause économique*.

[23] The Law from 27 January 1993 did oblige employers to present a plan for the redeployment of employees as part of the broader "social plan". This change might have related to Directive 92/56/EEC which, compared to Directive 75/129/EEC, emphasizes the need for social measures aimed at "*aid for redeploying or retraining workers made redundant.*" Art. 60 *loi n° 93-121 du 27 janvier 1993 portant diverses mesures d'ordre social*. Reference should also be made to the CJEU's ruling no. C-385/05 in which it pointed out to the French government that national legislation which excludes, even temporarily, a specific category of workers from the calculation of the staff numbers for the threshold of applying collective redundancy law is not reconcilable with the CRD. CJEU 18 January 2007, Case C-

385/05, *Confédération générale du travail (CGT) and Others v. Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement*.

24 Most discussions in France center on how to make collective dismissal law less restrictive, not on how to provide more protections. G. Auzero, D. Baugard & E. Dockès, Droit du travail, 33rd ed., Paris: Dalloz 2020, p. 601-602.

25 Art. L. 1233-24-1 – L. 1233-24-4 *code du travail*. See also F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, 7th ed., Paris: LGDJ 2020, p. 608.

26 C. Schmidt & F. A. Wilkening, Reformbedarf im Rahmen von Massenentlassungen – Umformulierung von § 17 KSchG, 2017 (4) NZA-RR, p. 169 *et seq*; K. Spelge, Die Gewährung von Massenentlassungsschutz im Europäischen Mehrebenensystem – Eine unlösbare Aufgabe?, 2018 (5) RdA, p. 297 *et seq*.

27 More specifically, German law used to consider it obligatory to consult and notify the public authorities prior to the dismissal (*Entlassung*) of the employee, i.e., prior to the moment the employment contract ends. However, the CJEU clarified that under the Directive, these obligations arise prior to the notice of dismissal (*Kündigung*), i.e., prior to the declaration by an employer of his intention to terminate the employment contract. CJEU 27 January 2005, Case C-188/03, *Irmtraud Junk v. Wolfgang Kühnel*; S. Gräf, Aktuelle Probleme des Massentlassungsrechts, 2009 (1) StudZR, p. 59 *et seq*, p. 60-61.

28 M. Weiss & M. Schmidt, Labour Law and Industrial Relations in Germany, 4th ed., Alphen aan den Rijn: Kluwer 2008, p. 141; M. Weiss, M. Schmidt & D. Hlava, IEL Labour Law: Germany, Alphen aan den Rijn: Wolters Kluwer 2023, p. 151.

29 The German notion of a redundancy for the purpose of establishing the thresholds for collective redundancies seems particularly broad. The Dismissal Protection Act (*Kündigungsschutzgesetz*) stipulates that summary dismissal shall not be included in the calculation of the number of redundancies. Also, managerial staff members are not considered a worker, hence, not to be counted. Thirdly, a non-renewal of a fixed-term employment contract is left outside of the calculation. Apart from these examples, however, other types of termination must arguably be counted, including regular dismissals for personal reasons. S. Lingemann, R. von Steinau-Steinrück & A. Mengel, Employment & Labor Law in Germany, 2nd ed., München: C.H. Beck 2008, p. 43; M. Eylert & R. Schinz, Collective Dismissal in the Federal Republic of Germany, in R. Cosio *et al.* (eds.), Collective Dismissal in the European Union: A Comparative Analysis, Alphen aan den Rijn 2017, p. 193 *et seq*, p. 199. The quantitative thresholds for determining a *collective* redundancy are somewhat lower, too. See Section 17 *Kündigungsschutzgesetz.*

30 The law confers powers onto the works council to pursue a reconciliation of interests (*Interessenausgleich*) on the planned change of business with the employer, and to contribute to the making of a social plan (*Sozialplan*) for compensation or mitigation of economic disadvantages suffered by employees. An entire apparatus has been conceived to support these discussions with a view to reaching an agreement

31 *Wet van 24 maart 1976, houdende regelen inzake melding van collectief ontslag*.

32 Whereas initially only dismissals officially permitted by the competent public authorities would be counted for the purpose of the collective redundancy, now also the dissolution and termination of the employment contract by mutual agreement would be counted. *Wet van 17 november 2011, houdende wijziging van de Wet melding collectief ontslag in verband met de uitbreiding van de reikwijdte en ter bevordering van de naleving van deze wet*; B. Filippo, Art. 1 t/m 9 – Wet melding collectief ontslag, Sdu Commentaar Arbeidsrecht Thematisch, 2022

33 Art. 3 *wet van 24 maart 1976, houdende regelen inzake melding van collectief ontslag*; Art. 2 and 25 (6) *wet van 28 januari 1971, houdende nieuwe regelen omtrent de medezeggenschap van de werknemers in de onderneming door middel van ondernemingsraden*.

34 Art. 3 – 6 *wet van 24 maart 1976, houdende regelen inzake melding van collectief ontslag*.

35 Art. 7:669 of the Civil Code describes the reasonable grounds for dismissal. One of these grounds is a dismissal for economic reasons. The Institute will, among other things, verify whether there is indeed an economic reason driving the redundancies or if the employer inappropriately relies on this ground. This assessment occurs according to the rules provided in a manual: UWV, *Uitvoeringsregels: Ontslag om bedrijfseconomische redenen*, Den Haag: Rijksoverheid 2020. For example, the Institute refused to provide Ryanair with a dismissal permit for collective redundancies. Ryanair had insufficiently demonstrated that the closure of the airline's base in the city of Eindhoven related to improving efficient operations and was motivated by economic circumstances. Instead, there were indications that the closure of the base occurred as retaliation because of strikes. The court overturned the assessment of the Institute on this point, ruling that there were objective economic reasons for the closure of the Eindhoven base. *Rechtbank Oost-Brabant* 2 October 2019, Case ECLI:NL:RBOBR:2019:5646.

[36] The Institute is called *Uitvoeringsinstituut Werknemersverzekeringen* in Dutch, abbreviated as UWV. Info: G. Boot & Y. Erkens, Collective Dismissal in the Netherlands, in Roberto Cosio *et al.* (eds.), Collective Dismissal in the European Union: A Comparative Analysis, Alphen aan den Rijn 2017, p. 337 *et seq*, p. 338.

[37] The European Commission initiated infringement proceedings in 1992 because the Directive was insufficiently transposed. More specifically, the Commission argued that:
"*the EPA does not ensure that workers' representatives will be informed and consulted in all the cases covered by the directive, since neither that statute nor any other provision of United Kingdom law provides for the designation of workers' representatives where an employer refuses to recognize them. Second, the scope of the EPA, which is limited to cases of 'redundancy', is narrower than that of the directive, which extends to all dismissals not related to the individual workers concerned. Third, the EPA does not ensure that consultation with workers will take place with a view to reaching an agreement and cover ways and means of avoiding redundancies or mitigating the consequences. Fourth, the EPA does not provide for effective sanctions against an employer who fails to comply with the obligation to inform and consult workers' representatives as required by the directive.*"[37]
Notably, the CJEU found in 1994 that the United Kingdom and Northern Ireland had failed to adequately transpose the directive on all four counts. CJEU 8 June 1994, C-383/92, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*.

[38] M. Hall & J. Purcell, Consultation at Work: Regulation and Practice, Oxford: OUP 2012, p. 71.

[39] Art. L. 1233-8 *code du travail*.

[40] Art. L. 1233-21 *code du travail*.

[41] Section 17 *Kündigungsschutzgesetz*.

[42] Art. 3 *wet van 24 maart 1976, houdende regelen inzake melding van collectief ontslag*.

[43] Section 188 Trade Union and Labour Relations (Consolidation) Act 1992.

[44] Art. L. 1233-57-1 *code du travail*.

[45] Sections 18 and 19 *Kündigungsschutzgesetz*.

[46] UWV, *Uitvoeringsregels: Ontslag om bedrijfseconomische redenen*, Den Haag: Rijksoverheid 2020.

[47] Section 193 Trade Union and Labour Relations (Consolidation) Act 1992.

[48] Art. 3 *wet van 24 maart 1976, houdende regelen inzake melding van collectief ontslag*.

[49] Section 188 Trade Union and Labour Relations (Consolidation) Act 1992.

[50] Art. L. 1233-66 *code du travail*.

[51] Section 112 *Betriebsverfassungsgesetz*.

[52] Art. 3 *wet van 24 maart 1976, houdende regelen inzake melding van collectief ontslag*.

[53] Section 188 (2) Trade Union and Labour Relations (Consolidation) Act 1992.

EU DIRECTIVES ON EMPLOYEE INFORMATION AND CONSULTATION: The Directives on Information and Consultation, European Works Councils and European Companies

1. A General Framework for Informing and Consulting Employees

A. Directive 2002/14/EC of 11 March 2002

i. The Objectives

Directive 2002/14/EC of 11 March 2002 advances principles, definitions and arrangements for employee information and consultation (hereinafter: I&C). It focuses solely on establishing minimum standards, not attempting to harmonize domestic law.[1] Member States must comply with the Directive's minimum standards on I&C but enjoy a lot of discretion to retain the particularities of their national system.[2] The Directive has been amended as regards seafarers[3] and is in force in the EEA.[4]

Directive 2002/14/EC is called the "Framework Directive", as it complements and supports existing Community legislation on I&C in areas such as collective redundancies and transfers of undertakings.[5] Importantly, contrary to preexisting EU instruments, the Framework Directive also covers more commonplace developments in the enterprise (not just big or unusual events, such as transnational issues or collective redundancies).[6]

ii. The Content

§ 1 The scope of application of the Framework Directive

Member States decide to apply the Framework Directive either once undertakings employ at least 50 employees in one Member State or once establishments employ at least 20 employees.[7] An undertaking is a public or private enterprise carrying out an economic activity, whether or not operating for gain; an establishment is a unit of business in the enterprise where an economic activity is carried out on an ongoing basis with human and material resources.[8] Within the boundaries provided by EU law,[9] Member States must determine the method for calculating the number of employees in relation to the undertaking/establishment to clarify at which point I&C obligations are triggered.[10]

§ 2 Arrangements for information and consultations

Member States must determine the practical arrangements for exercising I&C on the basis of principles from Article 1 of the Framework Directive: autonomy,[11] effectiveness,[12] and cooperation.[13] Article 4 provides specific instructions about the parameters within which I&C must occur (e.g., mandatory topics for information). If information is due, it must be given in an appropriate manner (timely, clear and substantive), allowing employee representatives, where necessary, to prepare for consultation.

The Framework Directive also contains criteria describing how consultations, if appropriate, should proceed (*i.a.*, the relevant level of management and potentially with a view of reaching an agreement).[14] According to some scholars, the Directive implies an obligation of good faith social dialogue.[15] Furthermore, Member States must ensure the confidentiality of I&C proceedings and appropriately protect employee representatives so that they can fulfil their functions.[16]

As an exemption from Article 4, Article 5 offers Member States the possibility of entrusting management and labour (for instance, at the company or establishment level) with the task of defining the practical I&C arrangements through a negotiated agreement. Consequently, a negotiated agreement rather than statutory law will shape the arrangement (see the discussion below on the United Kingdom).

B. Domestic Implementation of Directive 2002/14/EC

France

IMPLEMENTING THE DIRECTIVE – France did not consider it necessary to fundamentally amend its laws to transpose Directive 2002/14/EC.[17] Nonetheless, the Law from 18 January 2005 clarified some competences and remedies in court.[18] Further temporary measures[19] from a 2005 ordinance, ones permitting the omission of employees under the age of 26 from determinations of triggering thresholds, violated the Framework Directive in the view of the CJEU.[20]

GOING BEYOND THE DIRECTIVE – The French I&C mechanism goes beyond what is required by the Framework Directive. A major development[21] occurred in 2017 when France attempted to revitalize, simplify and qualitatively improve social dialogue.[22] Replacing three distinct representative bodies,[23] French law now prescribes I&C through a single representative body: the social and economic committee (*comité social et économique*). This committee must be established in enterprises with at least 11 employees.[24] Reflecting the Framework Directive, one set of provisions prescribes the committee's competences in enterprises with less than 50 employees; another set governs larger enterprises.[25] A social and economic committee can convert into a works council (*conseil d'entreprise*).[26] Once converted, the works council will negotiate, conclude and revise company and establishment agreements (taking over these competences from the trade union delegates (*délégués syndicaux*)).[27] Although exceeding the Directive's requirements in many respects, problems related to the mechanism's "effectiveness" have been raised.[28]

Germany

IMPLEMENTING THE DIRECTIVE – Germany did not consider it necessary to amend its laws to transpose Directive 2002/14/EC.[29] Scholars nonetheless remark that there is an insufficient transposition of the Directive for what concerns the I&C exercised through the economic committee (*Wirtschaftsausschuss*); this specialized committee discusses an employer's economic (development) issues.[30]

Under the Works Constitution Act (*Betriebsverfassungsgesetz*), works councils (*Betriebsräte*) are set up in establishments with (generally) at least 5 permanent employees entitled to vote.[31] In the case of very small enterprises, the works council is made up of 1 person only. Works councils have proper rights of co-determination on social issues (*Mitbestimmungsrechte*).[32] The strength of the works council's right of involvement depends on whether it concerns social, personnel policy or economic issues. As such, there are at least four degrees of intensity between simple rights of information and proper co-determination.[33]

GOING BEYOND THE DIRECTIVE – Not only does the Works Constitution Act's scope go beyond the Directive's requirements, but German law also equips the works council with far stronger rights than the Directive's mandated I&C rights.

The Netherlands

IMPLEMENTING THE DIRECTIVE – The Law of 2 December 2004 transposed the Framework Directive by making minor[34] amendments to the Law on Works Councils (*Wet op de ondernemingsraden*): (i) conditions were added to the Social and Economic Council's ability to grant individual companies an exemption from the obligation to set up a works council; (ii) it became possible to ask a court to lift the obligation for secrecy imposed by the employer.[35]

GOING BEYOND THE DIRECTIVE – Dutch Law goes beyond the Directive. Once the enterprise has 10 employees, its employees can force the employer to establish an "employment representation" (*personeelsvertegenwoordiging*).[36] Subsequently, an enterprise in which, as a rule, at least 50 persons are employed must, in any case, establish a full-fledged works council.[37] Dutch works councils have strong rights, issuing opinions on many issues,[38] and having to consent before the employer can adopt,

amend, or abolish various internal company rules and regulations.[39] In fact, indicative of their influence, van den Berg *et al.* observe that Dutch works council members "*are much more convinced of their impact on managerial changes in decision-making than the German WC members.*"[40]

The United Kingdom

IMPLEMENTING THE DIRECTIVE – The Information and Consultation of Employees Regulations (ICER) 2004 implemented the Framework Directive. This was a momentous change because the UK historically relies on a minimalist, "voluntary" tradition, having no overarching statutory framework governing "works councils" (or similar representative bodies).[41] In fact, some argue that mandatory I&C in Britain "*derive*[s] *almost entirely from EU law.*"[42] Because the UK did not have a "*general, permanent and statutory system of information and consultation of employees*" prior to the Framework Directive, the country used the transitional provisions from Article 10 Framework Directive. Moreover, the country relies on Article 5's derogation: UK employers and employee representatives must negotiate about how I&C will take place within the undertaking once it has 50 employees and a valid employee request is issued. Hence, I&C remains far less dictated by statutory law than in the continental systems.

GOING BEYOND THE DIRECTIVE – The UK does not go beyond the Directive. Even if the UK made major changes, "*it is widely thought that the ICE Regulations have had a limited impact, with a low take-up by employees.*"[43] Valid employee requests (with sufficient employee support) are needed before employers must negotiate, and, so far, few representative bodies are being established through this mechanism. To that extent, it is too early to say whether 2019's amendments of ICER, easing the conditions, will make a difference.[44] Apart from this labour-friendly amendment, the British authorities have not yet amended ICER in the post-Brexit period. Nevertheless, this area of law may eventually be overhauled.[45]

C. Comparative Table

	France	Germany	Netherlands	United Kingdom
Representative body	Social and economic committee (*comité social et économique*).[46]	Works council (*Betriebsrat*) and economic committee (*Wirtschaftsausschuss*) in larger companies.[47]	Works council (*Ondernemingsraad*) and potentially employee representation (*personeelsvertegenwoordiging*) in smaller companies.	Information and consultation representatives or employees.[48]
Threshold	Obligatory once at least 11 employees for 12 consecutive months in the *enterprise*.[49]	Works council is obligatory in *establishments* with generally at least 5 permanent employees entitled to vote. Economic committee in *undertakings* which, as a rule, employ more than 100 permanent employees.[50]	Employee representation is mandatory, upon request employees, if 10 employees or more are in the *enterprise*.[51] Works council is obligatory in *enterprises* in which, as a rule, at least 50 persons are employed.[52]	In *undertakings* with 50 or more employees, negotiations are obligatory once a "valid employee request" has been made.[53]
Composition	Comprises the employer and a staff delegation; once 50 employees, union delegate(s) join the committee.	Works council comprises only employee representatives. Economic committee comprises members of the undertaking, appointed by the	Comprises only employee representatives.[55]	In principle, a ballot among employer's employees to elect the relevant number of information and consultation representatives.[56]

		works council, who possess the professional aptitude to discuss economic matters.[54]		
Co-determination rights	Not really. "Participation" rights in the boards of directors or supervisory boards of companies.[57] A limited right to veto certain decisions exists.[58]	The works council has clear statutory co-determination rights on certain subjects.[59] It also needs to consent to other specified decisions.[60]	The works council has to consent to decisions establishing, amending or repealing various internal rules and regulations.[61] Employee representation in smaller companies partially has these competences.[62]	Although a negotiated agreement could confer co-determination or veto rights, this is rather unlikely.
Confidentiality	Professional secrecy about manufacturing processes, and obligation of discretion for confidential info.[63]	Special duty of confidentiality, and secrecy about personal circumstances and matters.[64]	Detailed explanation of confidentiality obligations.[65]	Statutory duty not to disclose confidential information.[66]
Dismissal protection	Art. L. 2317-1, L. 2411-5 and L. 2432-1 *code du travail*	Sections 78 and 103 *Betriebsverfassungsgesetz* and section 15 *Kündigungsschutzgesetz*	Art. 7:670 (4) and (10), 7:670a (2) (c) and 7:671b (6) *Burgerlijk wetboek*	Sections 30 and 32 ICER 2004, and section 105 Employment Rights Act 1996

D. Comparative Perspective on Information and Consultation

THRESHOLDS FOR ESTABLISHING THE REPRESENTATIVE BODIES – The United Kingdom's threshold of 50 employees in the undertaking and a valid employee request are particularly challenging. The Netherlands similarly makes works councils mandatory only once the enterprise has 50 employees; however, (i) the works council is more automatically established at this stage than the UK's request-triggered, negotiation-based representative bodies, and (ii) upon request of the employees, a more "basic"[67] form of employee representation is provided in Dutch enterprises with 10 employees or more. French law makes the establishment of a social and economic committee obligatory for 11 employees. The committee gains significant competences once the enterprise has 50 employees. Works councils in Germany become mandatory once 5 employees are entitled to vote in the establishment. This seems to present the lowest threshold. Overall, France, Germany and The Netherlands can all be considered to go beyond the Framework Directive's requirements in terms of the thresholds.

EXTENSIVE RIGHTS FOR THE EMPLOYEE REPRESENTATIVES – The Framework Directive merely wants employers to have a reasoned response to employee representatives' opinions or, sometimes, to consult with a view to reaching an agreement.[68] This is also the default[69] situation for UK employee representatives unless negotiations between the parties lead to an agreement on more thorough rights of involvement. Germany and The Netherlands go significantly beyond what the Directive requires, implementing proper co-determination rights (see table above). The German conciliation committee[70] (*Einigungsstelle*) and Dutch subdistrict court[71] (*kantonrechter*) are in place to resolve a potential gridlock between the employer and the works council. Furthermore, it is important to note that besides genuine rights of co-determination, representative bodies may have other means available to influence corporate governance (e.g., French warning rights[72], Dutch stringent advice[73], German employee complaints[74]).

E. Conclusion

Unlike many other EU directives, the Framework Directive does not clearly pursue harmonization. It predominantly imposes minimum requirements. This has meant that minor changes notwithstanding, France, Germany and the Netherlands have not had to transpose the Directive. Holistically speaking, their industrial relations systems go beyond what is required. The United Kingdom found itself in a very different situation, having to make significant changes. Striking a balance between its voluntary tradition and the Directive's push for more structural employee representation remains delicate.

Droit suisse sur l'information et la consultation des travailleurs

A. Cadre juridique

En droit suisse, c'est la loi fédérale du 17 décembre 1993 sur l'information et la consultation des travailleurs dans les entreprises (Loi sur la participation)[i] qui contient les règles générales sur la participation des travailleurs. Il s'agit d'une loi-cadre qui est complétée par des droits spéciaux de participation prévus dans les dispositions matérielles correspondantes, comme en matière de licenciements collectifs (art. 335d ss CO), de transfert d'entreprise (art. 333a CO) ou de protection de la santé (art. 48 LTr). La loi sur la participation a été adoptée en 1993 dans le cadre du programme Swisslex, consécutif au rejet de l'adhésion de la Suisse à l'EEE[ii]. Elle était destinée à instituer un cadre général pour la participation en Suisse dans le but de mettre en œuvre des droits spéciaux de participation prévus par le droit de la Communauté européenne[iii]. Mais elle ne reprend pas une directive européenne correspondante, qui n'existait pas encore à l'époque, si bien qu'une interprétation conforme à la directive (UE) 2002/14/CE ne s'impose pas dans ce cas[iv].

B. Comparaison entre le droit suisse et la directive (UE) 2002/14/CE

La loi sur la participation s'applique "à toutes les entreprises privées qui, en Suisse, occupent des travailleurs en permanence." (art. 1). Deux points peuvent être relevés en comparaison avec la directive (UE) 2002/14/CE : le champ d'application de la loi suisse est plus large, car il ne comprend pas de seuil minimal correspondant aux deux options prévues à l'art. 3, al. 1 de la directive (entreprise employant au moins 50 ou établissement employant au moins 20 travailleurs) ; il est également plus étroit, car il ne comprend pas les entreprises publiques (l'art. 2, let. a de la directive définit l'entreprise comme une "entreprise publique ou privée").

Sur le fond, la loi sur la participation octroie tout d'abord aux travailleurs le droit d'élire une représentation, dans les entreprises occupant au moins cinquante travailleurs (art. 3). Dans les entreprises occupant moins de 50 travailleurs, une représentation des travailleurs peut être constituée avec l'accord de l'employeur, auquel cas les dispositions de la loi sur la participation s'appliquent[v]. Si une représentation n'est pas constituée dans une entreprise donnée, les travailleurs exercent directement les droits à l'information et à la participation (art. 4).

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[i] RS 822.14.

[ii] Message du 24 février 1993 sur le programme consécutif au rejet de l'Accord EEE, FF 1993 I 757, ch. 243, qui reprend les modifications adoptées à l'origine en vue de l'adhésion à l'EEE; voir à ce sujet le message II du 15 juin 1992 sur l'adaptation du droit fédéral au droit de l'EEE (Message complémentaire II au message relatif à l'Accord EEE), FF 1992 V 506, 617 ss.

[iii] Message complémentaire II, FF 1992 V 506, 619.

[iv] WYLER/HEINZER, 1198-1199.

[v] WITZIG, Aurélien, Droit du travail, 2018, N 1911.

L'art. 9 de la loi sur la participation institue un droit à l'information pour la représentation des travailleurs. Ce droit consiste tout d'abord en une information sur toutes les affaires dont la connaissance est nécessaire pour que la représentation des travailleurs puisse s'acquitter de ses tâches (art. 9, al. 1). L'information est donnée en temps opportun et de manière complète. L'employeur doit ensuite informer sur les conséquences de la marche des affaires sur l'emploi et pour le personnel, et ce au moins une fois par année (art. 9, al. 2). Le droit à l'information sert à réaliser le mandat de la représentation des travailleurs, prévu à l'art. 8 de la loi, qui est de défendre les intérêts communs des travailleurs[vi]. Sur ce point, le droit suisse répond aux exigences de la directive, notamment s'agissant des modalités prévues à l'art. 4. L'art. 4, al. 2 décrit certes de manière plus détaillée le contenu de l'information, mais l'on ne voit pas de divergences notables avec le droit suisse.

L'art. 10 se rapporte aux droits de participation particuliers. Ce sont les droits qui sont prévus dans la "législation y relative", à savoir les lois ou dispositions spéciales correspondantes. L'art. 10, let. a à d énumère certains domaines pour lesquels de tels droits sont prévus: mesures de prévention des accidents et maladies professionnels (art. 82, al. 2, LAA[vii]), protection de la santé, organisation du temps de travail et aménagement des horaires de travail (art. 48, al. 1, LTr), transfert de l'entreprise, licenciements collectifs et affiliation à une institution de la prévoyance professionnelle et résiliation d'un contrat d'affiliation (art. 11 LPP[viii]). Il s'agit pour l'essentiel de droits à l'information et à la consultation. Une procédure de co-décision n'est prévue qu'à l'art. 11 LPP, l'al. 3ter de cette disposition prévoyant une prise de décision par un arbitre neutre ou à défaut par l'autorité de surveillance, si une entente entre l'employeur et les travailleurs n'est pas trouvée.

L'art. 10 de la loi sur la participation n'énumère pas tous les droits prévus spécialement. L'on peut encore citer l'introduction du travail du soir (art. 10, al. 1, LTr) ou l'établissement d'un règlement d'entreprise, ou encore les cas prévus dans la loi sur la fusion (art. 28, 50 et 77, respectivement en cas de fusion, de scission et de transfert de patrimoine). Il s'agit là aussi de droits à l'information et à la consultation. Des droits de co-décision sont notamment prévus en cas de déplacement des plages de l'horaire de jour et du soir (art. 10, al. 2, LTr), avec l'obligation de négocier un plan social (art. 335i CO) ou encore pour l'enregistrement simplifié de la durée du travail (art. 73b OLT 1).

Sur la forme, le droit suisse ne prévoit pas de droit général de consultation comme le prévoit l'art. 4 de la directive. Les droits spéciaux de consultation couvrent toutefois des domaines très larges si bien que cette différence formelle ne paraît pas impliquer des lacunes matérielles notables. Le droit suisse prévoit dans plusieurs situations, certes ponctuelles, un droit de co-décision, ce qui va plus loin que les exigences minimales de la directive.

En outre, les modalités de la consultation prévues à l'art. 4, al. 4 de la directive correspondent dans l'ensemble à la pratique suisse. Le contenu de la consultation n'est pas défini légalement en Suisse, ni de manière générale ni dans les différentes règles spéciales. Ses contours ont toutefois été tracés par la jurisprudence et la doctrine, en lien certes avec les différentes règles spéciales, qui sont toutefois interprétées en tenant compte du cadre posé par la loi sur la participation, notamment le principe de la bonne foi prévu à l'art. 11, al. 1.

Ainsi, la procédure de consultation doit être menée avec sérieux, la représentation des travailleurs devant pouvoir formuler des propositions que l'employeur se doit d'examiner sans être obligé de les accepter[ix]. Le but de la consultation est de permettre à la représentation des travailleurs d'influencer la décision de l'employeur, si bien que celui-ci doit informer assez tôt pour permettre un examen des mesures envisagées, la formulation de contre-propositions et l'examen de celles-ci par l'employeur[x].

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vi Message complémentaire II, FF 1992 V 506, 631.

vii Loi fédérale sur l'assurance-accidents (LAA; RS 832.20).

viii Loi fédérale sur la prévoyance professionnelle vieillesse, survivants et invalidité (LPP; RS 831.40).

ix TF, 4A_449/2010, c. 5.2.

x ATF 137 III 162, c. 1.1; 123 III 176, c. 4;

La notion de consultation reste tout de même controversée, plusieurs conceptions étant défendues dans la doctrine, en lien principalement avec l'art. 335f CO[xi]. La plus restrictive y voit un simple droit d'être entendu par l'employeur, une position intermédiaire admet, notamment au vu de la finalité de la consultation, qu'un échange doit avoir lieu entre l'employeur et les travailleurs, et une dernière ajoute qu'un éventuel refus de l'employeur doit être motivé[xii]. Une obligation de motiver a par ailleurs été reconnue par la jurisprudence cantonale[xiii]. Elle est également prévue explicitement aux art. 48, al. 1, LTr, 6, al. 2, OLT 3 et 6a, al. 2, OPA.

Ainsi, l'obligation de fournir une réponse motivée telle que prévue à l'art. 4, al. 4, let. d de la directive reste reconnue en droit suisse même si elle n'est pas consacrée sur le plan légal et qu'une partie de la doctrine la conteste. Pour ce qui est de l'art. 335f CO en particulier, il faut également noter qu'une interprétation eurocompatible, qui s'impose dans ce cas vu la volonté du législateur suisse de reprendre la législation européenne, imposerait d'admettre une obligation de motiver[xiv].

Pour ce qui est de l'exercice des activités de la représentation du personnel et du statut et de la protection des membres de la représentation, l'art. 11, al. 2 de la loi sur la participation enjoint à l'employeur de mettre à disposition les locaux, les moyens matériels et les services administratifs nécessaires, et l'art. 12 lui interdit d'empêcher l'exercice du mandat de représentation (al. 1) et de défavoriser les représentants des travailleurs en raison de l'exercice de leur activité, pendant ou après leur mandat (al. 2). Les représentants du personnel sont soumis à un devoir de discrétion (art. 14) et l'art. 15 traite des voies judiciaires ouvertes en cas de litiges, les associations d'employeurs et de travailleurs ayant la qualité pour agir - en constatation uniquement-, en sus des employeurs et travailleurs intéressés (al. 2). La protection contre le licenciement abusif de représentants du personnel est par ailleurs spécialement réglée à l'art. 336, al. 2, let. b, CO. Ces règles répondent aux exigences des art. 6 à 8 de la directive.

Les règles de la loi sur la participation sont en partie de droit impératif et ne peuvent faire l'objet de dérogation qu'en faveur des travailleurs (art. 2). Ainsi, le droit d'être représenté (art. 3), l'obligation d'information et les droits de participation spéciaux (art. 9 et 10), la protection des représentants du personnel (art. 12) et le devoir de discrétion (art. 14) ne peuvent faire l'objet de dérogations en défaveur des travailleurs. Cela est possible pour les autres règles, mais uniquement au moyen d'une convention collective de travail. Selon l'art. 5 de la directive, les modalités de l'information et de la consultation prévues à l'art. 4 peuvent être réglées librement par les partenaires sociaux, y compris au niveau de l'entreprise ou de l'établissement. De tels accords constituent des conventions collectives en droit suisse, si bien que les dérogations possibles en droit suisse sont conformes à ce que prévoit la directive.

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xi Voir sur les différentes positions, SHK-FACINCANI/SUTTER, N 60-62 ad art. 335f CO et STREIFF/VON KAENEL/RUDOLPH, N 3 ad art. 335f CO.

xii BSK-PORTMANN/RUDOLPH, N 10 ad art. 335f CO; BK-REHBINDER/STÖCKLI, N 15 ad art. 335f CO; CS-BRUCHEZ-DONATIELLO, N 5 ad art. 335f CO et références; contra WYLER/HEINZER, 1204-1205; STREIFF/VON KAENEL/RUDOLPH, N 3 ad art. 335f CO; ZK-STAEHELIN, N 3 ad art. 335f CO et références, ces auteurs se fondant sur le texte de la règle spéciale de l'art. 335f CO et ne déduisant par la même pas d'obligation de motiver des règles générales de la loi sur la participation.

xiii OGer ZH, décision du 2 avril 2003, ZR 103 (2004) Nr. 5=JAR 2005 464 ss, c. 10.

xiv Dans ce sens, STREIFF/VON KAENEL/RUDOLPH, N 3 ad art. 335f CO.

[1] H. Collins, K. D. Ewing & A. McColgan, Labour Law, 2nd ed., Cambridge: CUP 2019, p. 643.

[2] Recital 23 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

[3] Art. 3 Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

[4] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the Agreement on the European Economic Area.

[5] E. Ales, 2002/14/EC: Framework Information and Consultation, in M. Schlachter (ed.), EU Labour Law: A Commentary, Kluwer 2015, p. 519 *et seq*, p. 532.

[6] As the preamble mentions, this is necessary "*to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.*" Recital 7 Directive 2002/14/EC of 11 March 2002.

[7] The thresholds serve to avoid imposing administrative, financial or legal constraints which would hinder the creation and development of small and medium-sized undertakings. Recital 19 and Art. 3 (1) Directive 2002/14/EC of 11 March 2002.

[8] Art. 2 Directive 2002/14/EC of 11 March 2002.

[9] The CJEU does not allow national legislation to explicitly exclude, even temporarily, a specific category of employees from the calculation of staff numbers. CJEU 18 January 2007, Case C-385/05, *Confédération générale du travail (CGT) and Others v. Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement*; CJEU 15 January 2014, Case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others*.

[10] Art. 3(1) Directive 2002/14/EC of 11 March 2002.

[11] Member States are allowed to bear in mind their national law and industrial relations practices. Art. 1 (2) Directive 2002/14/EC of 11 March 2002.

[12] At the same time, irrespective of distinct national practices, policymakers should aim to enhance the effectiveness of domestic I&C arrangements. Art. 1 (2) Directive 2002/14/EC of 11 March 2002.

[13] "*When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.*" Art. 1 (3) Directive 2002/14/EC of 11 March 2002.

[14] Art. 4 (4) (b) Directive 2002/14/EC of 11 March 2002.

[15] E. Ales, 2002/14/EC: Framework Information and Consultation, in M. Schlachter (ed.), EU Labour Law: A Commentary, Kluwer 2015, p. 519 *et seq*, p. 544.

[16] Art. 6 and 7 Directive 2002/14/EC of 11 March 2002.

[17] I. Schömann. S. Clauwaert & W. Warneck, L'information et la consultation des travailleurs dans la Communauté européenne Transposition de la Directive 2002/14/CE, Brussels: ETUI-REHS 2006, p. 18.

[18] *Loi n° 2005-32 du 18 janvier 2005 de programmation pour la cohésion sociale.* The explanatory memorandum does not refer to the Directive though. Therefore, it is not entirely clear to what extent this law is the result of the Directive.

[19] *Ordonnance n° 2005-892 du 2 août 2005 relative à l'aménagement des règles de décompte des effectifs des entreprises.*

[20] CJEU 18 January 2007, Case C-385/05, *Confédération générale du travail (CGT) and Others v. Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement*.

[21] *Ordonnance n° 2017-1386 du 22 septembre 2017 relative à la nouvelle organisation du dialogue social et économique dans l'entreprise et favorisant l'exercice et la valorisation des responsabilités syndicales*.

[22] Rapport du comité d'évaluation, Évaluation des ordonnances du 22 septembre 2017 relatives au dialogue social et aux relations de travail, Paris: France Stratégie 2021, p. 15.

[23] It replaces the formerly relevant staff delegates (*délégués du personnel*), works council (*comité d'entreprise*) and committee on hygiene, security and working conditions (*comité d'hygiène, de sécurité et des conditions de travail*).

[24] Art. L. 2311-2 *code du travail*.

[25] Art. L. 2312-1 *code du travail*.

[26] This happens through a company agreement (*accord d'entreprise*) or a universally binding sectoral agreement (*accord de branche étendu*). Art. L. 2321-2 *code du travail*.

[27] G. Auzero, D. Baugard & E. Dockès, Droit du travail, 33rd ed., Paris: Dalloz 2019, p. 1523.

[28] An official evaluation found that conferring all competences and tasks to this unified committee poses practical and functional issues, even more in the absence of local representatives (*representation de proximité*). "*The enlargement and concentration on the* [committee] *of a very wide range of subjects to be dealt with does not automatically create a better articulation of strategic, economic and social issues, and may constitute an element of fragility in the commitment of the elected representatives (overload of representation work, difficulties in reconciling with professional activity, sometimes reinforced during the crisis because of the high demand on existing bodies, lack of expertise on all subjects, etc.) issues, etc.).*" Rapport du comité d'évaluation, Évaluation des ordonnances du 22 septembre 2017 relatives au dialogue social et aux relations de travail, Paris: France Stratégie 2021, p. 16.

[29] I. Schömann. S. Clauwaert & W. Warneck, L'information et la consultation des travailleurs dans la Communauté européenne Transposition de la Directive 2002/14/CE, Brussels: ETUI-REHS 2006, p. 17.

[30] H. Reichold, Durchbruch zu einer europäischen Betriebsverfassung Die Rahmen-Richtlinie 2002/14/EG zur Unterrichtung und Anhörung der Arbeitnehmer, 2003 (6) Neue Zeitschrift für Arbeitsrecht, p. 289 *et seq*; K. Riesenhuber, European Employment Law, Cambridge: Intersentia 2012, p. 666-667.

[31] Section 1 *Betriebsverfassungsgesetz*.

[32] Section 87 *Betriebsverfassungsgesetz*.

[33] P. Rémy, La transposition de la directive 2002/14 sur l'information et la consultation des travailleurs dans la Communauté européenne (suite), 2009 Revue de droit du travail, p. 537 *et seq*.

[34] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU, COM (2008) 146 final.

[35] Other, far more important amendments were domestically driven. A. Jacobs, Labour Law in the Netherlands, 2nd ed., Alphen aan den Rijn: Kluwer 2015, p. 297-298; J. M. van Slooten, M. S. A. Vegter & E. Verhulp, Arbeidsrecht, 12th ed., Arbeidsrecht, Deventer: Kluwer 2022, p. 663-664.

[36] Art. 35c *Wet van 28 januari 1971, houdende nieuwe regelen omtrent de medezeggenschap van de werknemers in de onderneming door middel van ondernemingsraden* (*Wet op de ondernemingsraden*).

[37] Art. 2 *Wet op de ondernemingsraden*.

[38] Art. 25 *Wet op de ondernemingsraden.*

[39] Art. 27 *Wet op de ondernemingsraden.*

[40] A. van den Berg et al., Works Councils in Germany and the Netherlands Compared: An explorative study using an input-throughput-output approach, Hans-Böckler-Stiftung 2019, p. 32.

[41] I. Schömann. S. Clauwaert & W. Warneck, L'information et la consultation des travailleurs dans la Communauté européenne Transposition de la Directive 2002/14/CE, Brussels: ETUI-REHS 2006, p. 21.

[42] S. Deakin & G. S. Morris, Labour Law, 5th ed., Oxford: Hart Publishing 2009, p. 792.

[43] H. Collins, K. D. Ewing & A. McColgan, Labour Law, 2nd ed., Cambridge: CUP 2019, p. 645 and 682. See also N. Cullinane *et al.*, Triggering employee voice under the European Information and Consultation Directive: A non-union case study, 2017 (4) Economic and Industrial Democracy, p. 629 *et seq*.

[44] The reduction of the threshold for a request from 10% to 2% of employee support might considerably change this outcome. The amendment came about as part of the Taylor Review of Modern Working Practices. M. Taylor, Good Work: The Taylor Review of Modern Working Practices, Department for Business and Trade, and Department for Business, Energy & Industrial Strategy 2017, p. 53; Section 16 The Employment Rights (Miscellaneous Amendments) Regulations 2019.

[45] Retained EU Law (Revocation and Reform) Bill; S. McBride, Amend, repeal, replace: Brexit Freedom Bill and employment law, available at: https://www.tlt.com/insights-and-events/insight/amend-repeal-replace-brexit-freedom-bill-and-employment-law/ (14.03.2023).

[46] Art. L. 2311-1 – 2317-2 *code du travail*.

[47] Section 106 *Betriebsverfassungsgesetz*.

[48] Section 16 (1) (f) Information and Consultation of Employees Regulations 2004.

[49] Art. L. 2311-2 *code du travail*.

[50] Sections 1 and 106 *Betriebsverfassungsgesetz*.

[51] Art. 35c *Wet op de ondernemingsraden*.

[52] Art. 2 *Wet op de ondernemingsraden*.

[53] Sections 3 and 7 Information and Consultation of Employees Regulations 2004.

[54] Sections 9 and 107 *Betriebsverfassungsgesetz*.

[55] Art. 6 *Wet op de ondernemingsraden*.

[56] Sections 18 and 19 Information and Consultation of Employees Regulations 2004.

[57] Art. L. 2312-72 – L. 2312-77 *code du travail*.

[58] The committee only has targeted veto rights, more specifically for the assignment of an occupational physician, the replacement of overtime pay by an equivalent compensatory rest in companies without union representation, the implementation of a training plan in public sector companies or the implementation of individualized working hours. If the committee is converted to a works council, the agreement governing this conversion might confer more veto rights to the works council than those priorly possessed by the committee. P. Lokiec, Le CSE comme instance de codetermination, une occasion manquée, 2018 (1) Bulletin Joly Travail, p. 47 *et seq*, p. 48.

[59] Sections 87, 91, 99 and 102 *Betriebsverfassungsgesetz*.

[60] E.g., sections 77, 95 and 103 *Betriebsverfassungsgesetz*.

[61] Art. 27 *Wet op de ondernemingsraden*.

[62] Art. 35c (3) *Wet op de ondernemingsraden*.

[63] Art. L. 2315-3 *code du travail*; Y. Leroy, Comité social et économique : composition et fonctionnement, Dalloz 2019, para. 107.

[64] Sections 79 and 99 *Betriebsverfassungsgesetz*.

[65] Art. 20 *Wet op de ondernemingsraden*.

[66] Section 25 Information and Consultation of Employees Regulations 2004.

[67] The rights of the employee representation are basic in comparison to a full-fledged Dutch works council. However, even this employee representation in smaller enterprises has a right to advice. Its advice has to be seriously considered. The representation must even consent with certain internal regulations of the employer, for example, on working hours. Therefore, some of the competences of this employee representation in smaller Dutch companies will exceed the competences of a representative body in a UK undertaking with more than 50 employees.

[68] Art. 4 (4) (d) and (e) Directive 2002/14/EC of 11 March 2002.

[69] Section 20 The Information and Consultation of Employees Regulations 2004.

[70] E.g., sections 76 and 87 (2) *Betriebsverfassungsgesetz.*

[71] Art. 27 (4) *Wet op de ondernemingsraden.*

[72] For example, the social and economic committee in France has “warning rights” (*droits d’alerte*) to force action on infringements of employees’ rights or to draw significant attention to economic issues. Art. L. 2312-59 – L. 2312-71 *code du travail*.

[73] Taking an unreasonable decision against the “advice” of a Dutch works councils may mean that the works council sues the employer before the Enterprise Chamber (*ondernemingskamer*) of the Amsterdam Court of Appeal. Art. 26 *Wet op de ondernemingsraden*.

[74] In Germany, workers have the right to complain if they consider themselves disadvantaged, unfairly treated or adversely affected. The works council receives these complaints, and if it considers the complaint justified, seeks redress from the employer. In case of differences of opinion between the works council and employer, the matter can be referred to the conciliation committee, which takes a decision (if the subject of the complaint is not a legal claim). Sections 84 and 85 *Betriebsverfassungsgesetz.*

2. European Works Councils

A. Directive 94/45/EC and Recast Directive 2009/38/EC

i. The Objectives

Council Directive 94/45/EC of 22 September 1994 introduced the European works councils (hereinafter: EWCs).[1] It was recasted[2] by Directive 2009/38/EC of 6 May 2009 (hereinafter: EWC Directive), which made various clarifications. The directives were primarily adopted because the EU's internal market spurs a transnationalization of undertakings. Therefore, the information[3] and consultation[4] (hereinafter: I&C) practices needed to be adapted, and it was deemed necessary to set up EWCs or to create other suitable procedures for transnational discussions. Related to this, policymakers feared that without a voice, workers would resist the process of transnationalization.[5] A secondary goal was to prevent unequal treatment of employees exposed to different Member States' domestic laws providing for transnational I&C arrangements.[6] Directive 94/45/EC, which was reinforced[7] in 2009's recast, envisions an enduring representative structure with employee representatives from different countries to discuss the multinational's transnational issues. The EWC Directive is in force in the EEA.[8]

ii. The Content

§ 1 The scope of application of the EWC Directive

The EWC Directive applies to entities considered to have a "community-scale" requiring transnational I&C arrangements. This can be either: (i) *undertakings* with at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States; or (ii) *groups of undertakings* with at least 1,000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State. Because of these definitions, also third-country's companies are affected, such as a Swiss company with 1,000 employees in the Member States spread across at least two Members.[9]

The "central management"[10] of the community-scale undertaking or, in the case of a community-scale group of undertakings, central management of the "controlling undertaking"[11] may have to initiate negotiations for the establishment of an EWC or an alternative[12] I&C procedure. Either this happens on the central management's own initiative, or it becomes obligatory at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.[13] Nothing happens until central management acts on its own initiative or until a valid request is made; there have been instances of stalling.[14]

§ 2 Establishing the European Works Council or alternative arrangement

NEGOTIATIONS – The drafters of the directives wanted flexibility.[15] Once the process commences, a special negotiating body is established, representing employees from the various Member States in a balanced fashion.[16] In principle, within the boundaries presented by (EU) law, the body negotiates with the central management to determine by a written agreement the scope, composition, functions, and terms of office of the EWC or "alternative"[17] I&C arrangements (Art. 6 EWC Directive).[18] Critically, the agreement should also cover the links between the EWC, which only governs *transnational*[19] issues, and domestic arrangements for I&C, which cover national issues.[20] Parallel consultation within the EWC and domestic representative bodies takes hold in the absence of any clarifications.[21]

ALTERNATIVES – Although a negotiated outcome is preferred, there are other possibilities. Firstly, as a fallback option, the "subsidiary requirements"[22] laid down by the legislation of the central management's Member State will apply: (i) where the central management and the special negotiating body so decide; (ii) where the central management refuses to commence negotiations within six months of the request; or (iii) where, after three years from the date of the request, the parties are

unable to conclude an agreement as laid down in Article 6, and the special negotiating body has not taken the decision provided for in Article 5 (5) EWC Directive.[23] Secondly, under Article 5 (5) EWC Directive, the special negotiating body may decide not to open negotiations or terminate the negotiations already opened. As a consequence, the establishment of the EWC will essentially be postponed for two years.[24]

THE EWC'S FUNCTIONING – Assuming an EWC or alternative I&C arrangement is established, a spirit of cooperation is demanded.[25] The EWC Directive also contains rules on the handling of confidential information and on the role and protection of employees' representatives.[26] Lastly, if the structure of (a group of) undertakings changes significantly, new negotiations can be initiated.[27]

B. Domestic Implementation of Directive 94/45/EC and Directive 2009/38/EC

France

IMPLEMENTING THE DIRECTIVE – The Law of 12 November 1996 transposed Directive 94/45/EC, adding a new chapter to the Labour Code about the EWC (*comité d'entreprise européen*).[28] The chapter was abrogated in 2007 and replaced.[29] The relevant articles can since be found in articles L. 2341-1 until L. 2346-1 and D. 2341-1 until R. 2345-1 of the Labour Code. Subsequently, the ordonnance of 20 October 2011 "strictly"[30] transposed the Recast EWC Directive and amended many of the domestic articles.[31] In subsequent years, the possibility of using video-conferencing for meetings was added,[32] the penalty for obstructing the EWC's formation/functioning increased,[33] and changes were made to reflect France's substitution of works councils by social and economic committees.[34]

GOING BEYOND THE DIRECTIVE – Contrary to EWCs in most countries, French EWCs have full legal personality, which is said to facilitate judicial proceedings.[35]

Germany

IMPLEMENTING THE DIRECTIVE – The European Works Council Act of 28 October 1996 transposed Directive 94/45/EC.[36] Due to the Recast EWC Directive, the German legislature issued the Second Act of 7 December 2011, amending the European Works Councils Act.[37] This has resulted in the consolidated Act on EWCs (*Europäische Betriebsräte*).[38] The amendments since 2011 related to crew members of seagoing vessels and COVID-19.[39]

GOING BEYOND THE DIRECTIVE – The European Commission notes that there is an obligation under German law to inform national social partners of the intention to launch EWC negotiations (not just European social partners), and EWC representatives must receive a reasoned reply to their opinions from central management.[40] These measures are said to go beyond what the Directive expects.

The Netherlands

IMPLEMENTING THE DIRECTIVE – The Law of 23 January 1997 on European Works Councils (*Europese ondernemingsraden*) transposed Directive 94/45/EC.[41] It was amended multiple times, including to expand the possibilities for legal action against a reluctant cross-border entity.[42] The Law of 7 November 2011 transposed the Recast EWC Directive.[43] According to the explanatory memorandum, the Law contained no rules other than those necessary for the implementation of the recasted EWC Directive.[44] Subsequent changes mostly related to seafarers.[45] Overall, the consolidated Dutch Law "*scrupulously follows the model for the introduction of European works councils as laid down in the EU Directive.*"[46]

GOING BEYOND THE DIRECTIVE – None of the Dutch implementation measures seems to significantly elevate the power of EWCs compared to what the Directive expects; however, one author notes that the duty under the subsidiary requirements to report to the EWC on the company's care for the environment goes beyond what the Directive expects.[47]

The United Kingdom

IMPLEMENTING THE DIRECTIVE – Directive 94/45/EC was only extended to the UK in 1997.[48] This led to The Transnational Information and Consultation of Employees Regulations 1999 (TICER), which were amended in 2010 to transpose the Recast EWC Directive.[49] The 2010 amendments, according to the explanatory memorandum, "*incorporate wording which is identical, or very close, to that used in the recast Directive*."[50] Recently, The Employment Rights (Amendment) (EU Exit) Regulations 2019 have thoroughly revised TICER, primarily to ensure that these provisions continue to operate effectively in relation to already existing EWCs under UK law.[51] Regarding EWCs that do not yet exist, the 2019 Regulations made it impossible to establish new ones under UK law as of 1 January 2021.[52]

As a consequence of the current legal situation, an Employment Appeal Tribunal ruled that EasyJet, which has an EWC under UK law because the group's central management is in the UK, has to maintain this EWC post-Brexit.[53] Additionally, EasyJet may have to create a new, second EWC under the law of a Member State (because the existing UK EWC is no longer acknowledged by the EU as a genuine EWC under its directives).[54]

GOING BEYOND THE DIRECTIVE – None of the UK implementation measures seem to have significantly increased the power of EWCs compared to what the Directive expected. The UK does, however, have elaborate provisions for initiating legal proceedings before the Central Arbitration Committee against central management in breach of the rules.

C. Comparative Table

	France	Germany	Netherlands	United Kingdom[55]
Establishment	Very specific in terms of who is obliged to provide the relevant information for establishing EWC.[56]	The specified sanction for those who neglect to provide the relevant information for establishing EWC.[57]	Duty to inform special negotiating body about changed circumstances.[58]	Specific possibility for a complaint of failure to provide relevant information, and dispute as to whether a valid request was made.[59]
The interplay between EWC and domestic representative bodies	As a default, for important changes, parallel I&C.[60]	I&C of the EWC shall be carried out at the latest at the same time as that of the national representative bodies (ideally before).[61]	As a default, for major decisions, as far as possible, I&C commence simultaneously.[62]	As a default, for substantial changes, I&C must begin within a reasonable time of each other.[63]
Absent an agreement, remarkable information is to be shared with EWC under subsidiary rules	Information on the probable evolution of the company's activities.[64]	Information on the relocation of companies, establishments or substantial parts of the business (as well as the relocation of production).[65]	Information on care for the environment must be shared.[66]	Nothing peculiar compared to the other three countries.[67]
Absent an agreement, the composition of the EWC under subsidiary rules	The trade unions appoint the "French" members to the EWC.[68]	The central or group works council appoint the "German" members to the EWC.[69]	The central, group or respective establishments' or enterprises' works councils appoint the "Dutch" members to the EWC.[70]	Employees' representatives appoint the "UK" members to the EWC, or a ballot might have to be organized.[71]
Sanctions for disrupting establishment/	Criminal offence: A fine of 7500 EUR and perhaps one year's imprisonment.[72]	Criminal offence: a prison sentence not exceeding one year or a fine. For	The Court of Appeal can reinforce a compliance order with a penalty	Central Arbitration Committee can order central management to

functioning EWC		other violations, solely administrative fines of max. 15000 EUR.[73]	payment (*dwangsom*). However, no specific fines.[74]	take steps, potentially with penalty notices (max. £100,000).[75]

D. Comparative Perspective on European Works Councils

SOMETIMES MORE DETAILED PROVISIONS – A 2018 report from the European Commission analyzed how Member States implemented the Recast EWC Directive. It notes that "*[w]hile most provisions have been implemented verbatim in national legislation, some countries have made more detailed provisions, which go beyond the minimum requirements of the Recast Directive.*"[76] In this regard, also France, Germany, the Netherlands, and the UK have more detailed provisions. That said, these additional details in domestic laws, for instance, about how to organize EWCs' meetings, do not mean that these countries' EWCs are more potent than what is envisioned under the Directive. Indeed, Member States do not seem to empower EWCs significantly.

EWCS' POWERS REMAIN LIMITED – Germany offers a good example. Even though it features in the European Commission's research as a country that goes beyond what is required in several respects,[77] German authors remark that "*the European Works Council itself does not have a particularly powerful position*[.] *[E]mployers are nevertheless well advised to respect the information and consultation rights of an existing European Works Council since its members are usually also employee representatives at national level where they might have much stronger participation rights.*"[78]

This remark captures the current situation. National representative bodies in countries such as Germany and the Netherlands regularly have proper co-determination rights. In contrast, even members of EWCs that have a right to express an opinion "*seem to have little influence in the decision-making process in their companies, notably in cases of restructuring.*"[79] Besides EWCs' ineffectiveness, many companies that should theoretically have an EWC still lack one because no valid request has thus far been made.[80] Therefore, the European Parliament (among others) repeatedly calls for the Recast EWC Directive to be revised anew.[81] With regard to EWCs, the EU's institutions seem to be in the driver's seat. Member States take little initiative.

E. Conclusion

EWCs are an important and innovative mechanism to increase workers' voices in multinationals. From an EU perspective, it is no small feat to impose a representative body designed for I&C about transnational matters upon large internal and third-country (groups of) enterprises with a strong EU presence (e.g., Swiss enterprises). On the other hand, it is evident that the current EWC Directive still contains flaws and that EWCs have little authority compared to national works councils (in certain EU Member States). Along these lines, "*[c]ommentators are divided as to whether the EWC Directive has been a successful experiment.*"[82]

Droit suisse et les comités d'entreprise européens

A. Cadre juridique

La Suisse dispose d'une législation sur l'information et la consultation des travailleurs au niveau national.[i] Lorsque celle-ci est pertinente pour les personnes occupées en Suisse, une information sur l'activité transnationale de l'entreprise peut devoir être fournie sur la base de la législation suisse. Une

[i] Voir le chapitre sur la directive européenne (UE) 2002/14/CE.

obligation de consulter peut aussi se rapporter à des mesures prises par l'entreprise à un niveau transnational. Cela affecte en particulier le moment de la consultation. La jurisprudence a ainsi jugé qu'une consultation au niveau suisse sur un licenciement collectif est tardive si elle intervient alors que la décision au niveau du groupe international a déjà été prise[ii]. Peu importe à cet égard que la filiale suisse n'ait pas eu connaissance de la décision ou n'a pas été associée au processus de décision.

Cela étant, la loi suisse sur la participation ne pose pas d'exigences particulières aux entreprises suisses actives dans plusieurs pays. La loi s'applique aux entreprises privées qui occupent des travailleurs en permanence en Suisse (art. 1) et vise à organiser la représentation des travailleurs au niveau Suisse. Qu'il s'agisse d'entreprises transnationales suisses qui occupent des travailleurs dans d'autres pays ou d'entreprises étrangères qui occupent des travailleurs en Suisse, la législation suisse n'a aucune portée sur les relations de travail en dehors de la Suisse.

Toutefois, les entreprises suisses qui occupent des travailleurs dans les Etats membres de l'UE et qui répondent à la définition d'entreprise ou de groupe d'entreprises de dimension communautaire (art. 2, al. 1, let. a et c de la directive) seront soumises à la directive. Cette dernière s'applique en effet aussi à des entreprises dont le siège est situé dans un Etat tiers comme la Suisse[iii], l'application se limitant bien entendu aux travailleurs occupés dans les Etats membres de l'UE.

B. Comparaison entre le droit suisse et la directive (UE) 2009/38/CE

Comme la directive (UE) 2009/38/CE couvre des situations transnationales et vise à assurer une coordination au niveau des Etats membres de l'UE, il faut se demander, pour un Etat comme la Suisse qui n'est ni membre de l'UE ni de l'EEE, quels sont les termes de la comparaison entre le droit suisse et celui de l'UE. Il faut ensuite se demander si une mise à niveau du droit suisse à celui de la directive est concevable et si oui, quelle forme elle prendrait.

Il ne s'agit tout d'abord pas de soumettre les entreprises transnationales suisses à la directive puisque celles-ci le sont déjà. Une comparaison peut par contre se fonder sur la prémisse qui voudrait que, par le biais d'un accord avec l'UE, la Suisse soit considérée comme un Etat associé, soumis à ce titre à la directive. Cela signifierait que les personnes occupées en Suisse seraient prises en compte pour déterminer si la directive s'applique. Ainsi, une entreprise employant 1000 personnes en Suisse et dans l'UE, 150 personnes en Suisse et, par exemple, 150 personnes en France serait tenue d'appliquer la directive. Ce point de départ, nécessite donc un accord avec l'UE, la seule voie de la transposition autonome du droit de l'UE par la Suisse n'étant pas suffisante. Une transposition autonome de la directive n'est certes théoriquement pas exclue mais poserait deux questions : tout d'abord, la Suisse appliquerait la directive sans réciprocité ; ensuite, cette approche, sans accord avec l'UE, poserait des problèmes de mise en œuvre. En effet, dans l'exemple ci-dessus, si l'entreprise en question est une entreprise française, il faudrait que la Suisse puisse imposer la constitution d'un comité d'entreprise européen ou l'institution d'une procédure d'information et de consultation des travailleurs, qui couvrirait les questions transnationales.

Une dernière approche se limiterait aux cas dans lesquels la directive s'applique et qui impliquent des entreprises occupant des personnes en Suisse. Il peut s'agir d'une entreprise suisse ou étrangère. Dans les deux cas, les personnes occupées en Suisse ne sont pas comprises dans les structures d'information et de consultation mises en place sur la base de la directive. L'art. 1, al. 6 de la directive (UE) 2009/38/CE limite en effet les pouvoirs du comité d'entreprise européen et la portée de la procédure d'information et de consultation aux établissements ou aux entreprises membres du groupe situés dans les Etats membres. C'est bien sous cet aspect de la participation des employés occupés en Suisse

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[ii] OGer ZH, décision du 2 avril 2003, ZR 103 (2004) Nr. 5=JAR 2005 464 ss, c. 11-12.

[iii] Voir ci-dessus let. A, ii, §1.

que le décalage entre droit suisse et droit de l'UE est généralement perçu et débattu[iv]. Mais cette divergence n'implique pas de transposer la directive (UE) 2009/38/CE en droit suisse. Comme indiqué ci-dessus, cette transposition ne ferait de sens que dans le cadre d'un accord avec l'UE[v]. Si l'on voulait envisager une mise en œuvre au niveau de la législation suisse, l'on pourrait imaginer un droit à être représenté dans un comité d'entreprise européen lorsqu'un tel comité a été constitué par une entreprise suisse qui viendrait compléter les droits de participation prévus dans la loi sur la participation. Il s'agirait alors d'une simple obligation au niveau suisse qui ne pourrait être implémentée au niveau européen. En relation avec cela, il faut noter que la directive (UE) 2009/38/CE laisse une place prépondérante à la négociation pour la mise en place d'un comité d'entreprise européen ou d'une procédure d'information ou de consultation (art. 5, al. 3 de la directive). Cela signifie que les entreprises transnationales suisses disposent de la liberté nécessaire pour accorder des droits aux personnes occupées en Suisse sur une base volontaire. Une étude menée en 2013 montre d'ailleurs que 72% des entreprises suisses disposant d'un comité d'entreprise européen y ont intégré une représentation suisse[vi]. A cela s'ajoute que les entreprises ou établissements sis dans un Etat membre de l'UE doivent accorder les mêmes droits aux travailleurs suisses et de l'UE occupés dans cet Etat membre, sur la base de l'art. 7, let. a de l'Accord sur la libre circulation des personnes[vii].
Sur cette base, l'on constate un décalage entre le droit suisse et le droit de l'UE en lien avec cette directive. Ce décalage est toutefois comblé de manière satisfaisante sur une base volontaire. D'autre part, il s'avère compliqué de parler ici de reprise ou de transposition de la directive sans envisager que celle-ci intervienne dans le cadre d'un accord avec l'UE.

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iv Voir du point de vue syndical: https://www.unia.ch/fr/monde-du-travail/de-a-a-z/syndicat-international/comites-dentreprise-europeens et https://employes.ch/quest-ce-quun-comite-dentreprise-europeen. Également, motion 11.3591 Leutenegger Oberholzer "Comités d'entreprise européens. Mettre sur un pied d'égalité salariés suisses et salariés européens" et développement.

v Dans ce sens également, la réponse du Conseil fédéral à la motion 11.3591 Leutenegger Oberholzer.

vi GABATHULER, Heinz/ZILTENER, Paul, L'importance des comités d'entreprises européens a été sous-estimée, La Vie économique 6-2013, 51 ss, 52-53.

vii Dans ce sens, la réponse du Conseil fédéral à la motion 11.3591 Leutenegger Oberholzer.

1 Council Directive 94/45/EC of 22 September 1994 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.

2 "*Recasting is like codification in that is brings together in a single new act a legislative act and all the amendments made to it. The new act passes through the full legislative process and repeals all the acts being recast.*" European Commission, Recasting, available at: https://ec.europa.eu/dgs/legal_service/recasting_en.htm (03.04.2023).

3 By information, the EWC Directive means "*transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings*". Art. 2 (1) (f) Directive 2009/38/EC of 6 May 2009.

4 By consultation, the EWC Directive means "*the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings*". Art. 2 (1) (g) Directive 2009/38/EC of 6 May 2009.

5 H. Collins, K. D. Ewing & A. McColgan, Labour Law, 2nd ed., Cambridge: CUP 2019, p. 646.

6 Preamble Council Directive 94/45/EC of 22 September 1994.

7 In relation to the original Directive, the EWC Directive from 2009 aimed to: (i) ensure the effectiveness of employees' transnational I&C rights; (ii) increase the proportion of EWCs for large enterprises; (iii) resolve the problems encountered in the practical application of Directive 94/45/EC; (iv) remedy the lack of legal certainty in some respects; (v) and ensure that other EU legislation on I&C is better linked. Recital 7 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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; European Commission, Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), COM(2018) 292 final, p. 4-5.

8 Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the EEA Agreement.

9 See Art. 4 (2) Directive 2009/38/EC of 6 May 2009, which mentions that where the central management is not situated in a Member State (e.g., central management in Switzerland), the central management's representative agent in a Member State, as designated by the company, shall take on the responsibility for setting-up an EWC or an alternative I&C procedure. In the absence of this company-designated representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on this responsibility. A good example is: CJEU 13 January 2004, Case C-440/00, *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v. Kühne & Nagel AG & Co. KG.*; K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 703-705.

10 For the identification of those responsible to establish the EWC, see Art. 4 Directive 2009/38/EC of 6 May 2009.

11 "*For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it.*" Article 3 of the EWC Directive furthermore describes which entities are presumed to exercise such a dominant influence. Art. 3 Directive 2009/38/EC of 6 May 2009.

12 "*In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances.*" Recital 19 Directive 2009/38/EC of 6 May 2009.

[13] Art. 5 Directive 2009/38/EC of 6 May 2009.

[14] It has been particularly important for employee representatives to have the right to request information from the concerned companies as to prove that the (group of) companies fulfils the conditions of the EWC Directive, and must, therefore, initiate negotiations upon a valid request. CJEU 29 March 2001, Case C-62/99, *Betriebsrat der bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG v Bofrost* Josef H. Boquoi Deutschland West GmbH & Co. KG*; CJEU 15 July 2004, Case C-349/01, *Betriebsrat der Firma ADS Anker GmbH v ADS Anker GmbH*. This CJEU case law has become EU law through the recasting of the Directive, see Article 4 (4) Directive 2009/38/EC of 6 May 2009.

[15] E.g., Article 14 EWC Directive on pre-existing agreements. C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, p. 671; T. Jaspers & P. Lorber, Workers' participation in business matters in T. Jaspers *et al.* (eds.), European Labour Law, Intersentia 2019, p. 373 *et seq*, p. 411.

[16] Recital 26 Directive 2009/38/EC of 6 May 2009.

[17] As mentioned in Article 6 (3), "*[t]he central management and the special negotiating body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council.*" The option is subject to certain conditions. Lorber mentions that "*[o]riginally, this option was open for companies who considered that without a body, the right of information and consultation could still be exercised fully with existing procedures. In practice, the option has seldom been used*". P. Lorber, 2009/38/EC: European Works Council in M. Schlachter (ed.), EU Labour Law: A Commentary, Wolters Kluwer 2015, p. 557 *et seq*, p. 578.

[18] Art. 5 (3) and 6 Directive 2009/38/EC of 6 May 2009.

[19] "*[T]he competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues.* […] *Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.*" Art. 1 (3) and (4) Directive 2009/38/EC of 6 May 2009. See also recital 16.

[20] Art. 12 (2) Directive 2009/38/EC of 6 May 2009.

[21] Art. 12 (3) Directive 2009/38/EC of 6 May 2009; A. C. L. Davies, EU Labour Law, Cheltenham: Edward Elgar 2012, p. 252-253.

[22] The subsidiary requirements are adopted in the legislation of the Member States but must satisfy the provisions set out in Annex I of the EWC Directive. Art. 7 (2) Directive 2009/38/EC of 6 May 2009.

[23] Art. 7 Directive 2009/38/EC of 6 May 2009.

[24] "*A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.*" Art. 5 (5) Directive 2009/38/EC of 6 May 2009.

[25] Art. 9 Directive 2009/38/EC of 6 May 2009.

[26] Art. 8 and 10 Directive 2009/38/EC of 6 May 2009.

[27] Art. 13 Directive 2009/38/EC of 6 May 2009.

[28] Among other things, articles L. 439-6 until L. 439-24 were added to the Labour Code. *Loi n° 96-985 du 12 novembre 1996 relative à l'information et à la consultation des salariés dans les entreprises et les groupes d'entreprises de dimension communautaire, ainsi qu'au développement de la négociation collective*.

[29] Art. 12 *Ordonnance n° 2007-329 du 12 mars 2007 relative au code du travail*.

[30] The report to the French President mentions that the ordinance strictly transposes the Recast EWC Directive. The report mentions the main changes brought about by the ordinance. *Rapport au Président de la République relatif à l'ordonnance n° 2011-1328 du 20 octobre 2011 portant transposition de la directive 2009/38/CE du Parlement européen et du Conseil du 6 mai 2009 concernant l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs.*

[31] *Ordonnance n° 2011-1328 du 20 octobre 2011 portant transposition de la directive 2009/38/CE du Parlement européen et du Conseil du 6 mai 2009 concernant l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs*; *Décret n° 2011-1414 du 31 octobre 2011 relatif à la composition du groupe spécial de négociation et du comité d'entreprise européen.*

[32] Art. 17 *loi n° 2015-994 du 17 août 2015 relative au dialogue social et à l'emploi*.

[33] Art. 262 *loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques*.

[34] Art. 4 *ordonnance n° 2017-1386 du 22 septembre 2017 relative à la nouvelle organisation du dialogue social et économique dans l'entreprise et favorisant l'exercice et la valorisation des responsabilités syndicales*.

[35] Art. L. 2343-7 *code du travail*; European Commission, Commission Staff Working Document: Evaluation Accompanying the Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), SWD(2018) 187 final, p. 34.

[36] *Gesetz uber Europaische Betriebsräte (Europäische Betriebsräte-Gesetz- EBRG) vom 28. Oktober 1996.*

[37] *Zweiten Gesetzes vom 7. Dezember 2011 zur Änderung des Europäische Betriebsräte- Gesetzes – Umsetzung der Richtlinie 2009/38/EG über Europäische Betriebsräte (2. EBRG-ÄndG)*.

[38] *Europäische Betriebsräte-Gesetz in der Fassung der Bekanntmachung vom 7. Dezember 2011*.

[39] These amendments gave rise to sections 41a and 41b of the *Europäische Betriebsräte-Gesetz*.

[40] Sections 1 (5) and 9 (3) *Europäische Betriebsräte-Gesetz*; European Commission, Commission Staff Working Document: Evaluation Accompanying the Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), SWD(2018) 187 final, p. 12.

[41] *Wet van 23 januari 1997 tot uitvoering van richtlijn nr. 94/45/EG van de Raad van de Europese Unie van 22 september 1994 inzake de instelling van een Europese ondernemingsraad of van een procedure in ondernemingen of concerns met een communautaire dimensie ter informatie en raadpleging van de werknemers (Wet op de Europese ondernemingsraden)*.

[42] *Wet van 17 maart 2005 tot uitvoering van richtlijn nr. 2001/86/EG van de Raad van de Europese Unie van 8 oktober 2001 tot aanvulling van het statuut van de Europese vennootschap met betrekking tot de rol van de werknemers (Wet rol werknemers bij de Europese vennootschap)*.

[43] J. M. van Slooten *et al.* note that this predominantly tightened the timing and manner of informing and consulting the EWC; tightened the interpretation of the concept of "transnational"; and required Member States to provide adequate sanctions to ensure compliance with the Directive. *Wet van 7 november 2011 tot wijziging van de Wet op de Europese ondernemingsraden in verband met de uitvoering van richtlijn 2009/38/EG van het Europees Parlement en de Raad van de Europese Unie van 6 mei 2009 (PbEU 2009, L 122), houdende herschikking van richtlijn 94/45/EG, inzake de instelling van een Europese ondernemingsraad of van een procedure in ondernemingen of concerns met een communautaire dimensie ter informatie en raadpleging van de werknemers*; J. M. van Slooten, M. S. A. Vegter & E. Verhulp, Arbeidsrecht, 12th ed., Deventer: Wolters Kluwer 2022, p. 790.

[44] *Memorie van toelichting bij de wijziging van de Wet op de Europese ondernemingsraden in verband met de uitvoering van richtlijn 2009/38/EG van het Europees Parlement en de Raad van de Europese Unie van 6 mei 2009 (PbEU 2009, L 122), houdende herschikking van richtlijn 94/45/EG, inzake de instelling van een Europese ondernemingsraad of van een procedure in ondernemingen of concerns met een communautaire dimensie ter informatie en raadpleging van de werknemers*.

[45] *Wet van 31 mei 2017 tot wijziging van de Wet op de Europese ondernemingsraden en Titel 10 van Boek 7 van het Burgerlijk Wetboek in verband met de implementatie van Richtlijn (EU) 2015/1794 van het Europees Parlement en de Raad van 6 oktober 2015 tot wijziging van de Richtlijnen 2008/94/EG, 2009/38/EG en 2002/14/EG van het Europees Parlement en de Richtlijnen 98/59/EG en 2001/23/EG van de Raad wat zeevarenden betreft (PbEU 2015, L 263)*; *Wet van 29 november 2017 tot wijziging van enkele wetten van het Ministerie van Sociale Zaken en Werkgelegenheid (Verzamelwet SZW 2018)*.

[46] A. Jacobs, Labour Law in The Netherlands, 2nd ed., Alphen aan den Rijn: Wolters Kluwer 2015, p. 313.

[47] A. Jacobs, Labour Law in The Netherlands, 2nd ed., Alphen aan den Rijn: Wolters Kluwer 2015, p. 313.

[48] *Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC 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*; C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, 665.

[49] The Transnational Information and Consultation of Employees (Amendment) Regulations 2010.

[50] Explanatory memorandum to The Transnational Information and Consultation of Employees (Amendment) Regulations 2010.

[51] Explanatory memorandum to The Employment Rights (Amendment) (EU Exit) Regulations 2019.

[52] Sections 7 – 17 of ICER have been repealed by The Employment Rights (Amendment) (EU Exit) Regulations 2019.

[53] Employment Appeal Tribunal 4 November 2022, Case [2022] EAT 162.

54 B. Kelleher, European Works Councils post-Brexit, available at: https://www.europarl.europa.eu/doceo/document/P-9-2021-000494_EN.html (04.04.2023); Commissioner Schmit, Answer given by Mr Schmit on behalf of the European Commission (6.4.2021), available at: https://www.europarl.europa.eu/doceo/document/P-9-2021-000494-ASW_EN.pdf (04.04.2023).

55 The details mentioned in the Comparative Table are from the Law before The Employment Rights (Amendment) (EU Exit) Regulations 2019 entered into force.

56 Art. L. 2342-3 *code du travail*.

57 Sections 5, 9 and 45 (1) 1. *Europäische Betriebsräte-Gesetz*.

58 Art. 7-8 *wet op de Europese ondernemingsraden*.

59 Sections 7-10 Transnational Information and Consultation of Employees Regulations 1999.

60 Art. L. 2341-9 *code du travail*.

61 Section 1 (7) *Europäische Betriebsräte-Gesetz*; T. Jaspers & P. Lorber, Workers' participation in business matters in T. Jaspers *et al.* (eds.), European Labour Law, Intersentia 2019, p. 373 *et seq*, p. 419.

62 Art. 11 (8) *wet op de Europese ondernemingsraden*.

63 Section 19E Transnational Information and Consultation of Employees Regulations 1999.

64 Except for the Netherlands, which is similar to France, the other countries solely demand information on for example the expected development of the business, production and sales situation, but not on its "activities", which is arguably broader. Art. L. 2343-2 *code du travail*.

65 The other countries will demand information on relocations of production, but seemingly not on the relocation of substantial parts of the business, which is arguably broader. Section 29 (2) 7. *Europäische Betriebsräte-Gesetz*.

66 The other countries do not mention the environment. Art. 19 (1) b. *wet op de Europese ondernemingsraden*.

67 Section 7 of Schedule 1 of the Transnational Information and Consultation of Employees Regulations 1999.

68 Art. L. 2344-2 *code du travail*.

69 Section 23 *Europäische Betriebsräte-Gesetz*.

70 Art. 10 and 17 *wet op de Europese ondernemingsraden*.

71 Section 3 of Schedule 1 of the Transnational Information and Consultation of Employees Regulations 1999.

72 Art. L. 2346-1 *code du travail*.

73 Sections 44-45 *Europäische Betriebsräte-Gesetz*.

74 Art. 5 *wet op de Europese ondernemingsraden*; J. M. van Slooten, M. S. A. Vegter & E. Verhulp, Arbeidsrecht, 12th ed., Deventer: Wolters Kluwer 2022, p. 801.

75 Sections 20-22 Transnational Information and Consultation of Employees Regulations 1999.

76 European Commission, Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), COM(2018) 292 final, p. 5.

77 Sections 1 (5) and 9 (3) *Europäische Betriebsräte-Gesetz*; European Commission, Commission Staff Working Document: Evaluation Accompanying the Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), SWD(2018) 187 final, p. 12.

78 P. R. Kremp & J. Kirchner, Employee Representation in J. Kirchner *et al.* (eds.), Key Aspects of German Employment and Labour Law, Springer 2010, p. 209 *et seq*, p. 222.

79 European Commission, Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), COM(2018) 292 final, p. 6.

80 A list containing the many reasons why EWCs are not being established, can be found in European Commission, Commission Staff Working Document: Evaluation Accompanying the Report on the implementation by Member States of Directive 2009/38/EC 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 (Recast), SWD(2018) 187 final, p. 21-22.

81 European Parliament resolution of 16 December 2021 on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive

(2021/2005(INI)); European Parliament resolution of 2 February 2023 with recommendations to the Commission on Revision of European Works Councils Directive (2019/2183(INL)).

82 C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, 672.

3. Employee Involvement in European Companies (*Societas Europaea*)

A. Directive 2001/86/EC of 8 October 2001

i. The Objectives

When the EU advanced regulations in 2001 to create a legal form for the European public limited-liability company, the idea was to create a legal form that would allow businesses to "*be able to plan and carry out the reorganisation of their business on a Community scale*"[1] and to facilitate cross-border structural changes.[2] The European Company or *Societas Europaea* (hereinafter: SE) continues to be an option. However, today, "regular" cross-border mergers have also become more convenient, perhaps partially explaining why the number and significance of SEs remain limited.[3]

The appropriate level of employee participation in SE decision-making led to significant discussion from the outset[4], as some Member States baulked at the idea of importing higher standards, and others rejected a possible lowering of their own standards.[5] The rules were eventually laid down in a separate Directive 2001/86/EC of 8 October 2001 (hereinafter: SE-Directive),[6] which itself forms "*an indissociable complement to* [the] *Regulation and must be applied concomitantly.*"[7] Both the Regulation and SE-Directive are in force in the EEA.[8]

ii. The Content

§ 1 A right of involvement in the SE

When establishing an SE, the SE-Directive calls for negotiations between a special negotiating body representing the employees and the management or administrative organs of the participating companies.[9] Negotiations cover three aspects of the future SE's employees' "right of involvement" in the SE: arrangements for informing workers about decisions regarding the SE, its entities in other Member States, or transnational matters[10]; specific arrangements for employee consultations[11]; and employee participation rights.

Issues other than the "right of involvement" remain under the legal framework applicable to comparable national companies.[12] Furthermore, the SE-Directive confirms that, in large part,[13] even its provisions on this right of involvement (focused on transnational matters) supplement domestic law on employee information and consultation (focused on national matters) without overriding it.[14]

§ 2 A negotiating procedure that shapes the right of involvement

The SE-Directive requires that management or administrative organs of the participating companies take necessary steps to start negotiations with the employee representatives in the special negotiating body[15] when drawing up a plan for establishing an SE. There are further procedural rules on how to conduct the negotiations and, to some extent, substantive ones about the required outcomes.[16] Within those boundaries,[17] the social partners are permitted substantial discretion.[18]

§ 3 Subsidiary rules for employee involvement in the SE

Although a negotiated arrangement is preferred, a negotiated agreement may not be within easy reach. Thus, EU Member States must draft "subsidiary rules" along the lines of the provisions set out in an Annex to the SE-Directive. Such rules will become applicable only where either: (a) the parties so agree; or (b) no agreement has been concluded within the negotiation period, (b)(i) the competent organ of each of the participating companies decides to accept the application of the subsidiary rules, and (b)(ii) the special negotiating body has not taken the decision to apply the regular rules applicable in the Member State where the SE has employees.[19] Some other conditions need to also be fulfilled.[20]

This mechanism guarantees minimum rules regarding information and consultation by constituting a representative body in the SE. The representative body may only address questions of a transnational nature.[21] Other issues remain subject to domestic laws on information and consultation.

Regarding employee participation rights, the level of participation in the SE is, in principle, based on the level of participation in the participating companies establishing the SE.[22] That is also what the standard rules for participation aim for in the absence of an agreement.[23] Therefore, if employee participation rules did not govern the companies creating the SE, the SE does not have to establish employee participation arrangements.[24]

B. Domestic Implementation of Directive 2001/86/EC

France

IMPLEMENTING THE DIRECTIVE – To implement the SE-Directive, a new legislative title was added to the French Labour Code in 2005,[25] and some clarifications were made to the Code's regulatory provisions.[26]

GOING BEYOND WHAT THE DIRECTIVE REQUIRES – One cannot truly analyse to what extent a country goes beyond what the Directive requires, as the Directive leaves it up to the Member States to fill certain gaps. Sometimes the Member State must undertake action, yet it retains discretion on how to proceed (e.g., to ensure members of the special negotiating body do not reveal confidential information).[27] At other times, the Member State is left with the choice to decide something (e.g., lay down budgetary rules regarding the operation of the special negotiating body).[28] Countries might make these determinations along the lines of what is provided in their general rules on employee information and consultation or in their rules on European works councils. However, as such, the countries do not go "beyond" what the Directive requires.

Germany

IMPLEMENTING THE DIRECTIVE –The Law of 22 December 2004 (*SE-Beteiligungsgesetz*) implements Council Directive 2001/86/EC and contains provisions on employee involvement in SEs.[29]

GOING BEYOND WHAT THE DIRECTIVE REQUIRES – One cannot truly analyse to what extent a country goes beyond what the Directive requires, as the Directive leaves it up to the Member States to fill certain gaps. Sometimes the Member State must undertake action, yet it retains discretion on how to proceed (e.g., to ensure members of the special negotiating body do not reveal confidential information). At other times, the Member State is left with the choice to decide something (e.g., lay down budgetary rules regarding the operation of the special negotiating body). Countries might make these determinations along the lines of what is provided in their general rules on employee information and consultation or in their rules on European works councils. However, as such, the countries do not go "beyond" what the Directive requires.

The Netherlands

IMPLEMENTING THE DIRECTIVE – Directive 2001/86/EC is implemented through the Law of 17 March 2005, which is referred to as the Employee Involvement in the European Company Act (*Wet rol werknemers bij de Europese vennootschap*).[30]

GOING BEYOND WHAT THE DIRECTIVE REQUIRES – One cannot truly analyse to what extent a country goes beyond what the Directive requires, as the Directive leaves it up to the Member States to fill certain gaps. Sometimes the Member State must undertake action, yet it retains discretion on how to proceed (e.g., to ensure members of the special negotiating body do not reveal confidential information). At other times, the Member State is left with the choice to decide something (e.g., lay down budgetary rules regarding the operation of the special negotiating body). Countries might make these determinations along the lines of what is provided in their general rules on employee information and consultation or in their rules on European works councils. However, as such, the countries do not go "beyond" what the Directive requires.

The United Kingdom

IMPLEMENTING THE DIRECTIVE – The European Public Limited-Liability Company Regulations 2004 transposed Regulation 2157/2001/EC and the SE-Directive. Until 2009 these regulations contained the rules on employee involvement. However, the European Public Limited-Liability Company (Amendment) Regulations 2009 have re-enacted these rules, with modifications, in a separate statutory instrument. The rules are now in The European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009. The latter was substantively amended pre-Brexit by The Agency Workers Regulations 2010 to consider temporary agency workers as part of the discussion when establishing an SE. Other amendments mostly focus on conciliation and court proceedings.[31]

Post-Brexit, The European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018 overhaul 2009's Regulations, resulting in an automatic change from SEs to so-called "UK Societas"[32]. These UK Societas (former SEs) will likely phase out over time as it is impossible to create new ones.[33] This has consequent effects on the remaining employment law provisions.[34]

GOING BEYOND WHAT THE DIRECTIVE REQUIRES – One cannot truly analyse to what extent a country goes beyond what the Directive requires, as the Directive leaves it up to the Member States to fill certain gaps. Sometimes the Member State must undertake action, yet it retains discretion on how to proceed (e.g., to ensure members of the special negotiating body do not reveal confidential information). At other times, the Member State is left with the choice to decide something (e.g., lay down budgetary rules regarding the operation of the special negotiating body). Countries might make these determinations along the lines of what is provided in their general rules on employee information and consultation or in their rules on European works councils. However, as such, the countries do not go "beyond" what the Directive requires.

C. Comparative Table

	France	Germany	Netherlands	United Kingdom
Source determining employee involvement in the SE	Labour Code[35]	SE Employee Involvement Act[36]	Employee Involvement in the European Company Act[37]	European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009
The representative body under the standard rules in the absence of an agree-ment	European Company Committee (*comité de la société européenne*)[38]	SE works council (*SE-Betriebsrat*)[39]	SE works council (*SE-ondernemingsraad*)[40]	The representative body[41]

D. Comparative Perspective on Employee Involvement in European Companies

EMPLOYEE PARTICIPATION – Member states transposed the rules on future employee participation in the SE along similar lines. Important to note is that the SE-Directive's mechanism to set employee participation rights can open a divide between employee participation in the SE and employee participation under the domestic rules in companies with a purely domestic legal form (for employee participation under the domestic rules, see the report on cross-border mergers). Whether it springs from a negotiated arrangement or the subsidiary rules, SE's employee participation arrangement can be isolated from domestic law on employee participation. The lawfully created SE is shielded from domestic law on employee participation[42] and instead is governed by the negotiated arrangement or the outcome under the subsidiary rules. Partially with this in mind, SEs are sometimes set up without

any employees at first, after which the workforce is transferred to the SE at a later date; the way the SE is set up from the start may prevent employee participation at a later date.[43]

INFORMATION AND CONSULTATION – In the absence of an agreement, by operation of law, a representative body will be established in the SE for transnational information and consultation. French law calls this a European Company Committee (*comité de la société européenne*).[44] German and Dutch law refer to an "SE works council" (*SE-Betriebsrat* and *SE-ondernemingsraad*).[45] In the United Kingdom, the law simply calls it the representative body.[46] Notwithstanding differences in terminology and other minor variations, all these bodies have to be composed and operated in accordance with the "standard rules" detailed in the Annex to the SE-Directive. These representative bodies resemble one another because they all operate according to domestic rules harmonized by the Annex's standards.

Shielded under the SE-Directive, the SE representative bodies are largely[47] disconnected from the common domestic laws on works councils and other types of representative bodies. Therefore, whereas there are significant differences between employee information and consultation in regular domestic French, German, Dutch, and UK works councils (or other representative bodies), there are fewer differences between the domestic subsidiary rules on employee information and consultation in SE representative bodies.

DIFFERENCES BETWEEN MEMBER STATES – Member States have the discretion to implement the SE-Directive in different ways in specific areas such as: (i) the method to be used for the election or appointment of the members of the special negotiating body; (ii) to some extent, the subsidiary rules on employee involvement; and (iii) for protecting the confidentiality of discussions in the special negotiating body.[48] However, those differences are minor in the larger scheme of things.

Not only is the SE-Directive quite detailed in its outlining of the whole negotiating procedure, but it also offers the social partners flexibility in drafting an agreement with bespoke information, consultation, and, perhaps, participation arrangements in the SE. Therefore, any differences between countries' domestic laws on issues like (i), (ii), and (iii) do not bear major consequences.

E. Conclusion

SEs are not prominent in European economies. The SE-Directive is only relevant when an SE is being formed, making it a very specific instrument. Nonetheless, in the rare event an SE is formed, the right to employee involvement in the SE is an important topic for discussion. Various rules exist to structure the negotiations about this right. Member States implement these rules without evidently "going beyond" what the Directive requires.

Leaving aside the comparative angle, some interesting aspects of the SE-Directive are: (i) employee participation rights were initially a significant obstacle to the adoption of the SE legal form; (ii) nonetheless, the SE-Directive partially disembeds employee participation in the SE from the domestic rules on employee participation applicable to "regular" companies; (iii) the SE-Directive's mechanism to establish employee participation in the SE was used as a blueprint for preserving employee participation rights in post-merger companies under the Directive 2005/56/EC on cross-border mergers of limited liability companies.[49]

Droit suisse et l'implication des travailleurs dans les entreprises européennes

A. Cadre juridique

Les règles suisses sur la participation des travailleurs résultent de la loi sur la participation et des règles spéciales prévues dans différentes lois.[liv]

B. Comparaison entre le droit suisse et la directive (UE) 2001/86/CE

La directive (UE) 2001/86/CE règle l'implication des travailleurs dans la société européenne. La société européenne est fondée à partir d'entités existant dans des Etats membres de l'UE et elle a son siège dans un Etat membre de l'UE. L'implication (participation) des travailleurs dans la société européenne se superpose aux règles nationales applicables aux entités nationales qui constitue la société. La structure et le contenu de la participation au niveau de la société européenne résulte en premier lieu d'une négociation entre la société et un groupe spécial de négociation qui représente les travailleurs des entités concernées. A défaut d'accord entre la société et le groupe spécial de négociation, des règles de référence s'appliquent, sauf si le groupe spécial de négociation a décidé, à la majorité des deux-tiers, de ne pas entamer de négociations ou de clore les négociations, auquel cas, les droits nationaux à l'information et à la consultation s'appliqueront.

Sur cette base, une reprise autonome de la directive (UE) 2001/86/CE n'est pas envisageable pour la Suisse, dans la mesure où des entreprises suisses ne sauraient unilatéralement participer à des sociétés européennes. En effet, le droit de l'UE exige que les sociétés, sur la base desquelles une société européenne est fondée, soient constituées selon le droit d'un Etat membre et aient leur siège statutaire et leur administration centrale dans l'UE (art. 2 du règlement (CE) n° 2157/2001). Dès lors, la participation des travailleurs d'une entreprise suisse à une société européenne ne se pose pas non plus. L'on peut se référer à titre d'exemple à la situation du Royaume-Uni suite au Brexit, telle que décrite ci-dessus (chapitre B).

Seul un accord avec l'UE permettrait d'intégrer les entreprises suisses dans le mécanisme de constitution d'une société européenne. Les règles en droit suisse sont à mettre en parallèle avec les règles nationales des Etats membres respectifs. Un niveau de fonctionnement et une structure qui seraient équivalents à ceux de la société européenne n'existent pas au niveau suisse, vu qu'il n'existe pas d'accord international prévoyant la création de sociétés transnationales du type de la société européenne qui inclurait des sociétés suisses. Il suffit donc ici de renvoyer à l'analyse générale des règles sur la participation des travailleurs.[lv]

Le modèle de participation mis en place par l'UE (et qui doit être implémenté au niveau national) repose de plus sur l'autonomie privée, avec des dispositions de référence qui s'appliqueront si les organes des sociétés impliquées et le groupe spécial de négociation ne trouvent pas d'accord ; ces dispositions de référence correspondent à du droit dispositif en droit suisse (auquel il est possible de déroger par accord). En gardant à l'esprit que, comme évoqué ci-dessus, la comparaison entre le droit suisse et les règles posées pour la société européenne n'est pas adéquate, l'on peut noter que le droit suisse repose quant à lui sur des règles impératives, une partie d'entre elles pouvant être écartées par des conventions collectives de travail.[lvi]

[liv] Voir le chapitre sur la directive (UE) 2002/14/CE.

[lv] *Ibidem*.

[lvi] *Ibidem*.

[1] Recital 1 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

[2] P. Storm, The SE in its sixth year: some early impressions, in D. Van Gerven & P. Storm (eds.), The European Company, Cambridge 2010, p. 3 *et seq*, p. 7-8.

[3] M. Stollt & M. Kelemen, A big hit or a flop? A decade of facts and figures on the European Company (SE), in J. Cremers, M. Stollt & S. Vitols (eds.), *A decade of experience with the European Company*, Brussels 2013; p. 25 *et seq*.

[4] Disputes over the employee participation regime were, for a long time, "the main obstacle" to the adoption of the SE statute altogether. S. Grundmann, European Company Law: Organization, Finance and Capital Markets, 2nd ed., Cambridge: Intersentia 2012, p. 845-848. Eventually, the "delicate compromise" about employee participation in SEs would serve as the blueprint to safeguard employee participation rights in post-merger companies. J. Cremers, The EU assessment of the SE corporate form, in J. Cremers, M. Stollt & S. Vitols (eds.), *A decade of experience with the European Company*, Brussels 2013; p. 229 *et seq*, p. 243.

[5] A. Sagan, The Misuse of a European Company according to Article 11 of the Directive 2001/86/EC, 2010 (1) European Business Law Review, p. 15 *et seq*, p. 15.

[6] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees.

[7] Recital 19 Council Regulation (EC) No 2157/2001 of 8 October 2001.

[8] Annex XVIII on health and safety at work, labour law, and equal treatment for men and women to the EEA Agreement; Annex XXII on company law to the EEA Agreement.

[9] Art. 3 Council Directive 2001/86/EC of 8 October 2001.

[10] Article 2 of the SE-Directive states that besides employee participation regimes, parties will also negotiate about how to inform "*the body representative of the employees and/or employees' representatives […] on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or* [on questions] *which exceed the powers of the decision-making organs in a single Member State at a time*".

[11] Parties negotiate about consultation arrangements in the SE for "*dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ*". Art. 2 Council Directive 2001/86/EC of 8 October 2001.

[12] "*Directive 2001/86/EC is designed to ensure that employees have a right of involvement in issues and decisions affecting the life of their SE. Other social and labour legislation questions, in particular the right of employees to information and consultation as regulated in the Member States, are governed by the national provisions applicable, under the same conditions, to public limited-liability companies.*" Recital 21 Council Regulation (EC) No 2157/2001 of 8 October 2001.

[13] The "*[p]rovisions on the participation of employees in company bodies*" of the SE are an exception. As mentioned in Article 13, the rules "*on the participation of employees in company bodies provided for by national legislation and/or practice, other than those implementing this Directive, shall not apply to companies established in accordance with Regulation (EC) No 2157/2001 and covered by this Directive.*" Art. 13 (2) Council Directive 2001/86/EC of 8 October 2001.

[14] Recital 15 and Art. 13 (3) Council Directive 2001/86/EC of 8 October 2001.

[15] The special negotiating body comprises representatives of all employees from the participating companies and concerned subsidiaries or establishments, ensuring a proportional representation based on the number of employees in each Member State. Art. 3 Council Directive 2001/86/EC of 8 October 2001.

[16] Art. 3, 5, 8 and 9 Council Directive 2001/86/EC of 8 October 2001.

[17] For example, CJEU 18 October 2022, Case C-677/20, *IG Metall and ver.di*.

[18] F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, Paris: LGDJ 2020, p. 420.

[19] Recital 11 Council Directive 2001/86/EC of 8 October 2001.

[20] Art. 7 Council Directive 2001/86/EC of 8 October 2001.

[21] Art. 2 (i) and (j) Council Directive 2001/86/EC of 8 October 2001.

[22] CJEU 18 October 2022, Case C-677/20, *IG Metall and ver.di*.

[23] Part 3 of the Annex to Council Directive 2001/86/EC of 8 October 2001.

[24] Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, COM/2008/0591 final.

[25] This title was initially inserted in book four through Article 12 *loi n° 2005-842 du 26 juillet 2005 pour la confiance et la modernisation de l'économie*. It was then moved to book three of the first part of the Code containing legislative provisions. See Art. L. 2351-1 – L. 2355-1 *code du travail*.

[26] Art. D. 2351-1 – R. 2354-1 *code du travail*. These provisions originate from the *décret n° 2006-1360 du 9 novembre 2006 relatif à l'implication des salariés dans la société européenne et modifiant le code du travail.*

[27] Art. 8 Council Directive 2001/86/EC of 8 October 2001.

[28] Art. 3 (7) Council Directive 2001/86/EC of 8 October 2001.

[29] *Gesetz vom 22. Dezember 2004 über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (SE-Beteiligungsgesetz - SEBG).* The Law of 22 December 2004 (*SE-Ausführungsgesetz*) contains the German company law statute for the SE. *Gesetz vom 22. Dezember 2004 zur Ausführung der Verordnung (EG) Nr. 2157/2001 des Rates vom 8. Oktober 2001 über das Statut der Europäischen Gesellschaft (SE) (SE-Ausführungsgesetz - SEAG)*. The only changes that have occurred in the meantime related to the COVID-19 pandemic, making sure that "SE works councils" (*SE-Betriebsräte*) and employee participation can operate without meeting in person. E.g., Art. 11 and 12 *Gesetz vom 20. Mai 2020 zur Förderung der beruflichen Weiterbildung im Strukturwandel und zur Weiterentwicklung der Ausbildungsförderung*. Currently found in section 48 *SE-Beteiligungsgesetz - SEBG.*

[30] *Wet van 17 maart 2005 tot uitvoering van richtlijn nr. 2001/86/EG van de Raad van de Europese Unie van 8 oktober 2001 tot aanvulling van het statuut van de Europese vennootschap met betrekking tot de rol van de werknemers (Wet rol werknemers bij de Europese vennootschap).* There have not been any substantive amendments so far, but minor changes revise certain references or terminology.

[31] E.g., section 59 The Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Employment) Order 2014.

[32] As explained in the explanatory memorandum, "*as a result of the UK leaving the EU, the European legislation* [on SEs] *will become retained EU law, under the European Union (Withdrawal) Act 2018. As the UK will no longer be a Member State it will not be able to operate within the SE framework. Accordingly, this retained EU law would, without changes, contain deficiencies which will have no practical application, and contain reciprocal arrangements and EU references which are no longer appropriate, for those SEs which remain registered in the UK. To avoid uncertainty in respect of the identity of such SEs on exit day, amendments made by this instrument to retained EU law in this area will convert any such entities on exit day to a new UK corporate form: a UK Societas.*"

[33] Companies House, Guidance: Running a UK Societas (UKS), available at: https://www.gov.uk/government/publications/uk-societas/running-a-uk-societas-uks (21.03.2023).

[34] The memorandum clarifies that "*[i]n order to retain as many of the employee rights as practicable for UK Societates, provisions relating to confidentiality have been maintained, as has protection for employees where they are involved in the employee involvement process. However,* [the 2018 Regulations have] *omitted provisions relating to the establishment of the special negotiating body and employee involvement agreement for UK Societates because generally employee involvement agreements will have had to have been in place prior to registration of these entities as an SE, and there will be no new formations.*"

[35] Art. L. 2351-1 – L. 2355-1 and D. 2351-1 – R. 2354-1 *code du travail*.

[36] *SE-Beteiligungsgesetz – SEBG*.

[37] *Wet rol werknemers bij de Europese vennootschap*.

[38] Art. L. 2353-1 – L. 2353-27-1 *code du travail.*

[39] Section 22 *SE-Beteiligungsgesetz – SEBG*.

[40] Art. 1:22 *wet rol werknemers bij de Europese vennootschap*.

[41] Schedule standard rules on employee involvement in The European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009.

[42] As Grundmann explains, "*[t]he most important consequence is petrification of the employee participation regime. Organic growth* [of the SE] *and the passing of the thresholds laid down in national law no longer lead to the (first) application of an employee participation regime or to the intensification of an existing regime. This implies that a European Company which has been (lawfully) created and has acted free of an employee participation regime will keep this status irrespective of how it develops.*" S. Grundmann, European Company Law: Organization, Finance and Capital Markets, 2nd ed., Cambridge: Intersentia 2012, p. 852.

[43] A.C.L. Davies, EU Labour Law, Cheltenham: Edward Elgar 2012, p. 263-264.

[44] Art. L. 2353-1 – L. 2353-27-1 *code du travail.*

[45] Section 22 *SE-Beteiligungsgesetz – SEBG*; Art. 1:22 *wet rol werknemers bij de Europese vennootschap*.

[46] Schedule standard rules on employee involvement in The European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009.

[47] There are some interconnections. For example, the employee representatives in the SE's representative body will enjoy similar protections against dismissal as the employee representatives in a standard works council. The same is true for the rules on confidentiality, in which case the rules governing the SE's representative body are (most likely) based on the regular rules for works councils.

[48] Art. 3 (2) (b), 7 and 8 Council Directive 2001/86/EC of 8 October 2001.

[49] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

EU DIRECTIVES ON OCCUPATIONAL SAFETY AND HEALTH: The Framework Directive and Specialized Directives

A. Framework Directive 89/391/EEC of 12 June 1989

i. The Objectives

Until the late 1980s, EU Member States' legal frameworks regulating occupational safety and health (hereinafter: OSH) differed widely, many having to be improved. This resulted in excessive accidents at work and consequently posed economic as well as personal losses.[1] Moreover, as with many employment rules, there was a risk that differences in domestic laws on the protection of safety, hygiene, and health at work spurred competition between Member States at the expense of employees. Directive 89/391/EEC of 12 June 1989 (hereinafter: Framework Directive) was adopted to counter the competitive pressure and ensure that improving workers' OSH is not subordinated to economic considerations.[2]

ii. The Content

The Framework Directive is "the major instrument"[3] of EU OSH law, providing the foundation for more specialized OSH directives. It advances general principles and guidelines[4] that are relevant to the overall OSH policies of the EU and its Member States. The Framework Directive is in force in the EEA.[5]

§ 1 The scope of application of the Framework Directive

The Framework Directive applies to persons employed by legal employers in most sectors of activity.[6] It excludes employees engaged in public service activities with peculiar characteristics (such as the armed forces), the self-employed, and domestic servants.[7]

§ 2 Employer obligations

COMPREHENSIVE PREVENTION – Employers must ensure the safety and health of workers in "every aspect"[8] related to the work.[9] Rather than compensation or sanction, prevention is at the centre of the Directive's approach to OSH obligations.[10] The "general principles of prevention" described in the Directive approach risk prevention as a continuous process, improving over time and taking into account technical progress, the individual's characteristics, and other contextual elements.[11]

More specifically, the Framework Directive mentions that the employer must take preventive measures to safeguard the safety and health of workers and ensure a higher degree of protection.[12] To this end, risk assessments are critical (i.e., identify hazards and assess the risk), followed by the appropriate preventive measures and changes to working and production methods (including, if the risk cannot be prevented, managing the risk).[13] It is furthermore important to provide information to workers on the topics mentioned in Article 10[14] and OSH training, in particular, related to the elements mentioned in Article 12.[15]
Additionally, the Framework Directive stresses the need to:

(i) designate specific workers to carry out OSH-related protection and prevention activities;[16]
(ii) establish mechanisms for first aid, firefighting and the evacuation of workers;[17]
(iii) evaluate protective equipment, as well as track and report occupational accidents;[18]
(iv) consult workers (representatives) on all questions relating to OSH;[19] and
(v) provide health surveillance.[20]

In all these respects, the employer must strive to adapt to current conditions and to improve the level of protection.[21]

§ 3 Worker obligations

The Directive emphasizes and illustrates a subsidiary responsibility of the worker to "*take care as far as possible of his own safety and health and that of other persons […] in accordance with his training and the instructions given by his employer.*"[22] At the same time, it stipulates that worker OSH obligations do not affect the principle of ultimate employer responsibility.[23]

§ 4 Enforcement

Enforcement, accompanied by potential legal action, is vital for effective OSH legislation.[24] The OSH directives mention enforcement and inspections only very sporadically, however.[25] The main EU measure has been the establishment of a Senior Labour Inspectors Committee (SLIC), which provides guidance and a forum for discussion.[26] The European Commission intends to strengthen Member States' enforcement mechanisms through the SLIC.[27]

B. Specialized Occupational Safety and Health Directives

Article 16 of the Framework Directive enables the EU institutions to adopt individual specialized directives on different OSH themes, such as the workplace, work equipment and personal protective equipment. In this vein, a corpus of specialized OSH directives arose of "enormous breadth" and "considerable scope".[28]
This report mentions five of these. Each complements and structurally resembles the Framework Directive.[29]

i. Content of Directive 89/654/EEC on the workplace

The core concern of Directive 89/654/EEC of 30 November 1989 (hereinafter: Workplace Directive), in force in the EEA, is the proper layout of workplaces.[30] It broadly applies to industries, excluding only some exceptional environments, such as extractive industries and fishing boats.[31]
The Directive prescribes general requirements concerning the workplace in Article 6. Minimum safety and health requirements are detailed in its annexes.[32] Workers and/or their representatives must be informed "*of all measures to be taken concerning safety and health at the workplace*" and consulted by the employer about the matters covered by the Directive.[33]

ii. Content of Directive 2009/104/EC on the use of work equipment

Directive 2009/104/EC[34] of 16 September 2009 (hereinafter: Work Equipment Directive), in force in the EEA, codified and replaced Directive 89/655/EEC[35] of 30 November 1989 on work equipment and its amendments. Work equipment is a broad term covering any machine, apparatus, tool or installation used at work.[36]

The Directive obliges employers to see to it that any equipment given to workers is adapted to the task assigned and does not pose a risk to the user's safety or health.[37] Where OSH risks are inherent, employers must take measures to minimize them. To these ends, the Directive imposes rules about: (i) the minimum technical requirements of work equipment; (ii) the appropriate use of work equipment; (iii) mandatory inspections; (iv) work equipment with specific risks; (v) the need of informing workers; (vi) training workers; and (vii) consulting workers.[38]

The Work Equipment Directive aims to provide "collective" protection, guaranteeing the safety of the work equipment to users and persons in the vicinity. The three specialized directives discussed below supplement the Work Equipment Directive by centering on the individual user's personal protection.[39]

iii. Content of Directive 89/656/EEC on personal protective equipment

Directive 89/656/EEC of 30 November 1989 (hereinafter: PPE Directive), in force in the EEA, governs personal protective equipment (PPE). PPE refers to equipment worn or held (perhaps as an addition

or accessory) by the worker to protect against likely OSH hazards. The Directive emphasizes that PPE is a measure of last resort, only to be used when risks cannot be avoided or sufficiently limited by other (more collectively oriented) measures.[40]
PPE must: (i) fulfil the general criteria mentioned in Article 4; (ii) be assessed (Article 5); (iii) be appropriately used (Article 6 and annexes); (iv) and is subject to information and consultation (articles 7-8). The Directive's annexes offer non-binding guidance to Member States on selecting PPE.[41]

The European Commission was empowered in 2019 to make strictly technical amendments to the annexes through delegated acts.[42] These annexes underwent technical adjustments in the same year to consider the latest technological developments and ensure consistency with Regulation 2016/425.[43] The latter determines what health and safety requirements PPE needs to comply with to obtain an EU declaration of conformity (to enable the free movement of PPE within the EU single market[44]).

iv. Content of Directive 90/269/EEC on the manual handling of loads

Directive 90/269/EEC of 29 May 1990 (hereinafter: Loads Handling Directive), in force in the EEA, is concerned with the transporting or supporting of loads where there is a risk to workers, particularly of back injuries. Employers must take organizational measures or provide the means, such as mechanical equipment, to avoid the need for workers' manual handling of loads. If manual handling cannot be avoided, the workstations have to be organized in such a way as to make handling as safe as possible; prior assessments, appropriate measures, information, training and consultation are critical.[45] The annexes to the Directive contain reference and individual risk factors to help evaluate the workstation.[46]

v. Content of Directive 90/270/EEC on display screen equipment

Directive 90/270/EEC of 29 May 1990 (hereinafter: Screen Equipment Directive), in force in the EEA, focuses on "display screen"[47] equipment and the related workstation design, including ergonomic aspects. Minimum requirements for workstations comprising display screen equipment are set out in the annex.[48] In case of non-compliance, the workstation needs to be adapted.[49] Workstations also need to be evaluated for OSH risks, and employers must take appropriate measures if needed.

Interestingly, the Directive also requires employers to plan workers' activities so that daily work on a display screen is periodically interrupted by breaks or changes of activity, reducing the workload at the display screen. Moreover, if appropriate, workers are entitled to regular eyesight tests with a subsequent ophthalmological examination and/or corrective appliances, such as glasses, being provided/reimbursed by the employer.[50]

C. Domestic Implementation of the Occupational Safety and Health Directives

France

IMPLEMENTING THE DIRECTIVES – The Law of 31 December 1991 was essential to transposing the Framework Directive, giving rise to a legally enforceable[51] general obligation for the head of the establishment to take the necessary measures to ensure workers' OSH.[52] Despite these changes, the European Commission successfully brought infringement proceedings for not having fully transposed the Directive.[53] In response, the Decree of 17 December 2008 was issued.[54]

The Workplace Directive likewise demanded implementing measures.[55] The main provisions are now found in articles L. 4221-1 till L4231-1 of the Labour Code.

The initial Work Equipment Directive[56] and PPE Directive[57] were partially transposed through a Decree of 11 January 1993 (now Art. L. 4311-1 till L4321-5 Labour Code).[58]

The Loads Handling Directive was implemented through a Decree of 3 September 1992 (now Art. R. 4541-1 till R. 4541-10 Labour Code).[59]

The Screen Equipment Directive resulted in a Decree of 14 May 1991 (abolished since 2008) (now Art. R. 4542-1 till R. 4542-19 Labour Code).[60]

GOING BEYOND THE DIRECTIVES – Unlike many other fields of EU labour law, where precise minimum requirements must be met, EU OSH instruments are characterized by a progressive approach.[61] As such, it is difficult to go "beyond" the Directives since they call for continual improvements.

Having said this, particularly noteworthy in France is that from 2002 to 2015, French case law based on the legislative provisions that came about through EU OSH law[62] has progressed beyond what is required by the Directive. Regarding workers' safety, in the past, the courts have held employers to a standard of strict liability (*obligation de sécurité de résultat*)[63] whereby an unsafe worker will result in the employer's liability regardless of preventive efforts. The *cour de cassation* has tempered this position since 2015.[64] The employer's preventive measures have again become relevant to assess liability. Nonetheless, judges still have a lot of discretion, possibly setting the bar relatively high.[65] The European Commission also highlights some other manners in which French law is more stringent than EU OSH law.[66]

Germany

IMPLEMENTING THE DIRECTIVES – The Law of 7 August 1996 transposed the Framework Directive[67] and introduced the Occupational Health and Safety Act of 7 August 1996 (*Arbeitsschutzgesetz*).[68] The latter has been amended[69] as a result of infringement proceedings.[70]

The Workplace Directive eventually resulted in the Workplace Ordinance of 12 August 2004.[71]

The initial Work Equipment Directive[72] gave rise to the Ordinance of 11 March 1997 (later repealed in 2002).[73] The rules can now be found in the Industrial Safety Ordinance.[74]

The PPE Directive led to the PPE Use Ordinance of 4 December 1996.[75]

The Loads Handling Directive was implemented through the Load Handling Ordinance of 4 December 1996.[76]

Lastly, the Screen Equipment Directive led to another Ordinance of 4 December 1996 (repealed in 2016).[77] The relevant provisions were added to the aforementioned Workplace Ordinance[78].[79]

GOING BEYOND THE DIRECTIVES – Unlike many other fields of EU labour law, where precise minimum requirements must be met, EU OSH instruments are characterized by a progressive approach.[80] As such, it is difficult to go "beyond" the Directives since they call for continual improvements.

Nonetheless, particularly noteworthy in Germany are the co-determination rights of the German works council regarding health and safety protection measures.[81] The works council has a statutory right to co-determination in relation to the employers' measures.[82] As Reinhard Richardi remarks, co-determination in this setting amounts to a right of co-regulation (*Mitregelungsrecht*). When dealing with OSH matters that are not covered by statutory law, the works council may propose additional measures to prevent accidents at work and damage to health.[83] The European Commission also highlights some other manners in which German law is more stringent than EU OSH law.[84]

The Netherlands

IMPLEMENTING THE DIRECTIVES – The Health and Safety at Work Act (*Arbeidsomstandighedenwet*) was first adopted in 1980.[85] It was amended in 1993 and 1994 to comply with the Framework Directive.[86]

Nevertheless, the European Commission successfully lodged infringement proceedings[87], during which the legislature adopted a new Health and Safety at Work Act (*Arbeidsomstandighedenwet*) in 1998. The latter was amended in 2005 when the CJEU agreed with the Commission's assessment.[88] The 1998 Act currently still serves as the Dutch framework law on OSH.[89]

The Workplace Directive led to a Decree of 8 October 1993.[90]

The Decree of 14 October 1993 transposed the initial Work Equipment Directive.[91]

The Decree of 15 July 1993 implemented the PPE Directive.[92]

The Loads Handling Directive gave rise to the Decree of 27 January 1993.[93]

Lastly, a Decree of 10 December 1992 transposed the Screen Equipment Directive.[94]

These various Decrees were brought together in the Health and Safety Work Decree (*Arbeidsomstandighedenbesluit*) of 15 January 1997, which currently contains the most relevant rules (supplemented by further implementing measures).[95]

GOING BEYOND THE DIRECTIVES – Unlike many other fields of EU labour law, where precise minimum requirements must be met, EU OSH instruments are characterized by a progressive approach.[96] As such, it is difficult to go "beyond" the Directives since they call for continual improvements.

Nevertheless, an interesting feature of Dutch law is the use of OSH catalogues (*arbocatalogi*) developed by social partners, for example, at the sectoral level. These catalogues contain more concrete methods and measures meant to achieve the goals of the statutory OSH laws and decrees. If the employer operates in accordance with the catalogues, he may reasonably trust that his practices comply with OSH laws.[97] The European Commission also highlights some other manners in which Dutch law is more stringent than EU OSH law.[98]

The United Kingdom

IMPLEMENTING THE DIRECTIVES – The primary OSH law is the Health and Safety at Work Act 1974. Section 2 (1) of the Act, containing the general duties of employers to their employees, was subject to unsuccessful infringement proceedings by the European Commission.[99] The Management of Health and Safety at Work Regulations 1992 were issued to transpose the Framework Directive.[100] These were replaced by the Management of Health and Safety at Work Regulations 1999, designed to better comply with EU rules.[101]

The Workplace Directive was transposed through the Workplace (Health, Safety and Welfare) Regulations 1992.

The initial Work Equipment Directive resulted in the Provision and Use of Work Equipment Regulations 1992, later replaced in 1998.[102]

The Personal Protective Equipment at Work Regulations 1992, amended in 2022,[103] implemented the PPE Directive.

The Loads Handling Directive gave rise to the Manual Handling Operations Regulations 1992.
Lastly, the Health and Safety (Display Screen Equipment) Regulations 1992 transposed the Screen Equipment Directive.

Brexit has not had a significant impact on UK OSH law. The Health and Safety (Amendment) (EU Exit) Regulations 2018 were adopted to ensure that EU-derived OSH protections remain available under

domestic law.[104] Some changes did occur, though. The UK's Health and Safety Executive highlights that Brexit impacted the safe management of chemicals, placement of civil explosives on the market, and the manufacturing and supply of new work equipment.[105]

GOING BEYOND THE DIRECTIVES – Unlike many other fields of EU labour law, where precise minimum requirements must be met, EU OSH instruments are characterized by a progressive approach.[106] As such, it is difficult to go "beyond" the Directives since they call for continual improvements.

Still, historically, a particular example of how the UK goes beyond the Directive's requirements has been the extension of the general duties under OSH law to the self-employed that are not employers.[107] That said, the degree to which such persons are covered by OSH obligations was diminished with Regulations from 2015.[108] Since 2015, only self-employed persons conducting specific undertakings described in the Regulation's schedule are covered. Additionally, the self-employed whose activities pose a risk to the health and safety of other persons (e.g., clients or bystanders) are also still covered. It is not always clear exactly who belongs to this second category, however.[109] The European Commission also highlights some other manners in which UK law is more stringent than EU OSH law.[110]

D. Comparative Table

	France	Germany	Netherlands	United Kingdom
Extent of employer's duty	The employer shall take the necessary measures.[111]	The employer is obliged t take the necessary measures.[112]	*Unless this cannot reasonably be required*, the employer shall […].[113]	It shall be the duty of every employer to ensure, *so far as is reasonably practicable*, […].[114]
Interesting aspects of employer's general duty under OSH (compared to Directive)	Emphasis on psychological and sexual harassment.[115]	Emphasis on mental health, vulnerable groups of workers, and measures with gender-specific effect.[116]	Emphasis on avoiding monotonous and pace-specific work, and preventing/limiting psychosocial workloads.[117]	Emphasis on "welfare" at work.[118]
Interesting aspects of risk assessments (compared to Directive)	Emphasis on the gender-differentiated impact of risk exposure. [119]	Emphasis on workers' insufficient qualifications and training, and psychological stress.[120]	Emphasis on employees' access to OSH experts, and on the need to attach a plan of action with measures and deadlines to the assessment.[121]	Emphasis on the need for additional consideration when employing young persons.[122]
The need to involve (external) OSH specialists	Art. L. 4644-1 et R. 4644-1 – D. 6466-11 *code du travail*.	Art. 6 *Gesetz vom 12. Dezember 1973*.	Art. 14 (1) *Arbeidsomstandighedenwet.*	Section 7 The Management of Health and Safety at Work Regulations 1999.
Employees' general duties	Art. L. 4122-1 *code du travail*.	Sections 15 and 16 *Arbeitsschutzgesetz.*	Article 11 *Arbeidsomstandighedenwet.*	Section 7 Health and Safety at Work Act 1974.
Coverage of the self-employed	Access to internal prevention and health service for self-employed.[123]	Employee-like persons are covered (*arbeitnehmerähnliche Personen*).[124] & Solo self-employed can be covered under sectoral rules, e.g. for construction work.[125]	Various OSH provisions apply to the self-employed.[126] Even more OSH rules become applicable if dangerous[127] work is performed or if the self-employed work in the same location as employees.[128]	OSH provisions apply to undertakings of a prescribed description (mostly self-employed with dangerous activities).[129]
Information and consultation on OSH	Social and economic committee (*comité social et économique*).[130] In	Works council (*Betriebsrat*).[132] Additionally, an occupational safety and	Works council (*ondernemingsraad*),[134] or employee representation in	In the case of recognized trade unions, safety representatives are

	large enterprises, a designated commission (*commission santé, sécurité et conditions de travail*).[131]	health committee has to be set up (*Arbeitsschutzausschuß*).[133]	smaller companies (*personeelsvertegenwoordiging*).[135]	appointed, and potentially a safety committee.[136] In case employees are not represented by safety representatives, employees are consulted or representatives of employee safety.[137]
Enforcement authorities and sanctions	Supervised by the labour inspectorate and the prevention service of the social security institutions.[138] Formal notices can be sent by the Departmental Director of Labour, Employment and Vocational Training or the labour inspectorate.[139] Administrative sanctions apply under some circumstances,[140] and a range of criminal sanctions exist.[141]	Supervised by the "Land authorities" (*Landesbehörden*) and accident insurance providers.[142] The competent authority can make individual case orders.[143] Contravening an order may result in administrative fines.[144] Criminal provisions apply in case of repeated violations or when intentionally endangering workers' health.[145]	Generally, supervised by the labour inspectorate.[146] They can issue compliance orders.[147] A legally more forceful order (with discontinuation of work) can be issued by the Inspector General of the Ministry of Social Affairs and Employment.[148] Criminal sanctions can also be applied.[149]	Supervised by the local authorities or the Health and Safety Executive.[150] The latter can also direct investigations and inquiries.[151] The competent authority's inspector can serve improvement and prohibition notices.[152] Obstructing the enforcement authority or contravening the inspector's notice is a criminal offence.[153]

E. Comparative Perspective on Occupational Safety and Health

A STRONG INFLUENCE BY EU INSTITUTIONS – THE IMPORTANCE OF SOFT LAW – Health and safety at work is a core area of EU labour law, with established legal frameworks and regulatory actors operating within those frameworks. The European Commission, in cooperation with the Advisory Committee on Safety and Health at Work (ACSH), sends clear policy signals.[154] Furthermore, the European social partners have concluded framework agreements in this area, drawing attention to psychosocial risks.[155] More practically, in particular, the European Agency for Safety and Health at Work (EU-OSHA) develops research,[156] campaigns, hands-on guidance instruments,[157] and partnerships to make progress (similarly SLIC). While soft law, these initiatives have an impact on this area of labour law.

SIGNIFICANT DIFFERENCES BETWEEN MEMBER STATES – France, Germany, the Netherlands, and the United Kingdom have comprehensive OSH systems grounded in the same EU directives. Nonetheless, as evidenced by EU-OSHA's Barometer, significant differences persist, for example, in terms of the occurrence of work accidents. The Netherlands scores better than Germany[158] and especially France. The Dutch made significant improvements in the period 2010-2020. Germany improved to some extent. In contrast, France deteriorated, explaining why its most recent national OSH policy is concerned with work accidents.[159] Eurostat data shows that also the United Kingdom generally compares favourably.[160]

NO QUICK LEGAL FIXES – The differences between countries arguably attest to the limits of black letter law in this area (e.g., consider the improvements in the Netherlands' score in light of the Dutch emphasis[161] on knowledge and workplace culture).[162] In a detailed comparative study, Juliet Hassard *et al.* mention the "lessons learned" from case studies on the OSH systems.[163] Those lessons relate to the qualifications of OSH professionals, the depth of stakeholder involvement, the structural interplay between OSH actors, the country's priority goals, and so forth. Even if these features are legally

enshrined to some extent, they mainly stem from the will of policymakers to address OSH risks on a structural, enduring, and evolving basis. As such, there are no quick legal fixes to improve OSH.

F. Conclusion

EU OSH law is generally considered fit for purpose. Nevertheless, the European Commission acknowledges that amendments to the EU OSH directives might be desirable due to new technological and labour market developments.[164] Certainly, as regards these newer or more unconventional dimensions of OSH law (e.g., protecting the self-employed and addressing psychosocial risks), Member States' domestic laws are often more developed than EU law. This also explains the relevance of EU soft law because, even if the Directives remain unchanged, the EU institutions can support Member States in tackling these more unconventional OSH topics.

Droit suisse sur la sécurité et la santé au travail

A. Cadre juridique

En Suisse, la loi sur le travail (LTr)[i] et ses ordonnances[ii] ainsi que la loi sur l'assurance (LAA)[iii] et l'ordonnance sur la prévention des accidents (OPA)[iv] constituent les bases principales de la protection de la santé sur le lieu de travail[v]. Selon le secrétariat d'Etat à l'économie (SECO), la notion de protection de la santé selon la LTr a un sens très large si bien que les exigences contenues dans cette loi vont plus loin que celles de la LAA[vi]. En effet, la législation sur le travail exige que chaque atteinte à la santé soit évitée et pas seulement les maladies professionnelles reconnues dans la LAA[vii]. La protection de la santé englobe tant l'intégrité physique que psychique des travailleurs[viii]. Les règles contenues dans ces textes sont de nature impérative. L'employeur et le travailleur ne peuvent pas y déroger.

§ 1 Champ d'application

Les prescriptions sur la prévention des accidents et maladies professionnels s'appliquent à toutes les entreprises dont les travailleurs exécutent des travaux en Suisse[ix]. L'OPA précise toutefois que les prescriptions sur la sécurité au travail ne s'appliquent pas aux ménages privés et aux installations et équipements de l'armée[x]. A cela s'ajoute que certains types d'entreprises ne sont pas concernés par les prescriptions sur la prévention des accidents professionnels[xi].
La législation sur le travail s'applique aussi à toutes les entreprises privées et publiques lorsque les travailleurs qu'elles occupent effectuent leur travail en Suisse[xii]. La LTr prévoit également des exceptions quant aux entreprises ou aux personnes[xiii]. Par exemple, la loi sur le travail ne s'applique

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i Loi sur le travail (LTr ; RS 822.11).
ii En particulier, ordonnance 1 relative à la loi sur le travail (OLT 1 ; RS 822.111) ; ordonnance 2 relative à la loi sur le travail (OLT 2 ; RS 822.112) ; ordonnance 3 relative à la loi sur le travail (OLT 3 ; RS 822.113) ; ordonnance 4 relative à la loi sur le travail 8OLT 4 ; RS 822.114) ; ordonnance 5 relative à la loi sur le travail (OLT 5 ; RS 822.115).
iii Loi fédérale sur l'assurance-accidents (LAA ; RS 832.20).
iv Ordonnance sur la prévention des accidents et des maladies professionnelles (OPA ; RS 832.30).
v SECO, Commentaire de l'article 6 LTr, p. 1.
vi *Ibidem*.
vii SECO, Commentaire de l'article 1 OLT 3, p. 2.
viii SECO, Commentaire de l'article 6 LTr, p. 2.
ix LAA, art. 81, al. 1; OPA, art. 1, al. 1.
x OPA, art. 2, al. 1.
xi *Op. Cit*., art. 2, al. 2.
xii LTr, art. 1 al. 3.
xiii *Op. Cit*., art. 1, al. 1.

pas aux entreprises agricoles[xiv] et aux ménages privés[xv]. Tandis que d'autres entreprises ou fonctions exclues de la loi restent soumises aux dispositions relatives à la protection de la santé[xvi] comme les administrations[xvii] ainsi que les travailleurs occupant une fonction dirigeante élevée[xviii].

§ 2 Obligations des employeurs

Pour protéger la santé des travailleurs et prévenir les accidents et les maladies professionnels, l'employeur est tenu de prendre toutes les mesures dont l'expérience a démontré la nécessité, que l'état de la technique permet d'appliquer et qui sont adaptées aux conditions d'exploitation de l'entreprise[xix]. La LTr et la LAA imputent la responsabilité de la protection de la santé en premier lieu à l'employeur[xx].

Lorsque des éléments font apparaître que l'activité exercée par un travailleur porte atteinte à sa santé, une enquête relevant de la médecine du travail doit être menée[xxi].

L'employeur doit faire appel à des spécialistes de la sécurité au travail lorsque la protection de la santé des travailleurs et leur sécurité l'exigent[xxii]. Par ailleurs, L'employeur doit prendre des mesures particulières lorsqu'il occupe des travailleurs âgés de moins de 18 ans[xxiii] ou des femmes durant leur maternité[xxiv].

De nombreuses obligations spécifiques sont imposées aux employeurs. Par exemple, une obligation d'information et d'instruction des travailleurs : l'employeur doit veiller à ce que tous les travailleurs occupés dans son entreprise, y compris ceux provenant d'une entreprise tierce, soient informés de manière suffisante et appropriée des risques auxquels ils sont exposés dans l'exercice de leur activité et instruits des mesures de sécurité au travail et de protection de la santé[xxv].
Les travailleurs, ou leurs représentants au sein de l'entreprise, doivent par ailleurs être consultés suffisamment tôt et de manière globale sur toutes les questions concernant la protection de la santé[xxvi].

§ 3 Obligations des travailleurs

L'employeur doit faire collaborer les travailleurs aux mesures de protection de la santé. Ils sont tenus de seconder l'employeur dans l'application des prescriptions sur la protection de la santé[xxvii]. En particulier, les travailleurs sont tenus de suivre les directives de l'employeur en matière de protection de la santé et d'observer les règles généralement reconnues. Ils doivent notamment utiliser les

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xiv *Op. Cit*., art. 2, al. 1, let. d.
xv *Op. Cit*., art. 2, al. 1, let. g.
xvi *Op. Cit*., art. 3a.
xvii *Op. Cit*., art. 2, al. 1, let. a.
xviii *Op. Cit*., art. 3, let. d.
xix *Op. Cit*., art. 6, al. 1; LAA, art. 82, al. 1.
xx SECO, Commentaire de l'article 6 LTr, p. 1.
xxi OLT 3, art. 3, al. 2; OPA, art. 3, al. 1bis.
xxii OPA, art. 11a ss.
xxiii LTr, art. 29 à 32 ; OLT 5 ; Ordonnances du DEFR concernant les dérogations à l'interdiction du travail de nuit et du dimanche pendant la formation professionnelles (RS 822.115.4) ; Ordonnance du DEFR sur les travaux dangereux (RS 822.115.2).
xxiv LTr, art. 35 à 35b; OLT1, art. 60 à 65; Ordonnance sur la protection durant la maternité (OPrOma ; RS 822.111.52).
xxv OLT 3, art. 5, al. 1; OPA, art. 6, al. 1.
xxvi *Op. Cit*., art. 6, al. 1; OPA, art. 6a, al. 1.
xxvii LTr, art. 6, al. 3.

équipements individuels de protection et s'abstenir de compromettre l'efficacité des moyens de protection[xxviii]. Des règles analogues existent matière de sécurité au travail[xxix].

§ 4 Mise en œuvre

L'exécution de la loi sur le travail et de ses ordonnances incombe aux cantons[xxx]. Ceux-ci doivent instituer les autorités chargées de l'exécution et mettre en place des instances pour traiter les recours contre des décisions cantonales[xxxi]. La Confédération exerce quant à elle la haute surveillance sur l'exécution de la loi et peut donner des instructions aux autorités cantonales[xxxii].
Dans le domaine de la sécurité au travail, les inspections cantonales du travail et la caisse nationale d'assurance (Suva) se partagent l'exécution des prescriptions sur la prévention des accidents et maladies professionnels[xxxiii]. Une Commission de coordination (CFST)[xxxiv] nommée par le Conseil fédéral délimite les différents domaines d'exécution et veille à l'application uniforme des prescriptions sur la prévention des accidents et maladies professionnels dans les entreprises[xxxv]. Le SECO et la CFST élaborent des instructions[xxxvi] concernant les exigences relatives à la protection de la santé afin d'assurer une application uniforme et adéquate des prescriptions sur la santé et la sécurité au travail. S'il se conforme aux instructions du SECO et de la CFST, l'employeur est présumé se conformer à ses obligations.

B. Règlementation particulière

L'art. 6 de la loi sur le travail constitue la base légale de la plupart des dispositions sur la protection de la santé contenues dans les ordonnances relatives à la LTr comme l'OLT 3 qui traite de la protection de la santé ou l'OLT 4 qui concerne la construction, l'aménagement et l'assujettissement des entreprises industrielles[xxxvii]. Tandis que l'ordonnance sur la prévention des accidents trouve son fondement dans la loi sur l'assurance-accident.

i. Règlementation spécifique concernant le lieu de travail

L'OLT 3 détermine les mesures de protection de la santé qui doivent être prises dans toutes les entreprises soumises à la loi afin d'assurer la santé des travailleurs à leur poste de travail[xxxviii]. Elle contient des règles particulières relatives à la conception des bâtiments et des locaux[xxxix], à l'hygiène du travail[xl], l'ergonomie[xli], surveillance des travailleurs, aux locaux sociaux[xlii], ainsi qu'à l'entretien et aux nettoyage[xliii] .

[xxviii] OLT 3, art. 10, al. 1.
[xxix] LAA, art. 82, al. 3; OPA, art. 11, al. 1.
[xxx] LTr, art. 41, al. 1.
[xxxi] SECO, Commentaire de l'article 41 LTr.
[xxxii] LTr, art. 42, al. 1.
[xxxiii] LAA, art. 85, al. 1.
[xxxiv] Il s'agit de la Commission fédérale de coordination pour la sécurité au travail (CFST).
[xxxv] LAA, art. 85, al. 2 et 3.
[xxxvi] Le SECO publie des commentaires des articles de la loi sur le travail et de ses ordonnances et la CFST élabore des directives qui concrétisent et explicitent les exigences légales contenues notamment dans l'ordonnance sur la prévention des accidents.
[xxxvii] SECO, Commentaire de l'article 6 LTr, p. 1.
[xxxviii] OLT 3, art. 1, al. 1.
[xxxix] *Op. Cit*., art. 11 à 14.
[xl] *Op. Cit*., art. 15 à 22.
[xli] *Op. Cit*., Art. 23 et 24.
[xlii] *Op. Cit*., art. 29 à 36.
[xliii] *Op. Cit*., art. 37.

L'ordonnance sur la prévention des accidents contient aussi des exigences relatives aux bâtiments et autres constructions[xliv] et au milieu de travail[xlv]. Pour ce qui concerne l'information, la formation[xlvi] et la consultation[xlvii] des travailleurs, les règles contenues dans l'OPA sont similaires à celles prescrites par l'OLT3.

ii. Règlementation spécifique sur l'utilisation des équipements de travail

En Suisse, la directive relative aux équipements de travail[xlviii] indique comment satisfaire aux prescriptions concernant la sécurité et la protection de la santé des travailleurs lors de l'utilisation des équipements de travail. Elle permet d'appliquer ces prescriptions de façon uniforme, adéquate et conforme à l'état de la technique, et montre aux employeurs comment satisfaire à leurs obligations concernant l'utilisation, l'emploi et l'entretien des équipements de travail. Cette directive fait un lien étroit avec les directives et normes européennes.
Au sens de la directive, sont réputés équipements de travail, les machines, installations, appareils et outils utilisés au travail. Cela comprend également les produits qui appartiennent au milieu du travail tels que l'aération, le chauffage, l'éclairage ainsi que les équipements de protection individuelle (EPI)[xlix].

iii. Règlementation spécifique sur l'équipement individuel de protection (EPI)

Les articles 5 OPA et 27 OLT 3 prévoient que l'employeur doit mettre à disposition des travailleurs des équipements de protection individuelle lorsqu'il y a un danger concret qui ne peut pas être éliminé par des mesures d'ordre techniques ou organisationnelles. Les travailleurs sont tenus d'utiliser les équipements individuels de protection conformément aux instructions d'utilisation et aux directives de l'entreprise[l]. De son côté, l'employeur doit contrôler l'utilisation correcte de ces équipements et, au besoin, l'imposer[li].

Les équipements individuels de protection doivent répondre aux exigences fondamentales de la loi sur la sécurité des produits (LSPro)[lii] en matière de sécurité et de protection de la santé, ainsi qu'à celles de l'ordonnance suisse sur la sécurité des équipements de protection individuelle (OEPI)[liii] qui règlemente la mise sur le marché ainsi que les exigences applicables à la conception et à la fabrication des équipements[liv]. L'OEPI transpose en Suisse les exigences du règlement européen 2016/425. Depuis le 21 avril 2019, seuls les EPI qui remplissent les exigences de l'OEPI peuvent être mis sur le marché en Suisse[lv].

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xliv OPA. Art. 12 à 23.
xlv *Op. Cit*., art. 33 à 37.
xlvi *Op. Cit*., art. 6, al. 1.
xlvii *Op. Cit*., art. 6a.
xlviii Directive CFST 6512.
xlix *Op. Cit*., p. 5.
l OLT 3, art. 10, al. 3 ; OPA, art. 11, al. 1.
li OLT 3, art. 3, al. 1 ; OPA, art. 3, al. 2.
lii Loi sur la sécurité des produits (LSPro ; RS 930.11).
liii Ordonnance sur la sécurité des équipements de protection individuelles (OEPI ; RS 930.115).
liv SECO, Commentaire de l'article 27 LTr, p. 2.
lv Informations consultées sur le site du SECO le 10 mai 2023.

iv. Règlementation spécifique concernant les travaux avec équipement à écrans de visualisation

En Suisse, il n'existe pas de règlementation spécifique relative au travail sur écran. Les règles relatives à l'aménagement ergonomique des postes de travail s'appliquent[lvi]. Une brochure de la SUVA[lvii] donne toutefois des conseils pratiques afin d'aménager les postes de travail de manière optimale.

v. Règlementation spécifique sur la manutention de charges lourdes comportant des risques lombaires

Les articles 25 OLT 3 et 41 OPA commandent à l'employeur de prendre les mesures d'organisation appropriées et de mettre à disposition les équipements adéquats pour éviter que les travailleurs ne doivent déplacer des charges lourdes, afin que la manipulation ne porte pas atteinte à la santé ou à la sécurité des travailleurs. L'employeur doit informer les travailleurs des dangers liés à la manipulation de charges lourdes et les instruire sur la façon de lever, porter et déplacer ces charges[lviii]. Il existe une abondante documentation sur le sujet[lix], en particulier la directive de la SUVA « Valeurs limites d'exposition au poste de travail »[lx] qui contient notamment des valeurs indicatives pour les contraintes corporelles.

C. Comparaison entre le droit suisse et la directive (UE) 89/391/CEE du 12 juin 1989

Pour ce qui concerne le champ d'application, le droit suisse ne limite pas les exceptions au champ d'application à certaines activités de la fonction publique ou à des services spécifiques dans les services de protection civile comme le prévoit l'article 2 ch. 2 de la directive européenne. En effet, d'autres secteurs que l'administration sont aussi concernés. Il s'agit en général de domaines qui sont soumis à des lois fédérales particulières. Par ailleurs, bien que les administrations soient en principe exclues du champ d'application de la loi sur le travail, les dispositions de la loi relatives à la protection de la santé leur restent applicables. A contrario, l'ordonnance sur la prévention des accidents ne prévoit pas d'exception pour les administrations publiques.

La loi sur le travail contient une définition plus élargie du terme travailleur que celle de la directive et couvre aussi les bénévoles[lxi].

La législation suisse n'impose pas à l'employeur de confier à un ou plusieurs travailleurs des activités relatives à la santé et la sécurité au travail. La nécessité de déléguer certaines tâches en matière de SST dépend en principe de la structure de l'entreprise en particulier de sa taille, du nombre d'employés, des types de travaux effectués et de l'organisation interne de l'entreprise[lxii]. Par contre, lorsque des substances ou préparations dangereuses sont utilisées à titre professionnel ou commercial, l'entreprise doit désigner une personne de contact capable de renseigner les autorités[lxiii]. C'est également le cas en matière de premiers secours, de lutte contre l'incendie, et d'évacuation : le droit suisse n'impose pas à l'employeur de désigner, dans tous les cas, un ou plusieurs travailleurs chargés de mettre en pratique les mesures de premiers secours, de lutte contre le feu et d'évacuation

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lvi En particulier, les articles 23, 24 OLT 3 et 27 OPA.

lviilvii SUVA, *Travail sur écran – Conseils pour travailler confortablement sur ordinateur*, réf. 84021.F.

lviii OPA, art. 41, al. 2bis; OLT 3, art. 25, al. 3.

lix Notamment, SUVA, *Liste de contrôle – Alléger la charge*, réf. 67199.F ; SUVA, Evaluation des contraintes corporelles – Manutention des charges, réf. 88190.F ; CFST, *Sécurité au travail et protection de la santé lors de la manutention de charges*, réf. 6245.F.

lx SUVA, *Valeurs limites d'exposition au poste de travail*, réf. 1903.f, éd. Février 2021.

lxi SECO, Commentaire de l'article 1 LTr, p. 2.

lxii OPA, art. 7 ; OLT 3, art. 7 ; SECO, Commentaire de l'article 7 OLT 3, p. 1.

lxiii Loi sur les produits chimiques (LChim ; RS 813.1), art. 25 al. 2 ; Ordonnance du DFI relative à la personne de contact pour les produits chimiques (RS 813.113.11).

des travailleurs. Pour ce qui concerne les premiers secours, la nécessité de mettre à disposition des infirmeries et du personnel formé est en fonction de la spécificité de l'entreprise (localisation, type de dangers, etc)[lxiv].

Pour ce qui concerne les accidents, l'employeur doit aviser sans retard l'assureur accident dès qu'il apprend que son travailleur assuré a été victime d'un accident qui nécessite un traitement médical ou provoque une incapacité de travail ou le décès[lxv]. Aucune différence n'est faite entre les accidents professionnels et non professionnels au niveau de l'obligation d'annonce. Les assureurs peuvent édicter, à l'intention des employeurs, du service compétent de l'assurance-chômage, de l'office AI, des travailleurs et des médecins, des directives sur l'établissement des déclarations d'accident ou de maladie professionnelle[lxvi].

Par ailleurs, selon la législation suisse, les travailleurs auxquels il est confié certaines tâches en matière de SST doivent être formé de manière appropriée et se voir attribuer des compétences et des instructions claires[lxvii]. Ces travailleurs ont les mêmes droits que les autres travailleurs pour ce qui concerne la participation et la consultation[lxviii]. En Suisse, une loi fédérale règlemente le droit à l'information et à la consultation des travailleurs[lxix]. En matière de santé et sécurité au travail, le SECO a édicté un feuillet[lxx] qui précise l'étendue de ces droits.

Enfin, la Suisse suit de manière informelle les travaux du SLIC et s'inspire des principes élaborés par ce Comité. Elle participe également en qualité de pays observateur à l'Agence Européenne pour la Sécurité au travail (EU-OSHA) à Bilbao.

[lxiv] OLT 3, art. 36, al. 2.

[lxv] Loi fédérale sur l'assurance-accident (LAA ; RS 832.20), art. 45, al. 2.

[lxvi] Ordonnance sur l'assurance-accident (OLAA, RS 832.202), art. 53, al. 4.

[lxvii] OLT 3, art. 5, al. 2; OPA, art. 7, al. 1.

[lxviii] LTr, art. 48; OLT 3, art. 6; OPA, art. 6a.

[lxix] Loi fédérale sur l'information et la consultation des travailleurs dans les entreprises (Loi sur la participation ; RS 822.14).

[lxx] SECO, *Participation : santé au travail*, Information n° 104, éd. 2018.

[1] C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, p. 501.

[2] Preamble to Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

[3] E. Ales & J. Popma, Occupational Health and Safety and Working Time in T. Jaspers *et al.* (eds.), European Labour Law, Intersentia 2019, p. 431 *et seq.*, p. 436.

[4] Art. 1 Council Directive 89/391/EEC of 12 June 1989.

[5] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the EEA Agreement.

[6] Art. 2 Council Directive 89/391/EEC of 12 June 1989; CJEU 5 October 2004, Case C-397/01 to C-403/01, *Bernhard Pfeiffer (C-397/01), et al. v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*; CJEU 14 July 2005, Case C-52/04, *Personalrat der Feuerwehr Hamburg v. Leiter der Feuerwehr Hamburg*.

[7] Art. 2-3 Council Directive 89/391/EEC of 12 June 1989. Although the Framework Directive does not demand this, many Member States have more limited OSH protections that cover workers in these peculiar public services, such as the army, cover certain self-employed workers (for example, those working besides an employee) and cover domestic workers.

[8] For clarifications on what this general duty implies, see CJEU 14 June 2007, Case C-127/05, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*.

[9] Art. 5 Council Directive 89/391/EEC of 12 June 1989.

[10] P.-Y. Verkindt, Améliorer les conditions de travail pour protéger la santé et la sécurité des travailleurs: Retour sur le rôle du droit européen dans la construction d'un droit de la santé au travail in É. Pataut *et al*. (eds.), Liber amicorum en hommage à Pierre Rodière, LGDJ 2019, p. 533 *et seq*., p. 534.

[11] Art. 6 Council Directive 89/391/EEC of 12 June 1989.

[12] Preamble Council Directive 89/391/EEC of 12 June 1989.

[13] Art. 6 (3) Council Directive 89/391/EEC of 12 June 1989; CJEU 7 February 2002, Case C-5/00, *Commission of the European Communities v. Federal Republic of Germany.*

[14] Art. 10 Council Directive 89/391/EEC of 12 June 1989; CJEU 12 June 2003, Case C-425/01, *Commission of the European Communities v. Portuguese Republic.*

[15] Art. 12 Council Directive 89/391/EEC of 12 June 1989.

[16] Art. 7 Council Directive 89/391/EEC of 12 June 1989; CJEU 15 November 2001, Case C-49/00, *Commission of the European Communities v Italian Republic*; CJEU 22 May 2003, Case C-441/01, *Commission of the European Communities v. Kingdom of the Netherlands*; CJEU 6 April 2006, Case C-428/04, *Commission of the European Communities v. Republic of Austria.*

[17] Art. 8 Council Directive 89/391/EEC of 12 June 1989; CJEU 6 April 2006, Case C-428/04, *Commission of the European Communities v. Republic of Austria.*

[18] Art. 9 Council Directive 89/391/EEC of 12 June 1989.

[19] Art. 11 Council Directive 89/391/EEC of 12 June 1989; CJEU 6 April 2006, Case C-428/04, *Commission of the European Communities v. Republic of Austria.*

[20] Art. 14 Council Directive 89/391/EEC of 12 June 1989.

[21] Art. 6 (1) Council Directive 89/391/EEC of 12 June 1989.

[22] Art. 13 Council Directive of 12 June 1989; CJEU 6 April 2006, Case C-428/04, *Commission of the European Communities v. Republic of Austria.*

[23] Art. 5 (3) Council Directive 89/391/EEC of 12 June 1989.

[24] European Commission, Commission Staff Working Document Ex-post evaluation of the EU occupational safety and health Directives (REFIT evaluation), SWD(2017) 10 final, p. 6-7; R. Graveling, Transposition, implementation and enforcement of EU OSH Legislation, Brussels: European Commission 2018, p. 1.

[25] For example, the Framework Directive notes that "*[w]orkers' representatives must be given the opportunity to submit their observations during inspection visits by the competent authority.*" Art. 11 (6) Council Directive 89/391/EEC of 12 June 1989.

[26] Commission Decision of 12 July 1995 setting up a Committee of Senior Labour Inspectors (95/319/EC).

[27] Communication from the European Commission, EU strategic framework on health and safety at work 2021-2027: Occupational safety and health in a changing world of work, COM(2021) 323 final.

[28] K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, 367. Reference is made to R. Birk, Festschrift für Wlotzke, p. 645.

[29] The OSH Directives are all built around so-called "Common Processes and Mechanisms". R. Graveling, Transposition, implementation and enforcement of EU OSH Legislation, Brussels: European Commission 2018, p. 2; E. Ales & J. Popma, Occupational Health and Safety and Working Time in T. Jaspers *et al.* (eds.), European Labour Law, Intersentia 2019, p. 431 *et seq.*, p. 462-463.

30 C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, p. 523.

31 Art. 1 Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

32 Art. 3-5 Council Directive 89/654/EEC of 30 November 1989. The European Commission was empowered in 2019 to make strictly technical amendments to the annexes through delegated acts. Regulation (EU) 2019/1243 of 20 June 2019.

33 Art. 7-8 Council Directive 89/654/EEC of 30 November 1989.

34 Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

35 Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

36 Art. 2 Directive 2009/104/EC of 16 September 2009.

37 Art. 3 Directive 2009/104/EC of 16 September 2009.

38 Art. 4-10 Directive 2009/104/EC of 16 September 2009.

39 C. Barnard, EU Employment Law, 4th ed., Oxford: OUP 2012, p. 526.

40 Art. 2 and 3 Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

41 Recital 4 Commission Directive 2019/1832 of 24 October 2019 amending Annexes I, II and III to Council Directive 89/656/EEC as regards purely technical adjustments.

42 Regulation (EU) 2019/1243 of 20 June 2019.

43 Recital 12 Directive 2019/1832 of 24 October 2019.

44 Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC.

45 Art. 1-7 Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

46 The European Commission was empowered in 2019 to make strictly technical amendments to the annexes through delegated acts. Regulation (EU) 2019/1243 of 20 June 2019.

47 CJEU 6 July 2000, Case C-11/99, *Margrit Dietrich v. Westdeutscher Rundfunk.*

48 The European Commission was empowered in 2019 to make strictly technical amendments to the annexes through delegated acts. Regulation (EU) 2019/1243 of 20 June 2019.

49 Art. 4-5 and annex to Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC); CJEU 12 December 1996, Case C-74/95, *Criminal proceedings against X*.

50 Art. 1-3 and 6-9 Council Directive 90/270/EEC of 29 May 1990; CJEU 12 December 1996, Case C-74/95, *Criminal proceedings against X*; CJEU 24 October 2002, Case C-455/00, *Commission of the European Communities v. Italian Republic*; CJEU 22 December 2022, Case C-392/21, *TJ v. Inspectoratul General pentru Imigrări*.

51 F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, 7th ed., Paris: LGDJ 2020, p. 626.

52 *Loi n° 91-1414 du 31 décembre 1991 modifiant le code du travail et le code de la santé publique en vue de favoriser la prévention des risques professionnels et portant transposition de directives européennes relatives à la santé et à la sécurité du travail.* Other laws and regulations have also been important, such as *Décret n° 92-158 du 20 février 1992 complétant le code du travail (deuxième partie : Décrets en Conseil d'Etat) et fixant les prescriptions particulières d'hygiène et de sécurité applicables aux travaux effectués dans un établissement par une entreprise extérieure*; and *Décret n° 92-333 du 31 mars 1992 modifiant le code du travail (deuxième partie: Décrets en Conseil d'Etat) et relatif aux dispositions concernant la sécurité et la santé applicables aux lieux de travail, que doivent observer les chefs d'établissements utilisateurs*.

53 E.g., in relation to the national railway services. CJEU 5 June 2008, Case C-226/06, *Commission of the European Communities v. French Republic.*

54 *Décret n° 2008-1347 du 17 décembre 2008 relatif à l'information et à la formation des travailleurs sur les risques pour leur santé et leur sécurité*.

55 *Décret n° 92-332 du 31 mars 1992 modifiant le code du travail (deuxième partie : Décrets en Conseil d'Etat) et relatif aux dispositions concernant la sécurité et la santé que doivent observer les maîtres*

d'ouvrage lors de la construction de lieux de travail ou lors de leurs modifications, extensions ou transformations; and *Décret n° 92-333 du 31 mars 1992 modifiant le code du travail*.

56 The following instruments are also important: *Décret n° 93-40 du 11 janvier 1993 relatif aux prescriptions techniques applicables à l'utilisation des équipements de travail soumis à l'Article L. 233-5-1 du code du travail, aux règles techniques applicables aux matériels d'occasion soumis à l'Article L. 233-5 du même code et à la mise en conformité des équipements existants et modifiant le code du travail*; *Arrêté du 5 mars 1993 soumettant certains équipements de travail à l'obligation de faire l'objet des vérifications générales périodiques prévues à l'Article R. 233-11 du code du travail*; *Arrêté du 4 juin 1993 complétant l'arrêté du 5 mars 1993 soumettant certains équipements de travail à l'obligation de faire l'objet des vérifications générales périodiques prévues à l'Article R. 233-11 du code du travail en ce qui concerne le contenu desdites vérifications*; and *Arrêté du 9 juin 1993 fixant les conditions de vérification des équipements de travail utilisés pour le levage de charges, l'élévation de postes de travail ou le transport en élévation de personnes* (abrogated since 2005). Directive 2009/104/EC seems not to have resulted in any national transposition measure.

57 The following instrument is also important: *Arrêté du 19 mars 1993 fixant la liste des équipements de protection individuelle qui doivent faire l'objet des vérifications générales périodiques prévues à l'Article R. 233-42-2 du code du travail*.

58 *Décret n° 93-41 du 11 janvier 1993 relatif aux mesures d'organisation, aux conditions de mise en oeuvre et d'utilisation applicables aux équipements de travail et moyens de protection soumis à l'Article L. 233-5-1 du code du travail et modifiant ce code*.

59 *Décret n° 92-958 du 3 septembre 1992 relatif aux prescriptions minimales de sécurité et de santé concernant la manutention manuelle de charges comportant des risques, notamment dorso-lombaires, pour les travailleurs et transposant la directive (C.E.E.) no 90-269 du conseil du 29 mai 1990*; and *Arrêté du 29 janvier 1993 portant application de l'Article R. 231-68 du code du travail relatif aux éléments de référence et aux autres facteurs de risque à prendre en compte pour l'évaluation préalable des risques et l'organisation des postes de travail lors des manutentions manuelles de charges comportant des risques, notamment dorso-lombaires*.

60 *Décret n° 91-451 du 14 mai 1991 relatif à la prévention des risques liés au travail sur des équipements comportant des écrans de visualization*. Reference is also being made to a *circulaire du Ministère du travail, de l'emploi et de la formation professionnelle n° 91-18 du 04 novembre 1991, relative à l'application du décret n° 91-451 du 14 mai 1991 concernant la prévention des risques liés au travail sur des équipements comportant des écrans de visualization*.

61 This is evidenced, for example, by the preamble's mentioning that "*Member States have a responsibility to encourage improvements in the safety and health of workers on their territory*", and the employer's obligation to "*be alert to the need to adjust [OSH] measures to take account of changing circumstances and aim to improve existing situations.*" Preamble and Art. 6 (1) Council Directive 89/391/EEC of 12 June 1989.

62 Art. L. 4112-1 and L. 4112-2 *code du travail*.

63 P.-Y. Verkindt, Améliorer les conditions de travail pour protéger la santé et la sécurité des travailleurs: Retour sur le rôle du droit européen dans la construction d'un droit de la santé au travail in É. Pataut *et al*. (eds.), Liber amicorum en hommage à Pierre Rodière, LGDJ 2019, p. 533 *et seq*., p. 544-547.

64 Cour de cassation 25 novembre 2015, Case ECLI:FR:CCASS:2015:SO02121, *Air France*.

65 G. Auzero, D. Baugard & E. Dockès, Droit du travail, 33rd ed., Paris: Dalloz 2020, p. 1143-1146.

66 European Commission, Commission Staff Working Document Ex-post evaluation of the EU occupational safety and health Directives (REFIT evaluation), SWD(2017) 10 final, p. 135.

67 *Gesetz vom 7. August 1996 zur Umsetzung der EG-Rahmenrichtlinie Arbeitsschutz und weiterer Arbeitsschutz-Richtlinien*.

68 *Gesetz vom 7. August 1996 über die Durchführung von Maßnahmen des Arbeitsschutzes zur Verbesserung der Sicherheit und des Gesundheitsschutzes der Beschäftigten bei der Arbeit (Arbeitsschutzgesetz – ArbSchG)*.

69 Art. 8 *Gesetz vom 19. Oktober 2013 zur Neuorganisation der bundesunmittelbaren Unfallkassen, zur Änderung des Sozialgerichtsgesetzes und zur Änderung anderer Gesetze (BUK-Neuorganisationsgesetz - BUK-NOG).*

70 The CJEU agreed with the European Commission that by exempting employers of 10 or fewer workers from the duty to keep documents containing the risk assessment results, German law violated the Framework Directive. CJEU 7 February 2002, Case C-5/00, *Commission of the European Communities v. Federal Republic of Germany.*

71 *Arbeitsstättenverordnung vom 12. August 2004*.

72 Germany seems to have considered it unnecessary to transpose Directive 2009/104/EC.

[73] *Verordnung vom 11. März 1997 über Sicherheit und Gesundheitsschutz bei der Benutzung von Arbeitsmitteln bei der Arbeit (Arbeitsmittelbenutzungsverordnung - AMBV)*.

[74] *Verordnung vom 3. Februar 2015 über Sicherheit und Gesundheitsschutz bei der Verwendung von Arbeitsmitteln (Betriebssicherheitsverordnung - BetrSichV)*.

[75] *Verordnung vom 4. Dezember 1996 über Sicherheit und Gesundheitsschutz bei der Benutzung persönlicher Schutzausrüstungen bei der Arbeit (PSA-Benutzungsverordnung – PSA-BV)*. There have been infringement proceedings against Germany related to the legislation of certain *Länder*, making personal protective equipment for firefighters subject to additional requirements. CJEU 22 May 2003, Case C-103/01, *Commission of the European Communities v. Federal Republic of Germany*.

[76] *Verordnung vom 4. Dezember 1996 über Sicherheit und Gesundheitsschutz bei der manuellen Handhabung von Lasten bei der Arbeit (Lastenhandhabungsverordnung - LasthandhabV)*.

[77] *Verordnung vom 4. Dezember 1996 über Sicherheit und Gesundheitsschutz bei der Arbeit an Bildschirmgeräten (Bildschirmarbeitsverordnung – BildscharbV).*

[78] *Arbeitsstättenverordnung vom 12. August 2004*.

[79] *Verordnung vom 30. November 2016 zur Änderung von Arbeitsschutzverordnungen.*

[80] This is evidenced, for example, by the preamble's mentioning that "*Member States have a responsibility to encourage improvements in the safety and health of workers on their territory*", and the employer's obligation to "*be alert to the need to adjust [OSH] measures to take account of changing circumstances and aim to improve existing situations.*" Preamble and Art. 6 (1) Council Directive 89/391/EEC of 12 June 1989.

[81] Section 87 *Betriebsverfassungsgesetz*. Please note that also the Netherlands provides the works council with co-determination rights on this matter. Art. 27 (1) d. and 28 (1) *wet van 28 januari 1971, houdende nieuwe regelen omtrent de medezeggenschap van de werknemers in de onderneming door middel van ondernemingsraden (Wet op de ondernemingsraden)*.

[82] If covered by co-determination rights, measures taken by the employer without the works council's proper consideration are void. S. Morgenroth & E. Mittelhamm, Working Hours, Holidays and Health and Safety in J. Kirchner *et al.* (eds.), Key aspects of German Employment and Labour Law, Springer-Verlag 2010, p. 83 *et seq*, p. 89.

[83] R. Richardi, Betriebsverfassungsgesetz, 17th ed., Beck 2022, Para. 548.

[84] European Commission, Commission Staff Working Document Ex-post evaluation of the EU occupational safety and health Directives (REFIT evaluation), SWD(2017) 10 final, p. 139.

[85] Arbowet van 8 november 1980.

[86] *Wet van 22 december 1993 houdende wijziging van de Arbeidsomstandighedenwet en enige andere wetten in verband met de tenuitvoerlegging van de Richtlijn van de Raad van de Europese Gemeenschappen van 12 juni 1989 betreffende de tenuitvoerlegging van maatregelen ter bevordering van de verbetering van de veiligheid en de gezondheid van werknemers op het werk en in verband met enige andere onderwerpen*; *Wet van 29 juni 1994 tot wijziging van de Arbeidsomstandighedenwet in verband met seksuele intimidatie en agressie en geweld.*

[87] Dutch law allowed employers to choose external health and safety services without restrictions. The Commission argued that the Directive prioritizes internal services if the company's staff has the appropriate competencies and that external services are a secondary option. CJEU 22 May 2003, Case C-441/01, *Commission of the European Communities v. Kingdom of the Netherlands*.

[88] *Wet van 7 april 2005 tot wijziging van de Arbeidsomstandighedenwet 1998 in verband met een gewijzigde organisatie van de deskundige bijstand bij het arbeidsomstandighedenbeleid en de daarmee samenhangende bepalingen*.

[89] *Wet van 18 maart 1999, houdende bepalingen ter verbetering van de arbeidsomstandigheden (Arbeidsomstandighedenwet 1998)*; A. Jacobs, Labour Law in the Netherlands, 2nd ed., Deventer: Wolters Kluwer 2015, p. 144.

[90] *Besluit van 8 oktober 1993 tot vaststelling van minimumvoorschriften inzake veiligheid en gezondheid voor arbeidsplaatsen (Besluit arbeidsplaatsen)*.

[91] *Besluit van 14 oktober 1993 tot vaststelling van minimumvoorschriften inzake veiligheid en gezondheid bij het gebruik door werknemers van arbeidsmiddelen op de arbeidsplaats (Besluit arbeidsmiddelen).*

[92] *Besluit van 15 juli 1993 tot vaststelling van minimumvoorschriften inzake veiligheid en gezondheid voor het gebruik op het werk van persoonlijke beschermingsmiddelen door de werknemers (Arbeidsomstandighedenbesluit persoonlijke beschermingsmiddelen)*.

[93] *Besluit van 27 januari 1993 tot vaststelling van regels ter bescherming van werknemers tegen de gevaren van fysieke belasting tijdens de arbeid (Besluit fysieke belasting)*.

[94] *Besluit van 10 december 1992, houdende regels met betrekking tot het verrichten van arbeid met beeldschermapparatuur (Besluit beeldschermwerk)*.

95 *Besluit van 15 januari 1997, houdende regels in het belang van de veiligheid, de gezondheid en het welzijn in verband met de arbeid (Arbeidsomstandighedenbesluit)*. Implementing measures at the executive level, most notably the Health and Safety at Work Regulations (*Arbeidsomstandighedenregeling*) and Health and Safety Policy Rules (*Arbobeleidsregels*) can also contain relevant provisions. *Arbeidsomstandighedenregeling van 12 maart 1997*; *Beleidsregels arbeidsomstandighedenwetgeving van 27 november 2001*.

96 This is evidenced, for example, by the preamble's mentioning that "*Member States have a responsibility to encourage improvements in the safety and health of workers on their territory*", and the employer's obligation to "*be alert to the need to adjust [OSH] measures to take account of changing circumstances and aim to improve existing situations.*" Preamble and Art. 6 (1) Council Directive 89/391/EEC of 12 June 1989.

97 W. H. A. C. M. Bouwens, M. S. Houwerzijl & W. L. Roozendaal, Schets van het Nederlandse arbeidsrecht, 26th ed., Deventer: Wolters Kluwer 2021, p. 44-45.

98 European Commission, Commission Staff Working Document Ex-post evaluation of the EU occupational safety and health Directives (REFIT evaluation), SWD(2017) 10 final, p. 166.

99 "*By its application, the Commission of the European Communities seeks a declaration from the Court that, by restricting the duty upon employers to ensure the safety and health of workers in all aspects related to work to a duty to do this only 'so far as is reasonably practicable', the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work*". The CJEU did not agree with the Commission's view that the EU Directive requires no-fault liability. CJEU 14 June 2007, Case C-127/05, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*.

100 The Management of Health and Safety at Work Regulations 1992; D. A. Grayham & V. O. del Rosario, The Management of Health and Safety at Work Regulations 1992, (1) Journal of the Royal Society of Medicine 1997, p. 47 *et seq*.

101 S. Deakin & G. S. Morris, Labour Law, 5th ed., Oxford: Hart Publishing 2009, p. 301.

102 The Provision and Use of Work Equipment Regulations 1998.

103 The Personal Protective Equipment at Work (Amendment) Regulations 2022.

104 Explanatory memorandum to the Health and Safety (Amendment) (EU Exit) Regulations 2018.

105 Health and Safety Executive, The UK has left the EU, available at: https://www.hse.gov.uk/brexit/ (14.04.2023).

106 This is evidenced, for example, by the preamble's mentioning that "*Member States have a responsibility to encourage improvements in the safety and health of workers on their territory*", and the employer's obligation to "*be alert to the need to adjust [OSH] measures to take account of changing circumstances and aim to improve existing situations.*" Preamble and Art. 6 (1) Council Directive 89/391/EEC of 12 June 1989.

107 Section 3 Health and Safety at Work Act 1974. The Health and Safety at Work Act used to impose "*a general duty on self-employed people to conduct their work in a way that they and other persons affected by their work are not exposed to risks to their health or safety, so far as is reasonably practicable, whilst the Management of Health and Safety at Work Regulations requires them to make an assessment of the risks to their health and safety as well as the health and safety of others arising from their work.*" R. E. Löfstedt, Reclaiming health and safety for all: An independent review of health and safety legislation, London: TSO 2011.

108 The Health and Safety at Work Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015.

109 Consider this example: "*Hairdresser - I'm a self-employed hairdresser, does the law apply to me? If you use bleaching agents or similar chemicals then yes, the law will apply to you. If you are simply washing and cutting hair, then health and safety law will no longer apply.*" Health and Safety Executive, Does the law apply to me?, available at: https://www.hse.gov.uk/self-employed/does-law-apply-to-me.htm (14.04.2023).

110 European Commission, Commission Staff Working Document Ex-post evaluation of the EU occupational safety and health Directives (REFIT evaluation), SWD(2017) 10 final, p. 191.

111 Art. L. 4121-1 *code du travail*.

112 Section 3 *Arbeitsschutzgesetz*

113 Art. 3 *Arbeidsomstandighedenwet.*

114 Section 2 Health and Safety at Work Act 1974.

115 Art. L. 4121-2 *code du travail*.

116 Section 4 *Arbeitsschutzgesetz.*

117 Art. 3 *Arbeidsomstandighedenwet.*
118 Section 2 Health and Safety at Work Act 1974.
119 Art. L. 4121-3 *code du travail*.
120 Section 5 *Arbeitsschutzgesetz.*
121 Art. 5 *Arbeidsomstandighedenwet.*
122 Section 3 The Management of Health and Safety at Work Regulations 1999.
123 *Décret n° 2022-681 du 26 avril 2022 relatif aux modalités de prévention des risques professionnels et de suivi en santé au travail des travailleurs indépendants, des salariés des entreprises extérieures et des travailleurs d'entreprises de travail temporaire*.
124 Section 2 (3) *Arbeitsschutzgesetz.*
125 *DGUV Unfallverhütungsvorschrift 38 Bauarbeiten*.
126 Art. 9.5. (1) *Arbeidsomstandighedenbesluit*.
127 Art. 9.5. (2)-(4) *Arbeidsomstandighedenbesluit*.
128 Art. 9.5. (5) *Arbeidsomstandighedenbesluit*.
129 Section 3 Health and Safety at Work Act 1974; The Health and Safety at Work Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015.
130 Art. L. 2312-5, L. 2312-6, L. 2312-9, L. 2312-13, etc. *code du travail*.
131 Art. L. 2315-36 – L. 2315-44 *code du travail*.
132 Sections 80, 81, 87, 88, etc. *Betriebsverfassungsgesetz*.
133 Section 11 *Gesetz vom 12. Dezember 1973 über Betriebsärzte, Sicherheitsingenieure und andere Fachkräfte für Arbeitssicherheit*.
134 *I.a.*, Art. 12 *Arbeidsomstandighedenwet*; Art. 4.92. – 4.93. *Arbeidsomstandighedenbesluit*; Art. 27-28 *Wet op de ondernemingsraden*.
135 *I.a.*, Art. 12 *Arbeidsomstandighedenwet*; Art. 4.92. – 4.93. *Arbeidsomstandighedenbesluit*; Art. 35c *Wet op de ondernemingsraden*.
136 The Safety Representatives and Safety Committees Regulations 1977; Regulation 17 The Management of Health and Safety at Work Regulations 1992.
137 The Health and Safety (Consultation with Employees) Regulations 1996.
138 Art. L. 4711-1 – L. 4711-5 *code du travail*.
139 Art. L. 4721-1 – L. 4723-1 *code du travail*.
140 Art. L. 4751-1 – L. 4755-4 *code du travail*.
141 Art. L. 4741-1 – L. 4746-1 *code du travail*.
142 Section 21 *Arbeitsschutzgesetz.*
143 Section 22 *Arbeitsschutzgesetz.*
144 Section 25 *Arbeitsschutzgesetz.*
145 Section 26 *Arbeitsschutzgesetz*
146 Art. 24 *Arbeidsomstandighedenwet.* Sometimes also, *i.a.*, the Environment and Transport Inspectorate or Food and Consumer Product Safety Authority. *Aanwijzingsregeling toezichthoudende ambtenaren en ambtenaren met specifieke uitvoeringstaken op grond van SZW wetgeving.*
147 Art. 27 *Arbeidsomstandighedenwet; Aanwijzingsregeling toezichthoudende ambtenaren en ambtenaren met specifieke uitvoeringstaken op grond van SZW wetgeving.*
148 Art. 28a and 28b *Arbeidsomstandighedenwet; Aanwijzingsregeling toezichthoudende ambtenaren en ambtenaren met specifieke uitvoeringstaken op grond van SZW wetgeving.*
149 Art. 33 – 34 *Arbeidsomstandighedenwet*; *Aanwijzingsregeling boeteoplegger SZW-wetgeving 2012*.
150 Sections 18-20 Health and Safety at Work Act 1974; The Health and Safety (Enforcing Authority) Regulations 1998.
151 Section 14 Health and Safety at Work Act 1974.
152 Sections 21-24 Health and Safety at Work Act 1974.
153 Section 33 and schedule 3A Health and Safety at Work Act 1974.
154 Communication from the European Commission, Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy, COM(2017) 12 final; Communication from the European Commission, EU strategic framework on health and safety at work 2021-2027: Occupational safety and health in a changing world of work, COM(2021) 323 final.
155 Framework Agreement of 8 October 2004 on Work-related Stress; Framework Agreement of 26 April 2007 on Harassment and Violence at Work.
156 A good example is the European Survey of Enterprises on New and Emerging Risks.
157 A good example is the Online Interactive Risk Assessment.

158 Eurostat data seems to suggest that Germany is also a relatively good performer. Health and Safety Executive, Comparisons with other countries, available at: https://www.hse.gov.uk/statistics/european/ (14.04.2023).

159 France's national OSH policy for 2021-2025 predominantly focuses on the fight against serious and fatal work accidents, whereas the previous one (2016-2020) had other priorities. *Plan santé au travail 4 (PST 4)*.

160 Health and Safety Executive, Comparisons with other countries, available at: https://www.hse.gov.uk/statistics/european/ (14.04.2023).

161 "*The most important policy goal is to reinforce knowledge and improve a culture on the workplace to prevent work-related illness.*" Dutch vision and strategy for occupational safety and health, 2016.

162 EU-OSHA highlights that "*the complexity of OSH rules was considered a key barrier in fulfilling OSH duties*". More regulations do not necessarily lead to better protections. European Agency for Safety and Health at Work, Third European Survey of Enterprises on New and Emerging Risks (ESENER 2019): Overview Report How European workplaces manage safety and health, Luxembourg: European Union 2022, p. 108.

163 J. Hassard, A. Jain & S. Leka, International Comparison of Occupational Health Systems and Provisions: A Comparative Case Study Review, Department for Work and Pensions 2021. See particularly, p. 194 (Germany), p. 236 (the Netherlands), and p. 249 (United Kingdom).

164 For example, regarding the Framework Directive, the European Commission has suggested that its scope of application in relation to domestic servants and the self-employed could be evaluated, and its impact in relation to psychosocial and musculoskeletal disorders. Remote working and technological changes might also necessitate, for instance, amendments to the Workplace and Display Screen Equipment Directives. European Commission, Commission Staff Working Document Ex-post evaluation of the EU occupational safety and health Directives (REFIT evaluation), SWD(2017) 10 final, p. 198, 201 and 269.

EU DIRECTIVES ON WORKING CONDITIONS: The Directives on Minimum Wages, Transparent and Predictable Working Conditions, Work-life Balance and Working Time

1. Minimum Wage-fixing Mechanisms

A. Directive 2022/2041 of 19 October 2022

i. The Objectives

EU Member States have highly diverging minimum wage-setting policies and mechanics.[1] Directive 2022/2041 of 19 October 2022 on adequate minimum wages[2], currently under examination by EEA and EFTA, is the first EU Directive that directly governs minimum wage mechanisms for employees[3].

The instrument's transversal goal is to address "in-work poverty" predominantly by ensuring the "adequacy" of (statutory) minimum wages and sufficient coverage of collective bargaining.[4] It does so by setting out minimum requirements related to the procedures establishing minimum wages.[5] Importantly, too, the EU limits its intentions, explicitly emphasizing that the Directive neither imposes a minimum wage nor harmonizes minimum wages.[6]

Despite this, disputes have arisen over the EU's competence to issue such a Directive. Article 153 (5) of the Treaty on the Functioning of the European Union (TFEU) explicitly excludes "pay" and the right of association as areas in which the EU can complement the Member States' social policies.[7] Even though the European Commission and others argue that the Directive merely affects pay "indirectly",[8] some Scandinavian countries argue the Directive disregards the EU's competencies and clashes with their industrial relations system.[9] Therefore, Denmark, supported by Sweden, lodged an annulment action against the Directive in January 2023.[10] The CJEU has yet to rule on the issue.

ii. The Content

The Directive has two separate parts: a chapter on collective bargaining for minimum wages, applying to all countries and a chapter on statutory minimum wages, applying to countries that already have statutory minimum wages. There is also an emphasis on effective access to minimum wages (enforcement).

§ 1 Strengthening collective bargaining

The Directive acknowledges that Member States' collective bargaining coverage is in decline.[11] Therefore, Article 4 obliges all Member States to facilitate the exercise of the right to collective bargaining on wage-setting. More precisely, Member States must: (i) enhance the capacity of the social partners, in particular at the sectoral or cross-industry level; (ii) encourage constructive, meaningful and informed negotiations on wages between the social partners;[12] (iii) protect the exercise of the right to collective bargaining on wage-setting from retaliatory acts (based on the principle of non-discrimination); (iv) protect trade unions and employers' organisations from external interference by others.[13]

Further, EU obligations would only be imposed on Member States with less than an 80% "collective bargaining coverage rate".[14] Countries below this threshold, i.e. most EU Member States,[15] must develop a framework of enabling conditions for collective bargaining and establish an action plan subject to periodical reviews.[16] The fact that Member States' coverage rates vary significantly due to national traditions and historical contexts will be considered when analysing progress.[17]

§ 2 Statutory minimum wages

EU Member States without statutory minimum wages are excluded from chapter II of the Directive. This way, Member States where wage formation is ensured exclusively via collective bargaining do not need to introduce statutory minimum wages.[18]

In contrast, Member States that already have statutory minimum wages must, first and foremost, establish the necessary procedures for setting and periodically[19] updating these minimum wages to make sure they are "adequate"[20]. Member States can mostly shape these procedures to their liking (e.g., optionally relying on (semi-)automatic indexation)[21]. Yet, in devising the procedures, they must bear in mind several conditions prescribed by the Directive[22] and include social partners in a timely and effective way throughout the decision-making process.[23] Furthermore, the Directive also makes variations, including deductions, in the minimum wage applicable to (different categories of) workers subject to the principles of non-discrimination and proportionality.[24]

§ 3 Supporting measures for minimum wages

The Directive highlights the importance of effective access to statutory minimum wages. This requires the Member States to control and enforce such wages, in particular through the development and provision of field inspections conducted by labour inspectorates and other enforcement bodies.[25]

Article 9 of the Directive obliges Member States to ensure that the economic operators and subcontractors participating in public procurement comply with their minimum wage obligations and the related collective bargaining rights.[26] Article 10 stresses the need for more effective data collection tools to monitor minimum wage protection.[27] Article 11 guarantees that information regarding statutory minimum wages and minimum wage protection in universally applicable collective agreements becomes publicly available. Lastly, the Directive permits impartial dispute resolution mechanisms as a way to settle wage disputes out of court.[28]

B. Domestic Implementation of Directive 2022/2041

Denmark

IMPLEMENTING THE DIRECTIVE – Member States need to comply with the Directive by 15 November 2024.[29] Unsurprisingly, since Denmark challenges the legality of the Directive before the CJEU, the Danish authorities are not particularly eager to transpose the Directive. Even though the action for annulment does not suspend the obligation to transpose, there is no indication of a legislative bill to comply with this obligation.

POSITION ON THE DIRECTIVE – The Danish government claims to have always opposed the Directive.[30] The Danish Parliament is likewise critical.[31] Although the Directive allows Denmark not to issue statutory minimum wages and to continue to rely on collective bargaining, the government disagrees with the EU's initiative as a matter of principle.[32] Not much is known about the proceedings before the CJEU, except that intending to preserve their Nordic labour market models, Sweden supports Denmark's action (only Sweden and Denmark voted against the Directive in the Council of Ministers).[33]

France

IMPLEMENTING THE DIRECTIVE – Member States need to comply with the Directive by 15 November 2024.[34] There is no indication of a concrete legislative bill yet.

POSITION ON THE DIRECTIVE – The French employment minister fully supported the initiative.[35] France took over the presidency of the EU in January 2022, after which it spearheaded the effort to bring the Directive to a successful conclusion.[36] The establishment of European legislation on minimum wages was a French priority.[37] Following the Directive's adoption, while certain French MPs question the

concrete effect the Directive will have domestically, the governing parties credit the French authorities for guiding this process to a successful conclusion.[38]

Germany

IMPLEMENTING THE DIRECTIVE – Member States need to comply with the Directive by 15 November 2024.[39] The scientific department of the German Parliament has evaluated the German Minimum Wage Law (*Mindestlohngesetz*)[40] based on the draft Directive. The expectation is that the German legislature will not have to amend the Law. The relevant authorities can interpret the Law's provisions in accordance with the Directive. At the same time, it is considered likely that German authorities will need to find ways to better monitor the collective bargaining coverage rate, and it is not unlikely they will need to take action[41] to increase said rate.[42] There is no indication of a concrete legislative bill yet.

POSITION ON THE DIRECTIVE – The German presidency of the EU commenced in July 2020. During its presidency, the European Commission launched the proposal for the Directive in October 2020.[43] From the outset, the German government was committed to developing a framework for national minimum wages.[44] Therefore, predictably, the German employment minister still supports the Directive.[45]

The Netherlands

IMPLEMENTING THE DIRECTIVE – Member States need to comply with the Directive by 15 November 2024.[46] Dutch discussions on reviewing the minimum wage in light of the Directive are ongoing.[47] There is no indication of a concrete legislative bill yet. More information regarding the bill to transpose the Directive is expected in the fourth quarter of 2023.[48]

Separately, a bill has been pending in the Dutch Parliament since November 2019 about the introduction of an hourly minimum wage (replacing the current monthly, weekly or daily minimum wage)[49]. The bill[50] recently passed and is considered to comply with the Directive because a generalized hourly minimum wage is clearer and more convenient than a system relying on a separate monthly, weekly and daily minimum wage.[51]

POSITION ON THE DIRECTIVE – The Dutch government took a pragmatic and constructive stance, primarily viewing the potential upward convergence of minimum wages between different Member States as interesting (hopefully, in their view, leading to "fairer" competition). The government considered a council recommendation a more appropriate instrument than a directive and emphasized the need to provide Member States significant flexibility.[52]

C. Comparative Table

	Denmark	France	Germany	Netherlands
Statutory minimum wage	Denmark does not have a statutory minimum wage nor rules on how wages are agreed upon through collective bargaining.[53]	The *salaire minimum interprofessionnel de croissance* (SMIC), i.e. hourly minimum wage, has long been set by law.[54] It has two pillars: (i) it is semi-automatically adapted to the consumer price index;[55] and (ii) it is subject to yearly discussions, enabling workers to benefit from the "nation's economic development".[56]	The statutory hourly minimum wage was only introduced in 2014. The Minimum Wage Commission (*Mindestlohnkommission*) passes resolutions about minimum wage adjustments every two years.[57] The government decides whether to bring the resolutions into force.[58]	*Minimumlonen*, i.e. monthly, weekly and daily minimum wages, have long been set by law. The minimum wage is generally adapted in a depoliticized manner; the Public Office of Statistics calculates the average level of pay rises, after which the universal minimum wage is adapted accordingly.[59] An hourly minimum wage will replace the monthly, weekly and daily minimum wage.[60]

Broader minimum wage setting mechanism	Denmark relies on social partners to conclude collective bargaining agreements regarding minimum salaries at the national/sectoral level and/or local/company level. There is no general law regulating this process.[61] The public authorities enable dispute resolution.[62]	In addition to the statutory minimum wage, at least once every four years (or every year), collective bargaining must take place at the sectoral level on wage-related elements.[63] Companies with union representatives must also negotiate salaries once every four years.[64]	Before 2014, remuneration was only regulated in collective agreements.[65] Despite 2014's *Mindestlohngesetz*, collective bargaining remains important at the sector or industry level (and company level).[66] Several legislative frameworks govern the collective agreements on pay.[67]	In addition to a Law on Minimum Wages,[68] another Law on Wage Determination exists. The latter confirms that social partners drive wage setting. Yet, it obliges the parties that conclude a sectoral or company-level collective agreement to register it with the public authorities (for it to become legally binding); thus, public authorities remain informed about wage developments, affecting the level of the statutory minimum wage.[69]
Collective bargaining coverage rate[70]	Rate of employees with a right to bargain was 82% in 2018.[71] CB coverage rate for minimum salaries, +-76%.[72]	Rate of employees with a right to bargain was 98% in 2018.[73] CB coverage rate for minimum wages, +-94%.[74]	Rate of employees with a right to bargain was 54% in 2018.[75] CB coverage rate for minimum wages, +-55%.[76]	Rate of employees with a right to bargain was 75,6% in 2019.[77] CB coverage rate for minimum wages, +-79%.[78]
Hourly statutory minimum wage on 1 January 2023[79]	N/A[80]	11,27 EUR	12 EUR	11,75 EUR
The proportion of minimum wage workers finding it difficult to make ends meet in 2018[81]	6%	24,6%	6,3%	11,7%

D. Comparative Perspective on Minimum Wages

COLLECTIVE BARGAINING IS CRUCIAL – The minimum wage setting mechanisms between EU Member States differ hugely. Some Member States, including Denmark, only confer minimum wage protection through collective agreements. Because of their well-functioning collective bargaining system, these Member States are strongly opposed to any governmental instrument, such as statutory minimum wages, which might undermine social partners' autonomy.[82]

In contrast, France and the Netherlands have long had statutory minimum wages (1950[83] and 1968,[84] respectively). Nevertheless, it should be noted that the actual level of the salary in France is predominantly established through collective agreements (hence higher than the statutory minimum wage),[85] and also in the Netherlands, collective bargaining on wages has clearly taken over, with the state only trying to intervene by guaranteeing a bottom line through the statutory minimum wage.[86]
Germany has long resisted the introduction of a universal statutory minimum wage. The wage-setting autonomy of social partners was and is considered crucial. However, the decline of collective wage bargaining coverage and the growth of low-wage sectors has reportedly led the state to introduce a statutory minimum wage (with the support of unions that recognized their structural weakness to address these issues).[87]
STATUTORY MINIMUM WAGES AS A BOTTOM LINE – The statutory minimum wage is generally considered a (semi-)universal bottom line. The EU Directive obliges Member States to comply with minimum

requirements when updating it.[88] At present, Member States use different parameters to determine if and when the minimum wage should increase. It can occur through an automatic indexation of minimum wages, like France's calculation based on the cost of living[89] or the Dutch mechanism with reference to average salary increases.[90] Other countries stick to a more political decision-making process by having a specialised body issuing advice to the government, e.g. Germany.[91] The Directive continues to give Member States the freedom to apply their own methodology; hence France, Germany, and the Netherlands will continue to differ. It imposes minimum requirements to obtain "adequate" minimum wages in all Member States.

The three countries also vary in a myriad of other ways, such as: (i) the factors that determine whether variations, deductions and exemptions from/in the minimum wage are possible;[92] (ii) the level of involvement of social partners; [93] and (iii) the mechanisms in place to enforce minimum wages.[94]

E. Conclusion

The Minimum Wage Directive is a daring attempt to influence a core element of domestic labour law in a context where the TFEU limits EU competencies to regulate. Awaiting the CJEU's ruling, Member States seem not to have undertaken action to transpose the Directive yet. Effective social partner involvement is required with a view to the implementation of the Directive by 15 November 2024.[95]

Schweizer Recht zu Mindestlöhnen

A. Rechtlicher Rahmen

In der Schweiz existiert kein nationaler gesetzlicher Mindestlohn. Die Lohnbildung erfolgt traditionellerweise durch die Sozialpartner oder im Rahmen von individuellen Vereinbarungen zwischen Arbeitgeber und Arbeitnehmenden und nicht durch den Staat. Die Sozialpartner können Mindestlöhne in Gesamtarbeitsverträgen (GAV) auf Branchen- oder Firmenebene festlegen und tragen dadurch der regional- und branchenspezifischen Realität Rechnung. GAV sind im Obligationenrecht (OR, SR 220; Art. 356 ff.) geregelt. Mit der Allgemeinverbindlicherklärung von Gesamtarbeitsverträgen, welche im Bundesgesetz über die Allgemeinverbindlicherklärung von Gesamtarbeitsverträgen (AVEG, SR 221.215.311) geregelt ist, und der Förderung des Dialogs unter den Sozialpartnern begünstigen Bund und Kantone sozialpartnerschaftliche Lösungen. Ab 2017 haben verschiedene Kantone sozialpolitisch motiviert Mindestlöhne eingeführt. Dies infolge eines Urteils des Bundesgerichts aus dem Jahr 2017, welches die Kantone unter dem Blickwinkel des Grundsatzes der Wirtschaftsfreiheit (Artikel 94 Absatz 1 der Bundesverfassung) als zum Erlass sozialpolitischer Massnahmen befugt erachtet hat.

Seit den 2004 eingeführten flankierenden Massnahmen (FlaM) beobachten tripartite Kommissionen den Arbeitsmarkt. Stellen sie wiederholte missbräuchliche Unterbietungen der orts- und branchenüblichen Löhne fest, können sie den befristeten Erlass von Mindestlöhnen vorschlagen. In Branchen mit einem GAV können gewisse Bestimmungen, namentlich solche zu Mindestlöhnen, erleichtert allgemeinverbindlich erklärt werden (Art. 1a AVEG). In Branchen, in denen es keinen GAV gibt, können bei wiederholter missbräuchlicher Lohnunterbietung Normalarbeitsverträge mit zwingenden Mindestlöhnen erlassen werden (Art. 360a OR).

B. Vergleich zwischen der Schweizer Regelung und der Richtlinie (EU) 2022/2041

Die EU-Richtlinie (2022/2041) besteht aus zwei separaten Teilen: Zwei Kapitel mit allgemeinen Bestimmungen insbesondere über Tarifverhandlungen für Mindestlöhne, das für alle Länder gilt, und

einem Kapitel über gesetzliche Mindestlöhne, das nur für Länder gilt, die bereits gesetzliche Mindestlöhne haben. Die Mitgliedstaaten haben zwei Jahre – also bis Oktober 2024 – Zeit, die Richtlinie in nationales Recht umzusetzen.

Gemeinsamkeiten

Die EU-Richtlinie (2022/2041) stellt in Art. 1 Abs. 3 klar, dass die Entscheidung der Mitgliedstaaten, überhaupt gesetzliche Mindestlöhne festzulegen, nicht berührt wird. So gibt es aktuell in fünf EU-Mitgliedstaaten (Österreich, Dänemark, Italien, Finnland und Schweden) keinen gesetzlich festgelegten Mindestlohn. Zudem berührt die Richtlinie nicht die Zuständigkeit der Mitgliedstaaten für die Festlegung der Höhe von Mindestlöhnen.

Auch in der Schweiz gibt es keinen nationalen gesetzlichen Mindestlohn. Die Bundesverfassung statuiert keinen gesetzlichen Mindestlohn und schreibt auch nicht die Einführung eines gesetzlichen Mindestlohnes vor. Zwar haben die Kantone Neuenburg, Jura, Tessin, Genf und Basel-Stadt auf ihrem Kantonsgebiet einen Mindestlohn eingeführt. Dabei handelt es sich jedoch um eine sozialpolitisch motivierte Massnahme zur Armutsbekämpfung. Der Mindestlohn muss denn auch entsprechend tief angesetzt sein, damit die Kantone gestützt auf die Verfassung überhaupt zu deren Erlass berechtigt sind.

In diesem Zusammenhang stellt sich insbesondere die Frage, ob die kantonal gesetzlich statuierten Mindestlöhne als gesetzliche Mindestlöhne im Sinne von Art. 1 lit. a und Art. 3 Abs. 2 der EU-Richtlinie (2022/2041) zu qualifizieren sind und inwiefern das Verfahren der Kantone für die Festsetzung ihrer Mindestlöhne mit dem Referenzrahmen für die Angemessenheit eines gesetzlichen Mindestlohns in Art. 5 Abs. 2 der EU-Richtlinie (2022/2041) standhalten würde. Art. 3 Abs. 2 EU-Richtlinie (2022/2041) bezeichnet den Ausdruck «gesetzlicher Mindestlohn» als einen gesetzlich oder durch andere verbindliche Rechtsvorschriften festgelegten Mindestlohn mit Ausnahme der tarifvertraglichen Mindestlöhne, die für allgemein verbindlich erklärt werden. Die EU-Mitgliedstaaten haben ab Inkraftsetzung der EU-Richtlinie (2022/2041) im Oktober 2022 zwei Jahre Zeit, diese in nationales Recht umzusetzen und der EU-Kommission die erlassenen Vorschriften mitzuteilen. Es wird sich somit erst zu einem späteren Zeitpunkt zeigen, was der Ausdruck «gesetzlicher Mindestlohn» alles beinhaltet und ob darunter auch regional festgesetzte Mindestlöhne fallen würden oder nur ein nationaler gesetzlicher Mindestlohn.

Gemäss Art. 1 lit. b und Art. 4 der EU-Richtlinie (2022/2041) soll mit der Richtlinie der Rahmen geschaffen werden für die Förderung von Tarifverhandlungen zur Lohnfestsetzung. Zudem wird in Art. 1 Abs. 4 der EU-Richtlinie (2022/2041) darauf hingewiesen, dass die Anwendung der Richtlinie in Übereinstimmung mit dem Recht auf Tarifverhandlungen erfolgt und die Richtlinie nicht so ausgelegt werden darf, als verpflichte sie einen Mitgliedstaat, in dem die Lohngestaltung ausschliesslich tarifvertraglich geregelt ist, zur Einführung eines gesetzlichen Mindestlohnes und dazu, Tarifverträge für allgemein verbindlich zu erklären (Tarifautonomie). Weiter sieht Art. 4 Abs. 1 lit. c der EU-Richtlinie (2022/2041) vor, dass die Mitgliedstaaten unter Beteiligung der Sozialpartner Massnahmen ergreifen für den Schutz zur Ausübung des Rechts auf Tarifverhandlungen zur Lohnfestsetzung und für den Schutz der Arbeitnehmenden und Gewerkschaftsvertretenden vor Handlungen, durch die sie in Bezug auf ihre Beschäftigung diskriminiert werden, weil sie an Tarifverhandlungen zur Lohnfestsetzung teilnehmen oder teilnehmen wollen.

In der Schweiz garantiert die Bundesverfassung in Art. 28 BV[i] die Koalitionsfreiheit. Die Arbeitnehmerinnen und Arbeitnehmer, die Arbeitgeberinnen und Arbeitgeber sowie ihre Organisationen haben das Recht, sich zum Schutz ihrer Interessen zusammenzuschliessen, Vereinigungen zu bilden und solchen beizutreten oder fernzubleiben (Art. 28 Abs. 1 BV). Die positive Koalitionsfreiheit verwirklicht sich in der Schweiz über die Bestimmungen des privatrechtlichen

[i] Bundesverfassung der Schweizerischen Eidgenossenschaft (BV; SR 101).

Persönlichkeitsschutzes: Art. 27 Abs. 2 ZGB[ii] gegen koalitionsfeindliche Reverse, wozu insbesondere Klauseln im Einzelarbeitsvertrag zählen, die dem Arbeitnehmer untersagen, einer Gewerkschaft anzugehören. Art. 28 ZGB gegen schwarze Listen, welche die Namen von gewerkschaftlich aktiven Arbeitnehmern aufführen und unter Arbeitgebern zirkulieren mit dem Zweck, solche Arbeitnehmer keine Anstellung finden. Art. 328 OR gegen die Benachteiligung bei Beförderungen, Aufgabenzuweisungen, Weiterbildungen und dergleichen. Art. 328b OR gegen die Frage nach der Gewerkschaftszugehörigkeit anlässlich der Bewerbung. Gemäss Art. 3 lit. c Ziff. 1 DSG[iii] gehören die gewerkschaftlichen Ansichten oder Tätigkeiten zu den besonders schützenswerten Personendaten. Nach Art. 336 Abs. 2 lit. a OR sind Kündigungen des Arbeitsverhältnisses durch den Arbeitgeber missbräuchlich, wenn sie ausgesprochen werden, weil der Arbeitnehmer einem Arbeitnehmerverband angehört oder nicht angehört oder weil er eine gewerkschaftliche Tätigkeit rechtmässig ausübt (Art. 336 Abs. 1 lit. b OR). Die Koalitionsfreiheit ist auch in mehreren Bestimmungen des internationalen, für die Schweiz verbindlichen Rechts verankert, so in Art. 11 EMRK[iv], Art. 8 UNO-Pakt I[v] sowie in den ILO-Übereinkommen Nr. 87[vi] und Nr. 151[vii]. Zudem hat sich die Schweiz in Art. 4 des ILO-Übereinkommens Nr. 98 über die Grundsätze des Vereinigungsreichts und des Rechts zu Kollektivverhandlungen über die Grundsätze des Vereinigungsreichts und des Rechts zu Kollektivverhandlungen verpflichtet, angepasste Massnahmen zu treffen, um den Abschluss von Gesamtarbeitsverträgen zu fördern[viii].

In der Schweiz besteht die Möglichkeit, dass auf Verlangen aller Vertragsparteien ein GAV allgemeinverbindlich erklärt werden kann. Damit die zuständigen Behörden im Bund und in den Kantonen Gesamtarbeitsverträge (GAV) allgemeinverbindlich erklären können, müssen die gesetzlichen Voraussetzungen dazu erfüllt sein (AVEG[ix]). Mit der Allgemeinverbindlicherklärung (AVE) wird der Geltungsbereich eines GAV ausgedehnt auf alle Arbeitnehmer/innen und Arbeitgeber der betreffenden Branche. In den AVE-Beschlüssen ist jeweils aufgeführt, für welches Gebiet, welche Branche und welche Arbeitnehmer/innen die allgemeinverbindlich erklärten Bestimmungen des GAV gelten. Die Tarifautonomie als Rechtsetzungsbefugnis von Arbeitsbedingungen in Gesamtarbeitsverträgen ist zwar in der Bundesverfassung nicht ausdrücklich erwähnt, die Allgemeinverbindlicherklärung von Gesamtarbeitsverträgen nach Art. 110 BV setzt deren Existenz aber voraus. Weshalb die Tarifautonomie der Koalitionen von Art. 28 BV als mitgewährleistet gilt.

Für den wirksamen Zugang der Arbeitnehmer zu den gesetzlichen Mindestlöhnen sieht Art. 8 der EU-Richtlinie (2022/2041) eine Festlegung wirksamer, verhältnismässiger und nichtdiskriminierende Kontrollen und Inspektionen vor Ort vor, die von den Arbeitsaufsichtsbehörden oder den für die Durchsetzung der gesetzlichen Mindestlöhne zuständigen Stellen durchgeführt werden.

In der Schweiz werden die Mindestlohnkontrollen einerseits durch die Arbeitsmarktinspektorinnen und andererseits durch die paritätischen Kommissionen sichergestellt. In Branchen mit einem Gesamtarbeitsvertrag werden die Kontrollen durch die Paritätische Kommission durchgeführt, in Branchen ohne Gesamtarbeitsvertrag kontrollieren die tripartiten Kommissionen der Kantone die

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ii Schweizerisches Zivilgesetzbuch (ZGB; SR 210).

iii Bundesgesetz über den Datenschutz (DSG; SR 235.1).

iv Europäische Menschenrechtskonvention (EMRK; SR 0.101); Die Schweiz hat sie 1974 ratifiziert.

v Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte (UNO Pakt I; SR 0.103.1); In Kraft getreten für die Schweiz am 18. September 1992.

vi Übereinkommen Nr. 87 über die Vereinigungsfreiheit und den Schutz des Vereinigungsrechts (SR 0.822.719.7); In Kraft getreten für die Schweiz am 25. März 1976.

vii Übereinkommen Nr. 151 über den Schutz des Vereinigungsrechtes und über Verfahren zur Festsetzung der Beschäftigungsbedingungen im öffentlichen Dienst (SR 0.822.725.1); In Kraft getreten für die Schweiz am 3. März 1982.

viii Die Internationale Arbeitsorganisation/International Labour Organization (IAO/ILO) wurde 1919 gegründet. Die Schweiz war einer der Gründerstaaten. Das Übereinkommen über die Anwendung der Grundsätze des Vereinigungsrechtes und des Rechtes zu Kollektivverhandlungen ist am 18. Juli 1951 in Kraft getreten.

ix Bundesgesetz über die Allgemeinverbindlicherklärung von Gesamtarbeitsverträgen (SR 221.215.311).

Einhaltung der orts- und berufsüblichen Löhne bzw. der zwingenden Mindestlöhne in einem Normalarbeitsvertrag.

Art. 9 der EU-Richtlinie (2022/2041) sieht vor, dass die Mitgliedstaaten geeignete Massnahmen ergreifen, um dafür zu sorgen, dass die Wirtschaftsteilnehmer und ihre Unterauftragnehmer bei der Vergabe und Ausführung von öffentlichen Aufträgen oder Konzessionsverträgen die geltenden Verpflichtungen in Bezug auf Löhne, das Vereinigungsrecht und das Recht auf Tarifverhandlungen zur Lohnfestsetzung im Bereich des Sozial- und Arbeitsrechts einhalten.

Bei der Vergabe und Ausführung von öffentlichen Aufträgen sind öffentliche Auftraggeberinnen im Bund gehalten, gemäss Art. 12 des BöB[x] und Art. 4 VöB[xi] öffentliche Aufträge im Inland nur zu vergeben, wenn die massgeblichen Arbeitsbedingungen und die Gleichstellung von Frau und Mann in Bezug auf die Lohngleichheit gewährleistet ist. Als Arbeitsbedingungen gelten die Gesamtarbeitsverträge und die Normalarbeitsverträge und, wo diese fehlen, die tatsächlichen orts- und berufsüblichen Arbeitsbedingungen. Die öffentlichen Beschaffungsstellen verlangen von den Anbieterinnen und Anbietern keinen Beitritt zu den nicht allgemeinverbindlich erklärten GAV. Es wird aber die Einhaltung der arbeitsvertraglichen Bestimmungen (inkl. Löhne) des GAV verlangt. Vergaben der Kantone und Gemeinden unterstehen hingegen nicht dem BöB, sondern dem kantonalen Vergaberecht. Auf kantonaler Ebene erlässt grundsätzlich jeder Kanton seine eigenen Bestimmungen zum Beschaffungswesen. Mit der Interkantonalen Vereinbarung über das öffentliche Beschaffungswesen (IVöB) haben sich jedoch die Kantone darauf geeinigt, die völkerrechtlichen Vorgaben auf interkantonaler Ebene umzusetzen, um eine weitgehende Harmonisierung zu erreichen. In Art. 4 lit. e IVöB wird statuiert, dass bei der Vergabe von Aufträgen die Arbeitsschutzbestimmungen und Arbeitsbedingungen für Arbeitnehmerinnen und Arbeitnehmer beachtet werden müssen.

Bei der Erteilung von Konzessionen und Bewilligungen in liberalisierten Märkten sind die Arbeitsbedingungen der jeweiligen Branche einzuhalten (Art. 6 lit. a FMG[xii]; Art. 5 VPG[xiii]; Art. 8d EBG[xiv] etc.).

Art. 10 der EU-Richtlinie (2022/2041) statuiert, dass die Mitgliedstaaten geeignete Massnahmen ergreifen, um sicherzustellen, dass wirksame Datenerhebungsinstrumente zur Überwachung des Mindestlohnes vorhanden sind. Weiter melden die Mitgliedstaaten der Kommission alle zwei Jahre die Quote und Entwicklung der tarifvertraglichen Abdeckung. Bei gesetzlichen Mindestlöhnen melden die Mitgliedstaaten die Höhe des gesetzlichen Mindestlohns und Anteil der davon erfassten Arbeitnehmer. Die Mitgliedstaaten mit ausschliesslich tarifvertraglich festgelegtem Mindestlohnschutz melden die niedrigsten in Tarifverträgen für Geringverdiener festgelegten Lohnsätze oder deren Schätzung und die Höhe der Löhne, die Arbeitnehmern gezahlt wird, für die kein Tarifvertrag gilt etc.

Gemäss Art. 11 der EU-Richtlinie (2022/2041) stellen die Mitgliedstaaten sicher, dass Informationen über die gesetzlichen Mindestlöhne und den Mindestlohnschutz, die in allgemein verbindlichen Tarifverträgen festgelegt sind, einschliesslich Informationen über Rechtshilfemechanismen, öffentlich zugänglich sind.

Gestützt auf die Bundesverfassung erhebt der Bund die notwendigen statistischen Daten über den Zustand und Entwicklung von Bevölkerung, Wirtschaft, Gesellschaft, Bildung, Forschung etc. in der Schweiz (Art. 65 Abs. 1 BV). In der Schweiz gilt das Öffentlichkeitsprinzip, danach hat jedermann Anspruch auf Zugang zu amtlichen Dokumenten der Bundesverwaltung, sofern nicht überwiegende öffentliche oder private Interessen dem Zugang entgegenstehen.

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[x] Bundesgesetzes über das öffentliche Beschaffungswesen (BöB; SR 172.056.1).

[xi] Verordnung über das öffentliche Beschaffungswesen (VöB; SR 172.056.11).

[xii] Fernmeldegesetz (FMG; SR 784.10).

[xiii] Postverordnung (VPG; SR 783.01).

[xiv] Eisenbahngesetz (EBG; SR 742.101).

Die Sektion Löhne und Arbeitsbedingungen des Bundesamtes für Statistik (BFS) erhebt Daten über Löhne (Lohnniveau, Lohnentwicklung), Erwerbseinkommen und Arbeitskosten in der Schweiz. Unter der Rubrik Gesamtarbeitsverträge und Sozialpartnerschaft erhebt die BFS insbesondere auch Daten zu diesem Themenbereich. Das BFS führt seit 1994 alle zwei Jahre die Erhebung der Gesamtarbeitsverträge in der Schweiz (EGS) durch. Diese Erhebung untersucht die Struktur und den Inhalt der GAV sowie die Entwicklung der gesamtarbeitsvertraglich geregelten Bereiche. Mit der EGS wird eine Bestandesaufnahme der in der Schweiz geltenden GAV des primären, sekundären und tertiären Sektors durchgeführt. Normalarbeitsverträge (NAV) sind ebenfalls ein fester Bestandteil der Erhebung. Weiter führt das SECO eine öffentliche Liste aller allgemeinverbindlich erklärten Gesamtarbeitsverträge und weist die in den Kantonen erlassenen NAV mit zwingenden Mindestlöhnen aus. Das SECO stellt zudem sicher, dass die Informationen über den NAV Hauswirtschaft des Bundesrates mit zwingenden Mindestlöhnen öffentlich zugänglich sind. Weiter besteht mit www.entsendung.admin.ch eine Informationsplattform zum Thema Arbeits- und Lohnbedingungen in der Schweiz und in den verschiedenen Kantonen. Sie richtet sich sowohl an Schweizer als auch an ausländische Unternehmen.

Die EU-Richtlinie (2022/2041) statuiert in Art. 12 Abs. 1, dass die Mitgliedstaaten sicherstellen, dass die Arbeitnehmer bei Verstössen gegen Rechte in Bezug auf gesetzliche Mindestlöhne oder den Mindestlohnschutz, sofern solche Rechte im nationalen Recht oder in Tarifverträgen festgelegt sind, Zugang zu einer wirksamen, rechtzeitigen und unparteiischen Streitbeilegung und Anspruch auf Rechtsbehelfe haben.

In der Schweiz gewähreistet Art. 29a BV, dass jede Person bei Rechtsstreitigkeiten Anspruch auf Beurteilung durch eine richterliche Behörde hat. Zudem hat jede Person, deren Sache in einem gerichtlichen Verfahren beurteilt werden muss, Anspruch auf ein durch Gesetz geschaffenes, zuständiges, unabhängiges und unparteiisches Gericht (Art. 30 Abs. 1 BV). In der Schweiz werden arbeitsrechtliche Klagen mit Streitwerten bis zu CHF 30'000.-- im vereinfachten Verfahren (Art. 243 ff. ZPO[xv]) behandelt und es werden keine Gerichtskosten (weder Gebühren noch Auslagen) erhoben, ausserdem stellt das Gericht den Sachverhalt von Amtes wegen fest.

Unterschiede

Die EU-Richtlinie (2022/2041)[xvi] verlangt von den Mitgliedstaaten, in denen die tarifvertragliche Abdeckung unterhalb einer Schwelle von 80 Prozent liegt, dass diese einen Rahmen festlegen müssen, der die Voraussetzungen für Tarifverhandlungen schafft, entweder durch Erlass eines Gesetzes nach Anhörung der Sozialpartner oder durch eine Vereinbarung mit diesen. Solche Mitgliedstaaten müssen ausserdem einen «Aktionsplan zur Förderung von Tarifverhandlungen» erstellen (Art. 4 Abs. 2 Satz 2 EU-Richtlinie (2022/2041)). In diesem Zusammenhang stellt sich aktuell auch die Frage, ob der europäische Gesetzgeber mit der Richtlinie seine Gesetzgebungskompetenzen überschritten hat. Dänemark hat beim EuGH eine Nichtigkeitsklage gegen die Vorgaben zur Förderung der Tarifverhandlung erhoben.

Gemäss Berechnungen des Staatssekretariats für Wirtschaft beträgt der GAV-Abdeckungsgrad in der Schweiz rund 50% (2018). Aktuell gibt es von Seiten des Bundesrates keine Bestrebungen, diesen Abdeckungsgrad direkt zu beeinflussen. Dies obliegt in der Schweiz grundsätzlich den Sozialpartnern. Einen höheren GAV-Abdeckungsgrad können diese primär durch die Mitgliedergewinnung erreichen. Zudem ist nicht jeder Arbeitnehmende auf kollektive Lohnverhandlungen angewiesen und daher ein möglichst hoher GAV-Abdeckungsgrad nicht per se zielführend. Der Bund leistet allerdings seinen Beitrag zum Funktionieren der Sozialpartnerschaft, indem er für gute Rahmenbedingungen sorgt. So fördert er einerseits den Dialog zwischen den Sozialpartnern und ermöglicht ihnen anderseits, eine aktive Rolle einzunehmen, sei es auf gesetzgeberischer Ebene oder auf Ebene des Vollzugs.

[xv] Schweizerische Zivilprozessordnung (ZPO; SR 272).

[xvi] Richtlinie (EU) 2022/2041 des europäischen Parlaments und des Rates vom 19. Oktober 2022 über angemessene Mindestlöhne in der Europäischen Union.

Welche Regelungen gehen weiter

Art. 5 der EU-Richtlinie (2022/2041) besagt, dass die Mitgliedstaaten mit gesetzlichen Mindestlöhnen die erforderlichen Verfahren für die Festlegung und Aktualisierung schaffen und Kriterien bestimmen, damit eine Angemessenheit erreicht werden kann. Die EU-Richtlinie (2022/2041) sieht vor, welche Aspekte die nationalen Kriterien mindestens umfassen müssen. Weiter sieht Artikel 5 Abs. 4 der Richtline (2022/2041) vor, dass die Mitgliedstaaten bei ihrer Bewertung der gesetzlichen Mindestlöhne Referenzwerte zugrunde legen. Zu diesem Zweck können sie auf internationaler Ebene übliche Referenzwerte wie 60% des Bruttomedianlohns und 50% des Bruttodurchschnittslohns und/oder Referenzwerte, die auf nationaler Ebene verwendet werden, verwenden.

In der Schweiz existiert kein gesetzlicher Mindestlohn auf nationaler Ebene, weshalb auch keine gesonderten Verfahren bestehen, um dessen Angemessenheit und Aktualisierung zu überprüfen. In Bezug auf sozialpolitisch motivierte kantonale Mindestlöhne wird auf die Ausführungen im Unterkapitel «Gemeinsamkeiten» verwiesen.

Allerdings können in der Schweiz in Branchen, in denen es keinen Gesamtarbeitsvertrag gibt, bei wiederholter missbräuchlicher Unterbietung der orts-, berufs- oder branchenüblichen Löhne befristet Normalarbeitsverträge mit zwingenden Mindestlöhnen erlassen werden. Diese Mindestlöhne gelten für die ganze Branche und können nur zugunsten des Arbeitnehmers abgeändert werden. Für die Festlegung der NAV Mindestlöhne besagt das Gesetz, dass diese weder dem Gesamtinteresse zuwiderlaufen noch die berechtigten Interessen anderer Branchen oder Bevölkerungskreise beeinträchtigen dürfen. Sie müssen den auf regionalen oder betrieblichen Verschiedenheiten beruhenden Minderheitsinteressen der betroffenen Branchen oder Berufe angemessen Rechnung tragen (Art. 360a Abs. 2 OR).

[1] Some countries entirely rely on collective bargaining without statutory minimum wages; other countries have weak collective bargaining institutions and are almost entirely reliant on statutory minimum wages. All sorts of variations exist in between these two extremes.

[2] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, available at: https://www.efta.int/eea-lex/32022L2041 (23.05.2023).

[3] Provided that they have an employment contract or employment relationship, "*workers in both the private and the public sectors, as well as domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees, apprentices and other non-standard workers, as well as bogus self-employed and undeclared workers could fall within the scope of this Directive. Genuinely self-employed persons do not fall within the scope of this Directive since they do not fulfil those criteria.*" Recital 21 Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

[4] L. Ratti, The Sword and the Shield: The Directive on Adequate Minimum Wages in the EU, 2023 Industrial Law Journal.

[5] Recital 18 Directive (EU) 2022/2041 of 19 October 2022.

[6] The Directive wants to reinforce Member States' existing minimum wage mechanisms without however: (i) directly imposing a minimum wage; (ii) harmonizing minimum wages across the EU; (iii) undermining the autonomy of social partners; (iv) and imposing a concrete, single model for wage setting. Recital 19 Directive (EU) 2022/2041 of 19 October 2022.

[7] Art. 153 Consolidated version of the Treaty on the Functioning of the European Union.

[8] European Commission, Commission Staff Working Document Impact Assessment: Accompanying the document: Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels: European Commission 2020, p. 21-22; e.g., S. Wixforth & L. Hochscheidt, Minimum-wages directive: it's legal, available at: https://www.socialeurope.eu/minimum-wages-directive-its-legal (15.05.2023).

[9] E. Sjödin, European minimum wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed directive on adequate minimum wages in the EU, 2022 European Labour Law Journal (2): 273-291.

[10] Case C-19/23: Action brought on 18 January 2023 — Kingdom of Denmark v European Parliament and Council of the European Union; Mette Klingsten Advokatfirma, Denmark requests annulment of the EU's minimum wage directive, available at: https://www.lexology.com/library/detail.aspx?g=ef281a0a-1780-4879-a280-b4262313da74 (15.05.2023).

[11] Recital 24 Directive (EU) 2022/2041 of 19 October 2022.

[12] The Directive is "*without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.*" Art. 1 (2) Directive (EU) 2022/2041 of 19 October 2022.

[13] Art. 4 (1) Directive (EU) 2022/2041 of 19 October 2022. See also Art. 12 (2) Directive (EU) 2022/2041 of 19 October 2022.

[14] Collective bargaining coverage "*means the share of workers at national level to whom a collective agreement applies, calculated as the ratio of the number of workers covered by collective agreements to the number of workers whose working conditions may be regulated by collective agreements in accordance with national law and practice.*" Art. 3 (5) Directive (EU) 2022/2041 of 19 October 2022

[15] European Commission, Commission Staff Working Document Impact Assessment: Accompanying the document: Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels: European Commission 2020, p. 154-155.

[16] Art. 4 (2) Directive (EU) 2022/2041 of 19 October 2022.

[17] Recital 25 Directive (EU) 2022/2041 of 19 October 2022.

[18] Recital 19 Directive (EU) 2022/2041 of 19 October 2022. In this regard, it is (possibly too easily) assumed that a high collective bargaining coverage rate ensures adequate minimum wages. L. Ratti, The Sword and the Shield: The Directive on Adequate Minimum Wages in the EU, 2023 Industrial Law Journal.

[19] "*Member States shall ensure that regular and timely updates of statutory minimum wages take place at least every two years or, for Member States which use an automatic indexation mechanism as referred to in paragraph 3, at least every four years.*" Art. 5 Directive (EU) 2022/2041 of 19 October 2022.

[20] "*Minimum wages are considered to be adequate if they are fair in relation to the wage distribution in the relevant Member State and if they provide a decent standard of living for workers based on a full-time employment relationship. The adequacy of statutory minimum wages is determined and assessed*

by each Member State in view of its national socioeconomic conditions, including employment growth, competitiveness and regional and sectoral developments. For the purpose of that determination, Member States should take into account purchasing power, long-term national productivity levels and developments, as well as wage levels wage distribution and wage growth." Recital 28 Directive (EU) 2022/2041 of 19 October 2022.

21 "*Member States which use an automatic indexation mechanism, including semi-automatic mechanisms in which a minimal obligatory increase of statutory minimum wage is at least guaranteed, should also carry out the procedures for updating the statutory minimum wages, at least every four years. Those regular updates should consist of an evaluation of the minimum wage taking into account the guiding criteria, followed, if necessary, by a modification of the amount. The frequency of the automatic indexation adjustments on the one hand, and the updates of the statutory minimum wages on the other might differ. Member States where automatic or semi-automatic indexation mechanisms do not exist should update their statutory minimum wage at least every two years.*" Recital 27 Directive (EU) 2022/2041 of 19 October 2022.

22 The wage-setting and -updating procedures "*shall be guided by criteria set to contribute to their adequacy, with the aim of achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap. Member States shall define those criteria in accordance with their national practices in relevant national law, in decisions of their competent bodies or in tripartite agreements. […] The national criteria referred to in paragraph 1 shall include at least the following elements: (a) the purchasing power of statutory minimum wages, taking into account the cost of living; (b) the general level of wages and their distribution; (c) the growth rate of wages; (d) long-term national productivity levels and developments.*" Art. 5 Directive (EU) 2022/2041 of 19 October 2022.

23 Art. 7 Directive (EU) 2022/2041 of 19 October 2022.

24 "*Variations and deductions should therefore pursue a legitimate aim. Examples of such deductions might be the recovery of overstated amounts paid or deductions ordered by a judicial or administrative authority. Other deductions, such as those related to the equipment necessary to perform a job or deductions of allowances in kind, such as accommodation, present a high risk of being disproportionate.*" Art. 6 and recital 29 Directive (EU) 2022/2041 of 19 October 2022.

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56 Each year, discussions take place in the CNNCEFP, a body that advises the government on how to fix a *salaire minimum de croissance* that appropriately remunerates workers for their "*participation in the economic development of the nation.*" Art. L. 2271-1, L. 3231-6 – L. 3231-9 and R. 3231-7 *code du travail*; Ministère du travail, du plein emploi et de l'insertion, CNNCEFP (Commission nationale de la négociation collective, de l'emploi et de la formation professionnelle), available at: https://travail-emploi.gouv.fr/ministere/instances-rattachees/Article/cnncefp-commission-nationale-de-la-negociation-collective-de-l-emploi-et-de-la (16.05.2023).

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2. Transparent and Predictable Working Conditions

A. Directive 2019/1152 of 20 June 2019

i. The Objectives

Directive 2019/1152 of 20 June 2019 on transparent and predictable working conditions (hereinafter: TPWC Directive) is the successor to Directive 91/533/EEC on employers' obligations to inform employees of the working conditions applicable to the contract or employment relationship (i.e., "Written Statement Directive"). The former is currently under examination by the EEA,[1] whereas the latter is still in force in the EEA.[2]

The TPWC Directive has a broader objective than its predecessor. It aims to improve working conditions by promoting more *transparent* and *predictable* employment. It lays down minimum rights applicable to every worker in the EU. This was deemed particularly relevant for those engaged in new forms of employment, such as platform work employees, which often have more casual and unpredictable work patterns.[3]

ii. The Content

Like its predecessor, the TPWC Directive endeavors to ensure that "workers"[4] receive timely information both about their employment at the start of the relationship and subsequently about changes to their conditions. Among other minimum requirements, it sets forth new worker rights meant to make working conditions more predictable.

§ 1 Mandatory information about the employment relationship

Article 3 of the TPWC Directive clarifies that all information that the employer must provide to the worker has to be provided in writing, either on paper or in electronic form.[5] Article 4 subsequently lists the essential aspects of the employment relationship about which the worker has to be informed in information documents. Some relevant clarifications are made related to these essential aspects (e.g., for the place of work[6] and remuneration[7]). In light of the Directive's broader goal to obtain transparent and predictable working conditions, the list also states that if the "work pattern"[8] is entirely or mostly unpredictable, the employer has particular information obligations.[9] Furthermore, some particularities apply if workers are required to work abroad for more than four consecutive weeks. The information documents have to then contain information specific to this situation.[10]

Regarding the timing of the information, many of the employment relationship's essential aspects have to be communicated by the employer individually to the worker as soon as possible, and at the latest within a calendar week from their first working day. The deadline for some essential aspects is within one month of the first working day.[11] In case the worker goes abroad (for more than four consecutive weeks), the information documents must be issued before the worker's departure.[12]

Subsequently, during employment, Member States' domestic laws must ensure that changes relating to the information provided at the start of employment are communicated by the employer in the form of another document at the earliest opportunity. The worker must receive this information at the latest on the day the changes take effect.[13]

Lastly, to enhance legal certainty, the Directive demands Member States to adopt favourable legal presumptions[14] and/or early settlement mechanisms to enforce these information obligations effectively.[15] Also, Member States have to ensure that information on the legislative, regulatory and administrative provisions that govern the essential aspects of the employment relationship is generally made available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means.[16]

§ 2 Minimum requirements relating to various working conditions

The TPWC Directive limits the use of probationary periods: (i) capping their duration for open-ended employment relationships so as not to exceed six months; (ii) ensuring a proportionate probationary period for fixed-term employment (especially of less than 12 months); and (iii) prohibiting a probationary period following the renewal of a contract for the same function and tasks. That said, on an exceptional basis, probationary periods can be extended if justified by the nature of the employment or in the worker's interest.[17]

The Directive furthermore addresses employers' practice of prohibiting a worker from taking up employment with other employers (e.g., a second job). Parallel employment is allowed in principle and should not lead to adverse treatment. However, Member States may lay down conditions for incompatibility restrictions, i.e. restrictions on working for other employers for objective reasons (e.g., business confidentiality).[18]

Article 13 of the TPWC Directive highlights that where an employer is required to provide training to workers by law or collective agreement to carry out the work for which they are employed, such training must: (i) be provided to the worker free of cost; (ii) count as working time; and (iii), where possible, take place during working hours.[19]

§ 3 Minimum requirements to make work more predictable

Since one of the Directive's principal preoccupations are the uncertain working hours found in some forms of employment, the instrument advances several mechanisms to make those hours more predictable and to counter employers' abusive practices.

First, building on the particular information obligations applicable to work patterns that are entirely or mostly unpredictable,[20] Article 10 states that the worker cannot be required to work if the work assignment falls outside the reference hours and days communicated in the information documents. Nor is the work assignment binding if the worker was not notified of the work assignment following the minimum notice period.[21] The worker can refuse a work assignment without adverse consequences if one of these conditions is violated.

Furthermore, to the extent the Member States decide to allow employers to cancel work assignments without compensation, workers have to be nevertheless entitled to compensation if the employer cancels the work assignment after a specified reasonable deadline.[22]

Thirdly, Article 12 of the Directive grants workers with at least six months of service with the same employer the right to request a form of employment with more predictable and secure working conditions (like open-ended and/or full-time employment). In principle, the employer has to issue a reasoned written reply within one month of the request.[23]

Lastly, additional protections are envisaged for on-demand employment contracts (in which the employer can call the worker to work as and when needed), including zero-hour contracts (where there are effectively no guaranteed working hours). If Member States allow for on-demand contracts, they have to take one or more of the following measures to prevent abusive practices: (i) limitations to the use and duration of on-demand employment contracts; (ii) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; or (iii) other equivalent measures that ensure effective prevention of abusive practices.[24]

§ 4 Effective rights

Related to all the rights covered under subheadings §1, §2 and §3, the Directive obliges Member States to ensure: (i) a right to redress;[25] (ii) protections against adverse treatment or consequences resulting

from a complaint lodged with the employer or from any enforcement proceedings;[26] (iii) a prohibition against dismissal or its "equivalent"[27] and all associated preparations on the grounds of having exercised any of these rights;[28] and (iv) penalties applicable to infringements of national provisions adopted pursuant to this Directive.[29]

B. Domestic Implementation of Directive 2019/1152

Denmark

IMPLEMENTING THE DIRECTIVE – Even though the TPWC Directive had to be transposed by 1 August 2022,[30] the Danish Parliament only adopted a legislative bill on certificates of employment and certain working conditions in May 2023 (following an agreement between the Danish Union and Employers' Confederation in June 2022). The law takes effect on 1 July 2023.[31] As such, a new Employment Certificate Act (*ansættelsesbevislov*) was passed. Additionally, the Act on Labour Tribunals and Industrial Arbitration Tribunals[32] and the Act on Seafarers' Employment Conditions were slightly amended.[33]

GOING BEYOND THE DIRECTIVE – Danish law does not evidently go beyond what is required by the Directive. Nevertheless, the law's substantive rights do not apply if the employment relationship in question is covered by a nationwide collective agreement concluded by the most representative social partners in the area; therefore, additional protections might arise through collective bargaining.[34]

France

IMPLEMENTING THE DIRECTIVE – France was late in transposing the Directive.[35] The Law of 9 March 2023 amended and introduced some provisions of/to the Labour Code.[36] Nonetheless, the details of many of the TPWC Directive's rights have to be still implemented through regulatory decrees.[37]

GOING BEYOND THE DIRECTIVE – French law was already stricter for probationary periods than required under EU law.[38] The French law implementing the Directive does not seem to evidently go beyond what is required.

Germany

IMPLEMENTING THE DIRECTIVE – The Law of 20 July 2022 transposed the TPWC Directive.[39] The most extensive amendments concerned the Evidence Act (*Nachweisgesetz*).[40] However, the transposition also affected various other instruments, including the Vocational Training Act (*Berufsbildungsgesetz*),[41] Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*),[42] Maritime Labor Act (*Seearbeitsgesetz*),[43] Trade Regulations (*Gewerbeordnung*),[44] Part-time and Fixed-term Act (*Teilzeit- und Befristungsgesetz*),[45] and Posted Workers Act (*Arbeitnehmer-Entsendegesetz*).[46]

GOING BEYOND THE DIRECTIVE – German law is stricter than the Directive in certain regards. The *Nachweisgesetz* indicates that proof of the essential aspects of employment in electronic form is excluded, and some of the information needs to be given at the latest on the first day of work.[47] Apart from this, the German law implementing the Directive does not seem to evidently go beyond what is required.

The Netherlands

IMPLEMENTING THE DIRECTIVE – The Law of 22 June 2022 transposed the TPWC Directive, most notably by amending book 7 of the Civil Code.[48] Additionally, also the Flexible Work Law[49] and Posted Workers Law[50] were amended.

GOING BEYOND THE DIRECTIVE – Dutch law already contained rules restraining the abusive use of on-demand contracts; those rules have been expanded to the broader notion of workers with unpredictable work patterns.[51] Interestingly, the request for more predictable working conditions is automatically granted if the employer fails to respond within the deadline of one (or three) month(s).[52]

Apart from this, the Dutch law implementing the Directive does not seem to evidently go beyond what is required.

C. Comparative Table

	Denmark	France	Germany	Netherlands
Electronic information documents	Possible if TPWC Directive's conditions are fulfilled.[53]	The relevant decree still has to be adopted.[54]	Proof of the essential contractual conditions in electronic form is excluded.[55]	Possible, but requires a qualified electronic signature, the possibility to save and print by the employee, and his explicit consent.[56]
Deadline for information documents	TPWC Directive's deadlines.[57]	The relevant decree still has to be adopted.[58]	Some information has to be shared no later than the first work day.[59]	TPWC Directive's deadlines.[60]
Enforcement of information obligations	An indemnity in front of the Appeal Board's Employment Committee (*Ankestyrelsens Beskæftigelsesudvalg*).[61]	The relevant decree still has to be adopted.[62]	Administrative fines apply of up to 2,000 EUR.[63]	An employer is liable for harm caused by no or faulty information.[64]
Probationary periods	Max. 6 months for open-ended employment contracts. Max. one-quarter of the length of the fixed-term employee's service.[65]	Max. 2 months for open-ended white-collar and blue-collar employment, max. 3 months for open-ended supervisors and technicians, and max. 4 months for managers.[66] Possible renewal if allowed by industry agreement.[67] Max. 1 day per week of employment for fixed-term employees.[68]	During max. 6 months, open-ended employment relationships can be terminated with two weeks' notice.[69] The probationary period in a fixed-term contract needs to be proportionate (hence, less than 6 months; what is considered "proportionate" remains unclear).[70]	Max. 2 months for open-ended employment contracts. Max. 1 month for fixed-term employment of 6 months to 2 years and max. 2 months for more extended fixed-term contracts.[71]
Parallel employment	Allowed unless incompatibility between parallel work and existing employment (e.g., health and safety considerations, trade secrets, the integrity of public administration or conflicts of interest).[72]	The Labour Code does not lay down any prohibitions with regard to the accumulation of salaried employment (despite the non-competition obligation inherent in any employment contract and possible *clause de non-concurrence*).[73]	Parallel employment is, in principle, allowed,[74] but employees may not compete during employment with the employer (subject to case law),[75] and non-compete clauses are possible (subject to statutory law).[76]	Article 7:653a was introduced to the Civil Code to prohibit contractual clauses that constrain an employee from working for another employer during the employment relationship (unless the clause can be justified based on an "objective reason").[77]
Description of entirely or mostly unpredictable work patterns	The explanatory memorandum indicates that the "temporal location" (*tidsmæssige placering*) of the work is not determined or is only determined to a lesser extent.[78]	No indication.	The concept is reformulated as "work on call" (*Arbeit auf Abruf*), which implies employees perform work in accordance with the workload.[79]	The explanatory memorandum indicates that the majority of working time is not known in advance; hence, predominantly determined directly or indirectly by the employer (after contract conclusion).[80]

Right to reject work assignment	Transposed. Nothing particular.[81]	Not transposed. It is argued that French labour law does not provide for conditions of predominantly or entirely unpredictable working patterns.[82]	Transposed, at least for what concerns on-call work (*Arbeit auf Abruf*). The employer must inform the employee at least 4 days in advance.[83]	Transposed, both for on-call workers and the broader category with unpredictable hours. The employer must inform the employee in principle at least 4 days in advance, but ways exist to reduce this to 24h.[84]
Right to compensation for late cancellation	If the employer cancels the work assignment after the expiry of a reasonable period, the employer must compensate the employee (calculated based on the specific circumstances of the cancellation of the work assignment).[85]	Not transposed. Same argument as above.[86]	No clear reference to this right.	Cancelling (even if only in part) or changing the hours within 4 days (potentially 24h) from the commencement of the work entails the employee is entitled to the wages he would have received if the work had proceeded as scheduled.[87]
Right to request more predictable working conditions	The employee is only entitled to a written and reasoned response once a year. In case the employer is a natural person, or the number of employees is less than 35, the response is only needed within 3 months (instead of 1 month).[88]	Fixed-term employees and temporary agency workers, both employed at the company for at least 6 months, can request information on open-ended positions.[89]	A part-time employee is at least entitled to an oral discussion (unlimited times). A written request/response is needed if the employment relationship exists 6 months or more (max. 1 written response a year). Employee representatives are kept informed.[90] Fixed-term employees and temporary agency workers seemingly only have the written procedure at their disposal.[91]	Employees working at least 26 weeks at the employer can file a written request once a year (unless exceptional circumstances); not responding within 1 month if the employer has 10 or more employees or within 3 months for smaller companies results in the automatic acceptance of the request.[92]
Protections from abusive on-call contracts	Once employed on an on-call basis for over 3 months, the employer must prove the employment agreement has not been entered into with a minimum number of (guaranteed) paid hours (the number corresponds to the work performed by the employee in the past 4 weeks).[93]	Not transposed. It is argued that on-demand work is not practised in France. There is no explicit ban on this type of employment relationship, but there are principles in the Labour code to limit abuses.[94]	On-call work agreements must specify a specific duration of weekly and daily working hours, which the law makes "semi-flexible"[95]. Without specification, a weekly working time of 20 hours is presumed and the performance of at least 3 consecutive hours on the active days.	Once an employment contract lasts at least 3 months, at the employee's request, the stipulated amount of work in subsequent months shall be presumed to be equal to the average in the 3 preceding months.[96] In case of unpredictable working arrangements of less than 15h a week and on-call work agreements, the employee additionally has the right to wages for 3 hours even if the work took less time.[97] Once the on-call agreement lasts 12 months, the employer has to make an offer for a stable working arrangement.[98]

Noteworthy penalties and remedies	Violations may result in an allowance.[99]	A contract is presumed to be open-ended unless the fixed-term contract fulfils the formal conditions.[100]	No references.	Not responding to a valid request for stable employment equals its approval.[101] The on-call worker can claim his average salary from the moment the contract reaches 1 year until the employer makes an offer for stable employment.[102]

D. Comparative Perspective on Transparent and Predictable Working Conditions

INFORMATION OBLIGATIONS AND OTHER WORKING CONDITIONS – Regarding the information obligations at the start of the employment relationship, Germany seems to have most significantly deviated from the Directive's template. The information documents are not to be provided electronically, which is a remarkable choice (e.g., the Netherlands allows it subject to explicit employee consent, and Denmark allows it). Some of the information in Germany has also to be provided on the employee's first day (stricter than the Directive's first-week requirement). In terms of sanctions, the explicit Dutch legislative provision holding employers liable for harm caused by no or faulty information is interesting.

Furthermore, it is worth pointing out that France and the Netherlands impose far stricter limitations upon probationary periods than required under the Directive. Different views most notably exist about what constitutes a proportionate limitation on a probationary period for a fixed-term contract.

UNPREDICTABLE WORKING ARRANGEMENTS – Some EU Member States have historically been reluctant to tolerate unpredictable working arrangements. In this vein, the French authorities remark that on-demand work is not practised in the country; therefore, the Directive's associated rights are only marginally transposed.[103] In contrast, the other three countries are generally more tolerant of unpredictable working arrangements. They have arguably more thoroughly transposed the Directive's related rights (see the comparative table above).
Some of these Member States' choices are remarkable, such as Germany's interpretation of the concept of an entirely or mostly unpredictable working pattern as on-call work.

Regarding the employee's right to reject untimely work assignments, Germany and the Netherlands want employers to generally notify the employee at least four days in advance about a work assignment (Danish law is less specific). Regarding the right to request more predictable working conditions, Germany's mechanism for part-time employees is noteworthy as it merges oral and written requests (and incorporates workers' representatives). The Netherlands' automatic approval of requests without a response is also striking.

The protections provided to workers in on-call work diverge remarkably. Specifically for on-call work, Danish law assumes the existence of a guaranteed amount of paid hours once the on-call arrangement has lasted three months; a similar provision exists in the Netherlands but is applicable to employees at large (not just on-call workers). Dutch law adds other protections for on-call workers. They receive at least three hours of pay for each work assignment (even if it is shorter), and a transition from on-call to more predictable work becomes a right once the on-call contract reaches 12 months. Germany takes a different tack, inciting the parties to negotiate specific weekly and daily working hours. The law makes this agreed duration "semi-flexible" by limiting the working time variability in two directions (max. 25 per cent above the agreed minimum weekly working time and max. 20 per cent below the agreed maximum weekly working time).

E. Conclusion

The TPWC Directive's primary contribution to developed labour law systems has been its attempt to address the unpredictable working arrangements of persons in non-standard forms of employment, including employees in on-demand and platform work.[104] Whether that attempt succeeds largely depends on Member States' implementing measures. While it is evident that the Member States intend to apply different means to reach the Directive's objectives, it is not clear yet which domestic variants of the Directive's rights effectively counter undesirable non-standard employment.

Droit suisse sur des conditions de travail transparentes et prévisibles

A. Cadre juridique

Art. 330b, al. 1, CO oblige l'employeur à informer par écrit l'employé, au plus tard un mois après le début de la relation de travail, des éléments suivants :

a. le nom des parties ;
b. la date du début du rapport de travail ;
c. la fonction du travailleur ;
d. le salaire et les éventuels suppléments salariaux ;
e. la durée hebdomadaire du travail.

L'al. 2 impose de communiquer également les modifications de ces éléments, lorsqu'elles interviennent durant les rapports de travail. L'art. 330b CO ne prévoit pas de sanction spécifique au non-respect de l'obligation d'information. Le travailleur dispose des actions générales en exécution et en dommages-intérêts, mais ne peut refuser d'exécuter sa prestation sur la base de l'art. 82 CO, car l'obligation d'information est une obligation accessoire de l'employeur[i]. Les informations fournies sont présumées refléter les conditions effectives de travail, l'employeur qui prétend qu'elles sont différentes devant en apporter la preuve[ii]. La doctrine majoritaire reconnaît par ailleurs que le non-respect de l'obligation d'information a des conséquences en matière de preuve, à savoir un allègement du fardeau de la preuve pour le travailleur ou même un renversement du fardeau suivant les avis[iii]. Lorsque la durée de travail est variable, son indication consistera suivant les avis en l'indication de la forme de travail appliquée (horaires flexibles ou travail sur appel par exemple) ou des éléments qui permettent de la déterminer, même de manière approximative[iv].

Selon l'art. 335b, al. 1, CO, la période d'essai est d'un mois. Des dispositions différentes peuvent certes être prévues par accord écrit, contrat-type de travail ou convention collective, mais la durée du temps d'essai ne peut dépasser trois mois (art. 335b, al. 2, CO). Cette période maximale s'applique également aux contrats à durée déterminée qui prévoient un temps d'essai[v]. L'art. 335b, al. 3, CO prévoit une prolongation correspondante du temps d'essai en cas d'absence due à une maladie, à un accident ou à l'accomplissement d'une obligation légale. Enfin, lorsqu'un contrat de durée déterminée est

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i BRUCHEZ/MANGOLD/SCHWAAB, N 6 ad art. 330b CO; contra PORTMANN, Wolfgang, Die Informationspflicht des Arbeitgebers gemäss Art. 330b OR Ein neues Instrument gegen Lohn- und Sozialdumping, DTA 2007, 1 ss, 7, en cas de refus persistant de l'employeur et en lien avec l'art. 328 CO.

ii Décision du Tribunal cantonal du canton des Grisons du 19 mai 2009, ZF 2008 66, c. 2d.

iii Notamment, CR CO-Ordolli, N 7 ad art. 330b CO; SHK-CLASSEN, N 29 ad art. 330a CO; PORTMANN, 7; PIETRUSZAK, Thomas, Die Informationspflichten des Arbeitgebers gemäass Art. 330b OR – zu Hintergrund, inhalt und Rechtsfolgen der neuen Regelung, Jusletter 29 mai 2006, N 48 ss, N 38-39; contra CS-AUBERT David, N 28 ad art. 330b CO.

iv CS-AUBERT David, N 11 ad art. 330b CO et PORTMANN, 6.

v ATF 109 II 449, c. 1b.

reconduit tacitement, il est réputé être de durée indéterminée (art. 334, al. 2, CO), si bien qu'il n'y a pas de nouveau temps d'essai au moment de la prolongation[vi]. Cette règle est certes de droit dispositif, mais les contrats en chaîne, à savoir une succession de contrats à durée déterminée, sont soumis à l'interdiction de l'abus de droit et doivent répondre à des motifs objectifs[vii].

L'exercice d'un emploi auprès d'autres employeurs est en principe licite en droit suisse[viii]. Ce n'est que lorsqu'une telle activité entre en conflit avec les intérêts légitimes de l'employeur qu'elle constituera une violation du contrat de travail. Ainsi, selon l'art. 321a, al. 3, CO, le travail rémunéré pour un tiers n'est interdit que "dans la mesure" où il lèse le devoir de fidélité du travailleur, notamment s'il fait concurrence à l'employeur[ix]. Cette disposition s'appliquera de manière très limitée à un contrat à temps partiel, car l'employeur doit compter avec une activité parallèle durant le temps libre restant au travailleur[x]. Une autre limite reconnue à l'exercice d'une activité parallèle est l'effet négatif qu'elle peut avoir sur les aptitudes du travailleur[xi], si celui-ci par exemple travaille la journée chez son premier employeur et la nuit chez le second. Le devoir de fidélité en droit suisse est à concrétiser selon les circonstances de chaque relation de travail, notamment la position occupée par le travailleur. Les exigences seront ainsi plus strictes pour les cadres[xii]. Les règles de l'art. 321a CO sont de nature dispositive, si bien que des règles différentes peuvent être prévues par les parties[xiii]. Le devoir de fidélité ne peut toutefois être étendu à volonté et trouve en particulier sa limite dans la protection de la personnalité du travailleur, qui ne permet par exemple pas d'interdire toute activité accessoire[xiv].Le droit suisse ne connaît pas de durée légale du travail contractuelle. Cette dernière découle de l'accord entre les parties[xv]. Le Tribunal fédéral a également jugé, en lien avec le travail sur appel, que la durée de travail, bien que constituant un élément essentiel du contrat de travail selon l'art. 319, al. 1, CO, ne doit être ni déterminée ni déterminable dans le contrat de travail[xvi]. Il est également admis que l'art. 330b, al. 1, let. e, CO, n'impose pas d'accord sur une durée fixe du travail[xvii]. Il s'en suit que des formes de travail flexibles impliquant des durées de travail variables ou des horaires irréguliers sont possibles. Dans les limites des règles sur les congés, les temps de repos ou la durée de travail hebdomadaire maximale (art. 9, al. 1, LTr), de même que la protection de la personnalité du travailleur (art. 328 CO), une disponibilité 24 heures sur 24 n'est pas exclue. Il n'en reste pas moins que le temps pendant lequel le travailleur doit être à disposition de l'employeur doit être prédéfini. Il sera en principe fixé dans le contrat de travail ou découlera de la pratique effective qui se sera développée entre les parties. Si, en principe, le travailleur doit connaître les plages horaires pendant lesquelles il doit être à disposition, sans quoi l'employeur ne pourra exiger de lui de répondre à son appel, la détermination de ces plages, lorsqu'elles ne sont pas fixées à l'avance, peut s'avérer être incertaine, par exemple lorsqu'une personne assure un service de garde à domicile et loge sur place[xviii].

S'agissant du délai d'annonce, l'art. 69, al. 1, OLT 1 prévoit que les travailleurs sont entendus sur la planification des horaires de travail et que ceux-ci leur sont communiqués suffisamment tôt, en général

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vi BRUCHEZ/MANGOLD/SCHWAAB, N 7 ad art. 334 CO.

vii ATF 139 III 145, c. 4.1.

viii BSK-OR PORTMANN/RUDOLPH, N 19 ad art. 321a CO.

ix Voir en lien avec avec l'existence d'un contrat de travail et le travail de plateforme, ATF 148 II 426, c. 6.6.2.

x BSK-OR PORTMANN/RUDOLPH, N 17 ad art. 321 CO; BRUCHEZ/MANGOLD/SCHWAAB, N 10 ad art. 321a CO; également, ATF 148 II 426, c. 6.6.2.

xi BRUCHEZ/MANGOLD/SCHWAAB, N 9 ad art. 321a CO.

xii ATF 127 III 86, c. 2a.

xiii ATF 117 II 72, c. 4.

xiv BRUCHEZ/MANGOLD/SCHWAAB, N 4 ad art. 321a CO.

xv Le Conseil fédéral a examiné en détail ces questions de même que celles relatives au travail sur appel dans son rapport du 17 novembre 2021, "Réglementer le travail sur appel", donnant suite au postulat 19.3748 Cramer du 20 juin 2019. Voir en particulier le ch. 3 du rapport.

xvi ATF 124 III 249, c. 2a.

xvii Rapport Cramer, ch. 3.2.

xviii Par exemple, TF, arrêt du 14 décembre 2017, 4A_96/2017, c. 2.2.

deux semaines à l'avance. Que le travailleur ait droit à une certaine prévisibilité est reconnu par la doctrine[xix]. Dès le moment où l'annonce des interventions n'est pas réglée dans le contrat, elle relève du pouvoir de donner des instructions de l'employeur (art. 321d CO). Or ce pouvoir n'est pas illimité et doit respecter les règles légales impératives comme la protection de la personnalité, et être exercé conformément au principe de la bonne foi (art. 321d, al. 2, CO)[xx]. Les instructions doivent répondre à un besoin objectif de l'employeur, respecter le principe de proportionnalité et être dans un équilibre acceptable avec les intérêts du travailleur[xxi]. Sur cette base, un délai d'annonce peut en général être déduit, mais, en l'absence de règles contractuelles, il sera à déterminer selon les circonstances concrètes.

Le travail sur appel est en soi autorisé en droit suisse[xxii]. Le Tribunal fédéral a toutefois fixé des règles qui en posent les limites[xxiii]: tout d'abord, l'employeur doit respecter les règles impératives sur les délais de congé (art. 335a CO) si bien qu'il ne peut, lorsque le contrat est résilié, priver le travailleur de tout travail et donc de tout salaire durant le délai de congé; l'employeur supporte également le risque de l'entreprise, si bien qu'il ne peut fixer unilatéralement, en fonction de ses propres besoins, la durée du travail et la rétribution du travailleur; enfin, le Tribunal fédéral a jugé que le temps d'attente, pendant lequel le travailleur est à disposition pour d'éventuels appels, est du temps de travail qui doit être, sauf accord contraire, rémunéré à un taux plein si l'attente est effectuée dans les locaux de l'employeur ou à un taux réduit à déterminer en équité si elle est effectuée en dehors de ceux-ci. Il résulte de cette pratique que l'employeur doit payer le temps mis à disposition si un accord ne l'exclut pas. Si la rémunération du temps d'attente est contractuellement exclue, l'employeur ne peut faire varier son offre de travail de manière abrupte de sorte à priver le travailleur de toute rémunération. Il doit garantir une certaine quantité de travail. En cas de variations trop abruptes, l'employeur verse le salaire calculé sur la base de la moyenne des engagements effectués par le travailleur sur une période à déterminer en équité[xxiv]. Le droit suisse admet ainsi, dans le cadre du travail sur appel, des fluctuations limitées de la durée de travail mais permet des correctifs lorsque cette variation est trop brutale.

Selon l'art. 327a, al. 1, CO, l'employeur doit rembourser les frais imposés par l'exécution du travail. Cette règle est de droit impératif (art. 327a, al. 3, CO). Il en découle qu'une formation qui est imposée par l'exécution du travail est à la charge de l'employeur[xxv]. Par contre, une formation continue, de caractère général, qui améliore les capacités du travail sans lien avec un employeur ou un travail particulier, n'est pas imposée par l'exécution du travail et ne doit pas être payée par l'employeur[xxvi]. De même, l'art. 13, al. 4, OLT 1, prévoit que le temps qu'un travailleur consacre à une formation complémentaire ou continue, soit sur ordre de l'employeur, soit, en vertu de la loi, parce que son activité professionnelle l'exige, est réputé temps de travail. Selon le Tribunal fédéral, le salaire est dû pour toute la durée consacrée à la formation[xxvii].

Le droit suisse n'interdit pas en tant que tel un traitement moins favorable motivé par l'exercice des droits décrits ci-dessus. Un tel traitement peut toutefois être constitutif d'une atteinte à la personnalité du travailleur et constituer une violation de l'art. 328 CO.

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xix Voir notamment CS-DUNANT, N 61 ad art. 319 CO.

xx Entre autres, ZK-STAEHELIN, N 18-19 et 20-21 ad art. 321d CO.

xxi STREIFF/VON KAENEL/RUDOLPH, N 3 ad art. 321d CO.

xxii Rapport Cramer, ch. 3.

xxiii Arrêts de principe: ATF 124 III 249 et 125 III 65. Rapport Cramer, ch. 3.3.1, 3.3.2 et 3.4.

xxiv Voir par ex., TF, arrêt du 27 août 2018, 4A_534_2017, c. 4.

xxv Dans ce sens, parmi d'autres, BSK-OR PORTMANN/RUDOLPH, N 3 ad art. 327a CO; BRUCHEZ/MANGOLD/SCHWAAB, N 3 ad art. 327a CO; voir TF, arrêt du 14 avril 2011, 4D_13/2011, c. 2.5 a contrario.

xxvi TF, arrêt du 14 avril 2011, 4D_13/2011, c. 2.5.

xxvii TF, arrêt du 14 avril 2011, 4D_13/2011, c. 2.3.

Un licenciement prononcé parce que le travailleur fait valoir de bonne foi des prétentions découlant du contrat de travail, dont font partie les droits décrits ci-dessus, constitue un congé abusif au sens de l'art. 336, al. 1, let. d, CO et est de ce fait interdit. Un congé abusif n'est toutefois pas nul, mais est sanctionné par une indemnité fixée par le juge et plafonnée à 6 mois de salaire (art. 336a, al. 1 et 2, CO).

L'employeur doit motiver le licenciement par écrit si le travailleur le demande (art. 335, al. 2, CO). La preuve du motif abusif est à la charge du travailleur. La jurisprudence lui accorde toutefois un allègement dans ce sens que seule la vraisemblance prépondérante (et non la pleine preuve) doit être apportée. Elle peut résulter d'un faisceau d'indices. Le Tribunal fédéral a ainsi jugé que "... le juge peut présumer en fait l'existence d'un congé abusif lorsque l'employé parvient à présenter des indices suffisants pour faire apparaître comme non réel le motif avancé par l'employeur. Si elle facilite la preuve, cette présomption de fait n'a pas pour résultat d'en renverser le fardeau. "[xxviii]

B. Comparaison entre la règlementation suisse et la directive (UE) 2019/1152

Dans le message concernant la loi fédérale révisant les mesures d'accompagnement à la libre circulation des personnes, dans lequel il est proposé l'article 330b CO, le Conseil fédéral (CF) se réfère à la "Directive 91/533/CE du Conseil, du 14 octobre 1991, relative à l'obligation de l'employeur d'informer le travailleur des conditions applicables au contrat ou à la relation de travail".[xxix]. La Suisse n'a toutefois pas conclu d'accord visant à reprendre cette directive ni n'en a fait une transposition autonome. Il en va de même de la directive (UE) 2019/1152 relatives aux conditions de travail transparentes et prévisibles qui a abrogé et remplacé la directive (UE) 91/533/CEE.

Le CF explique en effet que "Les propositions retenues en matière d'information des travailleurs sur les points essentiels du contrat de travail ne satisfont pas pleinement à la directive 91/533/CE du Conseil, du 14 octobre 1991, relative à l'obligation de l'employeur d'informer le travailleur des conditions applicables au contrat ou à la relation de travail[14]. Cette directive n'a toutefois pas d'effet contraignant pour la Suisse. Il a été considéré que les obligations qu'elle comporte pour les employeurs sont excessives du point de la charge administrative et des mécanismes de sanction prévus."[xxx]

A plus forte raison, la compatibilité du droit suisse avec les nouvelles règles plus étendues prévues aux art. 3 à 7 de la directive (UE) 2019/1152 est très partielle. Ainsi, certes, le droit suisse connaît une obligation d'informer le travailleur par écrit au début du contrat ou lors de toute modification ultérieure. Mais le délai prévu en droit suisse, qui est d'un mois après le début des rapports de travail, ne correspond plus au délai prévu pour les informations correspondantes à l'art. 5, par. 1 de la directive, qui échoit le septième jour calendaire qui suit le premier jour de travail. Ensuite, nombre d'informations prévues à l'art. 4, par. 2, de la directive ne sont pas prévues à l'art. 330b CO, notamment le lieu de travail (let. b), la durée et les conditions de la période d'essai (let. g), le droit à la formation (let. h) ou la durée du congé payé (let. i). Cela se comprend aisément, car l'art. 4, par. 1 de la directive impose l'indication des éléments essentiels du contrats, qui sont concrétisés au par. 2, alors que l'art. 330b CO prévoit une information sur certains éléments du contrat de travail. De plus, le degré de précision n'est pas le même en droit suisse, laissant une marge d'interprétation et donc d'incertitude sur le contenu exact de l'information. Cela concerne en particulier la durée de travail lorsque le rythme de travail est entièrement ou majoritairement imprévisible (art. 4, par. 2, let. m de la directive). Nous avons vu qu'une partie de la doctrine en Suisse se contente de l'indication de la forme de travail (par ex., travail sur appel) alors qu'une autre déduit de l'art. 330b, al. 1, let. e, CO une obligation d'indiquer les éléments permettant d'établir la durée et les moments du travail.

[xxviii] ATF 130 III 699, c. 4.1.

[xxix] Message du Conseil fédéral du 1er octobre 2004 concernant la loi fédérale révisant les mesures d'accompagnement à la libre circulation des personnes, FF 2004 6187.

[xxx] Message, FF 2004 6187, 6209.

Les règles du droit suisse sur le temps d'essai sont conformes aux exigences de l'art. 8 de la directive (UE) 2019/1152. La durée de trois mois est inférieure à celle de six mois prévue à l'art. 8, par. 1. En droit suisse, les contrats à durée déterminée ne comprennent pas de période d'essai ni ne peuvent être résiliés, mais les parties peuvent le prévoir. La durée maximale de 3 mois s'applique alors également par analogie à la période d'essai ; l'application par analogie implique qu'une adaptation de ce maximum est envisageable si en particulier la durée du contrat de durée déterminée est très courte. Un temps d'essai de 3 mois pour un contrat d'une durée de 3 mois et demie ne paraît ainsi pas acceptable. La condition de la proportionnalité de la période d'essai, prévue à l'art. 8, par. 2 de la directive, paraît donc respectée en droit suisse. Enfin, l'art. 334, al. 2, CO, répond à l'exigence de l'art. 8, par. 2, 2e phr. de la directive. Il paraît également exclu en droit suisse de prévoir un temps d'essai dans chaque contrat, si plusieurs contrats successifs à durée déterminée sont conclus de manière licite avec la même personne. L'art. 335b, al. 3, CO, correspond en outre à l'exception prévue à l'art. 8, par. 3 de la directive.

Les règles du droit suisse en lien avec l'exercice d'activités parallèles entre pleinement dans le cadre fixé à l'art. 9, par. 2 de la directive (UE) 2019/1152. Le respect du devoir de fidélité et l'interdiction de concurrencer l'employeur (art. 321a, al. 3, CO) constituent ainsi des motifs objectifs relevant de la prévention de conflits d'intérêts. La possibilité de déroger à ces règles par accord individuel ou collectif n'est de même pas illimitée car elle doit rester, entre autres, dans les limites de la protection de la personnalité.

S'agissant de la prévisibilité minimale du travail (art. 10 de la directive (UE) 2019/1152), le droit suisse ne contient certes pas de règles spécifiques correspondant aux deux conditions posées à l'art. 10, al. 1, pts. a et b de la directive. Les règles générales montrent toutefois que les heures pendant lesquelles le travailleur doit accepter des engagements sont en principe fixées contractuellement ou découlent de la pratique effective du travail. Cela peut créer des incertitudes et des litiges quant à savoir si certaines périodes sont ou non des temps d'attente rémunérés ou du temps libre (par ex. en cas de présence jour et nuit auprès d'une personnes soignée à domicile). Le droit suisse ne garantit donc pas pleinement la prévisibilité voulue par la directive, étant également rappelé que l'information requise selon l'art. 330b, al. 1, let. e, CO fait l'objet d'interprétations divergentes. Un délai de prévenance minimale est par contre prévu à l'art. 69, al. 1, OLT 1 et découle des règles générales du droit du contrat de travail.

Le refus d'exécuter la prestation de travail est, en droit suisse, une conséquence qui découle des règles générales du droit du contrat de travail. Elle existe dans les deux cas de figure envisagés à l'art. 10, al. 1 de la directive. Ainsi, les "heures et jours de référence prédéterminés" constituent en droit suisse le temps pendant lequel le travailleur se doit d'être à disposition. Ces périodes sont en général définies dans le contrat ou résultent de la pratique établie par les parties. En dehors de ce temps, il s'agit de temps libre pendant lequel le travailleur n'est pas tenu d'effectuer sa prestation. Le cadre du droit de l'UE est toutefois plus précis et plus prévisible pour le travailleur, au vu de l'obligation d'information claire fixée à l'art. 4, par. 2, let. M et ii de la directive. De même, en droit privé suisse, si le délai d'annonce est contraire au droit impératif, notamment à la protection de la personnalité, ou à ce qui est prévu dans le contrat, le travailleur ne doit pas répondre à la demande de son employeur. L'instruction de l'employeur serait en effet illicite et le travailleur ne doit pas exécuter des instructions contraires au droit. Mais dans ce cas aussi, le cadre fixé par la directive est plus précis et prévisible.

Le droit suisse ne prévoit pas de compensation particulière en cas d'annulation d'une tâche à effectuer (art. 10, par. 3 de la directive). Il se peut que l'employeur soit tenu de verser le salaire s'il est en demeure d'offrir du travail (art. 324 CO).

S'agissant du travail sur appel (contrat à la demande selon l'art. 11 de la directive), le droit suisse ne prévoit pas de limitation particulière quant au recours ou à la durée de tels contrats (art. 11, let. a de la directive). Les limites posées par le Tribunal fédéral entrent toutefois, selon notre compréhension, dans les possibilités prévues à l'art. 11, let. b ou c de la directive (UE) 2019/1152. Vu toutefois que la

directive est récente et n'a pas été concrétisée par la jurisprudence, il s'agira de voir en particulier quelles "mesures équivalentes" au sens de l'art. 11, let. c de la directive seront admises par la CJUE. A ce stade toutefois, l'on peut raisonnablement faire un parallèle entre la pratique du Tribunal fédéral et l'art. 11, let. b ou c de la directive. Le Tribunal fédéral tire en effet de l'interdiction de reporter le risque de l'entreprise sur le travailleur une interdiction de faire varier de manière abrupte les volumes de travail et préconise de calculer dans ces cas une durée de travail fondée sur une moyenne établie en fonction du travail effectué sur une période à déterminer en équité. L'on peut par ailleurs noter que l'art. 11 ne requiert de prendre qu'une ou plusieurs des mesures prévues.

La demande d'une forme d'emploi comportant des conditions de travail plus prévisibles et plus sûres, dont doit bénéficier le travailleur selon l'art. 12, par. 1 de la directive (UE) 2019/1152, avec une réponse écrite de l'employeur dans un certain délai (art. 12, par. 2), n'existe pas en droit suisse.

Les règles du droit suisse sur la formation répondent aux exigences de l'art. 13 de la directive.

L'art. 14 de la directive (UE) 2019/1152 permet aux Etats membres de prévoir des dérogations aux art. 8 à 13, si celles-ci figurent dans une convention collective. Cela signifie pour la comparaison que, dans les cas où les règles du droit suisse sont de droit dispositif, comme pour le devoir de fidélité s'agissant d'activités parallèle ou pour la rémunération du temps d'attente, et que des dérogations figurent dans de conventions collectives, ces dérogations sont conformes à la directive. Nous n'avons toutefois pas connaissance de telles dérogations, et dans les deux cas mentionnés (devoir de fidélité et rémunération du temps d'attente), les règles légales du droit suisse sont en elles-mêmes déjà conformes au droit de l'UE.

L'art. 15 de la directive (UE) 2019/1152 règle les conséquences du non-respect de l'obligation d'informer par l'employeur, telle qu'elle découle des art. 5, par. 1 et 6 de la directive. Nous avons vu que le droit suisse donne au travailleur le droit d'agir en exécution de l'obligation prévue à l'art. 330b CO, et que la doctrine majoritaire s'accorde à reconnaître des conséquences au niveau de la preuve en cas de non-respect de l'obligation. De ce fait, le droit suisse est conforme à cette disposition. De même, le droit de recours prévu à l'art. 16 de la directive, est assuré en droit suisse. Les droits fondés sur des dispositions du CO peuvent être invoqués devant les juridictions civiles et ceux qui relèvent de la LTr ou de ses ordonnances d'application sont exécutés par les inspections cantonales du travail. A noter qu'en vertu de l'article 342, al. 2, CO, si des dispositions de la Confédération ou des cantons sur le travail imposent à l'employeur ou au travailleur une obligation de droit publique susceptible d'être l'objet d'un contrat individuel de travail, l'autre partie peut agir civilement en vue d'obtenir l'exécution de cette obligation.

S'agissant du traitement ou des conséquences défavorables (art. 17 de la directive (UE) 2019/1152) et de la protection contre le licenciement (art. 18, par. 1 et 2 de la directive), le droit suisse est en principe conforme aux exigences de la directive. L'interdiction du licenciement à l'art. 18, par. 1, est comprise comme n'excluant pas la possibilité de sanctionner un tel licenciement par une indemnité. Nous estimons également que l'interdiction de traitements moins favorables est réalisée par l'art. 328 CO qui interdit les atteintes à la personnalité du travailleur. Constitue en effet une telle atteinte toute péjoration des conditions de travail qui ne serait pas justifiée par des motifs objectifs liés à la situation économique ou au bon fonctionnement de l'entreprise[xxxi]. S'ajoute à cela dans le cas précis visé à l'art. 17 de la directive le fait que la mesure prise par l'employeur l'est à titre de représailles contre le travailleur qui exerce ses droits et est de ce fait destinée à l'intimider, ce qui peut déjà en soi constituer une atteinte à la personnalité. Enfin, si l'allègement en matière de preuve opère dès le moment où le travailleur rend vraisemblable un motif interdit de licenciement (art. 18, par. 3 de la directive), le droit suisse est plus strict en ce que la jurisprudence exige d'établir une vraisemblance prépondérante.

[xxxi] BSK-PORTMANN/RUDOLPH, N 21g ad art. 328 CO et références citées.

[1] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, available at: https://www.efta.int/eea-lex/32019L1152 (23.05.2023).

[2] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the EEA Agreement.

[3] New forms of employment that "*vary significantly from traditional employment relationships with regard to predictability, creating uncertainty with regard to the applicable rights and the social protection of the workers concerned.*" Therefore, Recital 4 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

[4] The Directive applies to workers who have employment contracts or employment relationships as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice. Recital 8 provides some clarifications, explaining what is meant by this reference to the case law of the CJEU. Art. 1 Directive (EU) 2019/1152 of 20 June 2019.

[5] In case of an electronic form, the information has to be accessible to the worker, possible to store and print, and the employer must retain proof of transmission or receipt. Art. 3 Directive (EU) 2019/1152 of 20 June 2019.

[6] "*Where the worker has no fixed or main place of work, he or she should receive information about arrangements, if any, for travel between the workplaces.*" Recital 16 Directive (EU) 2019/1152 of 20 June 2019.

[7] "*Information on remuneration to be provided should include all elements of the remuneration indicated separately, including, if applicable, contributions in cash or kind, overtime payments, bonuses and other entitlements, directly or indirectly received by the worker in respect of his or her work. The provision of such information should be without prejudice to the freedom for employers to provide for additional elements of remuneration such as one-off payments.*" Recital 20 Directive (EU) 2019/1152 of 20 June 2019.

[8] Work pattern "*means the form of organisation of the working time and its distribution according to a certain pattern determined by the employer.*" Art. 2 Directive (EU) 2019/1152 of 20 June 2019.

[9] The employer must inform the worker of: (i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours; (ii) the reference hours and days within which the worker may be required to work; (iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation Art. 4 (2.) (m) Directive (EU) 2019/1152 of 20 June 2019.

[10] Art. 7 Directive (EU) 2019/1152 of 20 June 2019.

[11] Art. 5 Directive (EU) 2019/1152 of 20 June 2019.

[12] Art. 7 Directive (EU) 2019/1152 of 20 June 2019.

[13] Art. 6 Directive (EU) 2019/1152 of 20 June 2019.

[14] "*It should be possible for such favourable presumptions to include a presumption that the worker has an open-ended employment relationship, that there is no probationary period or that the worker has a full-time position, where the relevant information is missing.*" Recital 39 Directive (EU) 2019/1152 of 20 June 2019.

[15] Art. 15 Directive (EU) 2019/1152 of 20 June 2019.

[16] Art. 5 Directive (EU) 2019/1152 of 20 June 2019.

[17] Recital 28 an Art. 8 Directive (EU) 2019/1152 of 20 June 2019.

[18] Recital 29 and Art. 9 Directive (EU) 2019/1152 of 20 June 2019.

[19] "*The costs of such training should not be charged to the worker or withheld or deducted from the worker's remuneration. Such training should count as working time and, where possible, should be carried out during working hours. That obligation does not cover vocational training or training required for workers to obtain, maintain or renew a professional qualification as long as the employer is not required by Union or national law or collective agreement to provide it to the worker. Member States should take the necessary measures to protect workers from abusive practices regarding training.*" Recital 37 Directive (EU) 2019/1152 of 20 June 2019.

[20] The employer must inform the worker of: (i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours; (ii) the reference hours and days within which the worker may be required to work; (iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation Art. 4 (2.) (m) Directive (EU) 2019/1152 of 20 June 2019.

[21] "*A reasonable minimum notice period, which is to be understood as the period of time between the moment when a worker is informed of a new work assignment and the moment when the assignment starts, constitutes another necessary element of predictability of work for employment relationships with work patterns which are entirely or mostly unpredictable. The length of the notice period may vary according to the needs of the sector concerned, while ensuring the adequate protection of workers.*" Recital 32 Directive (EU) 2019/1152 of 20 June 2019.

[22] "*Where a worker whose work pattern is entirely or mostly unpredictable has agreed with his or her employer to undertake a specific work assignment, the worker should be able to plan accordingly. The worker should be protected against loss of income resulting from the late cancellation of an agreed work assignment by means of adequate compensation.*" Recital 34 and Art. 10 Directive (EU) 2019/1152 of 20 June 2019.

[23] "*Where employers have the possibility to offer full-time or open-ended employment contracts to workers in non-standard forms of employment, a transition to more secure forms of employment should be promoted in accordance with the principles established in the European Pillar of Social Rights. Workers should be able to request another more predictable and secure form of employment, where available, and receive a reasoned written response from the employer, which takes into account the needs of the employer and of the worker.*" Recital 36 Directive (EU) 2019/1152 of 20 June 2019.

[24] Recitals 12 and 35, and Art. 11 Directive (EU) 2019/1152 of 20 June 2019.

[25] Art. 16 Directive (EU) 2019/1152 of 20 June 2019.

[26] Art. 17 Directive (EU) 2019/1152 of 20 June 2019.

[27] "*Workers exercising rights provided for in this Directive should enjoy protection from dismissal or equivalent detriment, such as an on-demand worker no longer being assigned work, or any preparations for a possible dismissal, on the grounds that they sought to exercise such rights.*" Recital 43 Directive (EU) 2019/1152 of 20 June 2019.

[28] Art. 18 Directive (EU) 2019/1152 of 20 June 2019.

[29] Art. 19 Directive (EU) 2019/1152 of 20 June 2019.

[30] Art. 21 Directive (EU) 2019/1152 of 20 June 2019.

[31] *Forslag til lov om ansættelsesbeviser og visse arbejdsvilkår.*

[32] Section 9 *lov om Arbejdsretten og faglige voldgiftsretter.*

[33] Predominantly sections 3a – 3e *lov om søfarendes ansættelsesforhold m.v.*

[34] Section 1 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[35] European Commission, Non-transposition of EU legislation: Commission takes action to ensure complete and timely transposition of EU directives, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_22_5409 (23.05.2023).

[36] Art. 19 *loi n° 2023-171 du 9 mars 2023 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture.*

[37] F. Satge, L'information du salarié lors de l'embauche est améliorée, available at: https://open.lefebvre-dalloz.fr/actualites/droit-social/information-salarie-embauche-amelioree_fe1ef5850-9641-4f17-af46-65ab31ae6e27 (23.05.2023); Y. Dufour, L'information des CDD sur les postes disponibles en CDI est renforcée, available at: https://www.efl.fr/actualite/information-cdd-postes-disponibles-cdi-renforcee_f05d8ef1b-b716-40e3-8cd6-f4f39ae0c0e3 (23.05.2023).

[38] Art. L. 1221-19 – L. 1221-26 *code du travail*.

[39] *Gesetz vom 20. Juli 2022 zur Umsetzung der Richtlinie (EU) 2019/1152 des Europäischen Parlaments und des Rates vom 20. Juni 2019 über transparente und vorhersehbare Arbeitsbedingungen in der Europäischen Union im Bereich des Zivilrechts und zur Übertragung von Aufgaben an die Sozialversicherung für Landwirtschaft, Forsten und Gartenbau*.

[40] *Gesetz vom 20. Juli 1995 über den Nachweis der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen (Nachweisgesetz - NachwG).*

[41] *Berufsbildungsgesetz in der Fassung der Bekanntmachung vom 4. Mai 2020.*

[42] *Arbeitnehmerüberlassungsgesetz in der Fassung der Bekanntmachung vom 3. Februar 1995*.

[43] *Seearbeitsgesetz vom 20. April 2013*.

[44] *Gewerbeordnung in der Fassung der Bekanntmachung vom 22. Februar 1999.*

[45] *Teilzeit- und Befristungsgesetz vom 21. Dezember 2000.*

[46] *Arbeitnehmer-Entsendegesetz vom 20. April 2009*.

[47] Section 2 *Gesetz vom 20. Juli 1995 über den Nachweis der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen.*

[48] *Burgerlijk Wetboek Boek 7*.

[49] Art. 2b *wet van 19 februari 2000, houdende regels inzake het recht op aanpassing van de arbeidsduur (Wet aanpassing arbeidsduur)*. Also known as *wet flexibel werken*.

[50] Art. 3 *wet van 1 juni 2016, houdende Regeling van de arbeidsvoorwaarden van gedetacheerde werknemers in verband met de implementatie van Richtlijn 2014/67/EU van het Europees Parlement en de Raad van 15 mei 2014 inzake de handhaving van de detacheringsrichtlijn en tot wijziging van de IMI-verordening over de administratieve samenwerking via het Informatiesysteem interne markt (Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie)*.

[51] Art. 7:628a and 7:628b *Burgerlijk Wetboek Boek 7*.

[52] Art. 2b *wet flexibel werken*.

[53] Section 3 §3 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[54] Art. L. 1221-5-1 *code du travail*.

[55] Section 2 (1) *Nachweisgesetz*.

[56] Art. 7:655 (3), (7) and (8) *Burgerlijk wetboek*.

[57] Section 3 §1 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[58] Art. L. 1221-5-1 *code du travail*.

[59] Section 2 (1) *Nachweisgesetz*.

[60] Art. 7:655 (3) *Burgerlijk wetboek*.

[61] Sections 12 §1 and 13 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[62] Art. L. 1221-5-1 *code du travail*.

[63] Section 4 *Nachweisgesetz*.

[64] Art. 7:655 (4)*Burgerlijk wetboek*.

[65] Section 6 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[66] Art. L. 1221-19 *code du travail*.

[67] Art. L. 1221-21 *code du travail*.

[68] The probationary period may not exceed a duration calculated at the rate of 1 day per week, within the limit of 2 weeks when the duration initially provided for in the contract is at most equal to 6 months and 1 month in other cases. Art. L. 1242-10 *code du travail*.

[69] Section 622 (3) Bürgerliches Gesetzbuch.

[70] Section 15 (3) Teilzeit- und Befristungsgesetz vom 21. Dezember 2000; P. Verma, Wann ist die Probezeit verhältnismäßig?, available at: https://www.humanresourcesmanager.de/arbeitsrecht/wann-ist-die-probezeit-verhaeltnismaessig/ (02.06.2023).

[71] Art. 7:652 *Burgerlijk wetboek*.

[72] Section 7 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[73] C. Lefranc-Hamoniaux, Travail à temps partiel, Dalloz 2012, no. 197 *et seq*; F. Favennec-Héry & P.-Y. Verkindt, Droit du travail, Paris: LGDJ 2020, p. 523 *et seq*.

[74] Section 12 Grundgesetz für die Bundesrepublik Deutschland.

[75] M. Weiss, M. Schmidt & D. Hlava, Labour Law and Industrial Relations: Germany, Alphen aan den Rijn: Wolters Kluwer 2023, p. 157.

[76] Sections 74-75 *Handelsgesetzbuch*.

[77] Art. 7:653a *Burgerlijk wetboek*.

[78] "*Zero-hour contracts will mean that the work is completely unpredictable, and on-call employment, where the employee and employer enter into an ad hoc agreement on a specific work task, can also be considered unpredictable if it is a continuous employment relationship in which the employer, for example, has guaranteed a certain minimum number of hours. If it is a question of highly variable working hours, the work must also be seen as completely or predominantly unpredictable, even if the start time for the tasks in question is possibly known in advance, and it can be stated that work in which a small part, for example, a Saturday shift, is fixed, but in addition and primarily in the employment relationship, work is actually done at different times that cannot be determined in advance, which may for example be on call. It will depend on a specific assessment of the individual employment, whether the work pattern must be considered to be completely or predominantly unpredictable.*" *Bemærkninger til lovforslaget til lov om ansættelsesbeviser og visse arbejdsvilkår*.

[79] Section 2 (1) 9 *Nachweisgesetz* and section 12 *Teilzeit- und Befristungsgesetz*.

[80] *Memorie van toelichting bij de wet implementatie EU-richtlijn transparante en voorspelbare arbeidsvoorwaarden.*

[81] Section 8 §1 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

[82] Étude d'impact: Projet de loi portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture, Paris: Première Ministre 2022, p. 330.

[83] Section 12 (3) Teilzeit- und Befristungsgesetz vom 21. Dezember 2000.

[84] Art. 628a (2), (4) and 628b *Burgerlijk wetboek*.

[85] Section 8 §3 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

86 Étude d'impact: Projet de loi portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture, Paris: Première Ministre 2022, p. 330.

87 Art. 628a (3) and 628b *Burgerlijk wetboek*.

88 Section 10 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

89 A Decree has to provide further details. Art. L. 1242-17 *code du travail* and Art. L. 1251-25 *code du travail*.

90 Section 7 (2)-(4) Teilzeit- und Befristungsgesetz vom 21. Dezember 2000.

91 Section 18 *Teilzeit- und Befristungsgesetz vom 21. Dezember 2000*; section 13a *Arbeitnehmerüberlassungsgesetz*.

92 Art. 2b *wet flexibel werken.*

93 Section 9 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

94 Étude d'impact: Projet de loi portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture, Paris: Première Ministre 2022, p. 331.

95 The employer has to indicate a specific weekly and daily duration, but the law states that "[*i*]*f a minimum working time has been agreed for the duration of the weekly working time in accordance with subsection (1) sentence 2, the employer may only call up to an additional 25 per cent of the weekly working time. If a maximum working time has been agreed for the duration of the weekly working time in accordance with paragraph 1 sentence 2, the employer may only call up to 20 percent less of the weekly working time*." Section 12 (1) and (2) *Teilzeit- und Befristungsgesetz vom 21. Dezember 2000.*

96 Art. 610b *Burgerlijk wetboek*.

97 Art. 628a (1) *Burgerlijk wetboek*.

98 Art. 628a (5)-(8) *Burgerlijk wetboek*.

99 Section 14 *lov om ansættelsesbeviser og visse arbejdsvilkår.*

100 Art. L. 1245-1 *code du travail*.

101 Art. 2b *wet flexibel werken.*

102 Art. 628a (8) *Burgerlijk wetboek*.

103 Étude d'impact: Projet de loi portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture, Paris: Première Ministre 2022, p. 330-331.

104 B. Bednarowicz, Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union, 2019 (4) Industrial Law Journal; D. Georgiou, The new EU Directive on Transparent and Predictable Working Conditions in the context of new forms of employment, 2022 (2) European Journal of Industrial Relations.

3. Work-life Balance

A. Directive 2019/ 1158 of 20 June 2019

i. The Objectives

Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers is the successor to Directive 2010/18/EU implementing the revised Framework Agreement on parental leave. The 2010 Directive is in force in the EEA,[1] whereas the 2019 Directive is currently under examination by EEA EFTA.[2] The WLB Directive modernizes the prior Directive's rules on parental leave and regarding requests for flexible working arrangements, and introduces rights to paternity and carers' leave.[3]

The WLB Directive is motivated by the observation that caring responsibilities are unequally shared between men and women, hampering the participation of women in the labour market.[4] Therefore, Article 1 highlights the need to set minimum requirements to achieve equality between men and women. This overarching goal is connected to the need for a reconciliation of work and family life throughout a worker's life, hence not only for young parents but also for carers.

ii. The Content

The Directive advances and reinforces various rights to achieve its goals: paternity leave, parental leave, carers' leave and flexible working arrangements for workers who are parents or carers.[5] The Directive also attempts to make sure that workers are not disincentivized from using their rights.

§ 1 Family-related leave

The WLB Directive obliges Member States to ensure that fathers (or equivalent second parents insofar as recognised by national law) have a right to ten working days of paid[6] paternity leave on the occasion of the child's birth to provide care. Although paternity leave should be taken around the time of the birth, Member States largely determine how flexibly the worker can use the entitlement.[7]

Additionally, Member States must ensure that workers have an individual right to paid[8] parental leave of four months to take care of their child. The worker must take the leave before the child reaches a specified age (max. age 8), and at least two months must be taken by the father (that is, no more than two months can be transferred to the mother)[9].

Unlike the right to paternity leave, the employer may make the right to parental leave subject to a period of work qualification or to a length of service qualification (max. 1 year) and a reasonable period of notice. The employer has to follow a certain procedure to postpone the granting of parental leave.[10] A noteworthy feature is the introduction of part-time parental leave.[11]

The Directive furthermore introduces carers' leave so that workers are able to provide personal care or support to a relative[12] or to a person who lives in the same household and is in need of significant care or support for a serious medical reason.[13] Each worker has a right to unpaid[14] carers' leave for at least five working days per year. This may, however, be subject to appropriate substantiation[15] under national law.[16]

The right to carers' leave comes in addition to the right to time off from work for urgent family reasons in the case of illness or accident, as already provided in Directive 2010/18/EU.[17]

§ 2 Flexible working arrangements

Article 9 of the Directive demands measures from Member States to ensure that workers with children up to (at least) eight years old and carers have the right to request flexible working arrangements for caring purposes. Such arrangements may include the use of remote working arrangements, flexible

working schedules, or a reduction in working hours.[18] The right can be made subject to a period of work qualification or to a length of service qualification (max. 6 months). A request for flexible working arrangements must receive a response from the employer within a reasonable period of time, providing reasons for any refusal or postponement.[19]

The worker also has a right to request (and the employer needs to respond) a return to the original working pattern. If flexible working arrangements are limited in duration, the worker has a right to return to the original working pattern at the end of the period.[20]

§ 3 Effective rights

Article 10 of the Directive protects the acquired rights of workers and their position at the company subsequent to the leave.[21] Related to this, Member States must define the status of the employment contract or employment relationship during the period of leave, bearing in mind the CJEU's case law.[22] Article 11 obliges Member States to prohibit less favourable treatment of workers on grounds related to the Directive's rights. Along these lines, there is also special protection from dismissal.[23] The Directive furthermore refers to penalties that have to exist for infringements of national provisions implementing this Directive,[24] protections against adverse treatment for complaints and legal proceedings,[25] and the enforcement competence of equality bodies (in addition to labour inspectorates).[26]

B. Domestic Implementation of Directive 2019/1158

Denmark

IMPLEMENTING THE DIRECTIVE – Denmark adopted various instruments, including (i) the Law of 22 March 2022 amending the Maternity Act (*barselsloven*),[27] (ii) the Guidelines of 2 August 2022 on the right to leave with maternity benefits for parents of a child,[28] and (iii) the Law of 21 June 2022 amending, among other instruments, the Act[29] on employees' right to absence from work for special family reasons, the Act[30] on equal treatment of men and women with regard to employment, and the Act[31] on active social policies.[32] After an initial formal notice for an alleged failure to adequately transpose the Directive, the case was closed in June 2023.

GOING BEYOND THE DIRECTIVE – Even if the Government and social partners agreed to transpose the Directive in a way that interferes as little as possible with the Danish labour market model,[33] one study identified Denmark as the only Member State in which the transposition of the WLB Directive was generally satisfactory on 31 August 2022 (no important implementation gaps but a "temporal"[34] issue). Danish law evidently goes beyond the Directive's requirements concerning parental leave.[35]

France

IMPLEMENTING THE DIRECTIVE – The Law of 9 March 2023 transposed the WLB Directive, making precise but important changes to the Labour Code.[36] Without referring to the Directive, the Law of 14 December 2020 had already significantly amended the Code's provisions on paternity leave.[37] Carers' leave was amended through the Law of 23 December 2021.[38] Despite these efforts, the European Commission sent a formal notice for an alleged failure to transpose the Directive in September 2022, followed by a motivated legal opinion in April 2023, making it possible for the Commission to start infringement proceedings as a third step.[39]

GOING BEYOND THE DIRECTIVE – Although France might become subject to infringement proceedings, French law evidently goes beyond the Directive for what concerns (aspects of) paternity leave,[40] parental leave,[41] and carers' leave.[42]

Germany

IMPLEMENTING THE DIRECTIVE – Although the German authorities considered domestic law to already substantially align with the Directive,[43] the Law of 19 December 2022 was issued to transpose the instrument further, amending the Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz*),[44] Caregiver Leave Act (*Pflegezeitgesetzes*),[45] Family Care Leave Act (*Familienpflegezeitgesetzes*)[46] and General Equal Treatment Act (*AGG*)[47].[48] A previous Law of 15 February 2021 had already made significant changes to the parental leave scheme.[49] Even though questions remain about German paternity leave (a legislative bill, *Familienstartzeitgesetz* for 2024),[50] after an initial formal notice for an alleged failure to adequately transpose the Directive, the case was closed in June 2023.

GOING BEYOND THE DIRECTIVE – The German reluctance to act on paternity leave is said to be in part due to its extensive parental leave provisions.[51] Indeed, parental leave under German law goes far beyond the Directive's requirements,[52] and the country also makes it possible to take carers' leave for a long period.[53]

The Netherlands

IMPLEMENTING THE DIRECTIVE – Before the Directive, the Dutch legislature had already adopted the Law of 14 November 2018 to introduce additional Birth Leave (i.e. Paternity Leave).[54] Subsequently, the Law of 13 October 2021 on Paid Parental Leave, the main legislative act transposing the Directive (also containing provisions on issues other than paid parental leave), was advanced.[55] A regulatory Decree complements this Law.[56]

GOING BEYOND THE DIRECTIVE – The Netherlands did not receive any notice for a failure to communicate the full transposition of the Directive, which is in part due to the fact that the country is at the forefront of WLB issues. Dutch law evidently goes beyond the Directive's minimum requirements for what concerns paternity leave,[57] parental leave,[58] carers' leave[59] and requests for flexible working arrangements.[60]

C. Comparative Table

The table below is incomplete as it does not mention, for example, the situation of adoption instead of birth, nor what happens in the event of twins.

	Denmark	France	Germany	Netherlands
Paternity leave	Right to 2 consecutive weeks of benefits[61] covered leave following birth (more flexible options possible within 10 weeks after birth if the employer agrees).[62]	Right to 25 calendar days of benefits[63] covered paternity leave, to be taken within 6 months after birth; 4 days must immediately follow birth[64] leave (3 days' leave from the day of birth).[65]	Traditionally, a possibility immediately after the birth of a short *force majeure* absence.[66] Also, very extensive parental leave coverage first 3 years. In the near future, the Family Start Time Act (*Familienstartzeitgesetz*), entering into force in 2024, is meant to establish the Directive's parental leave of 10 working days at birth (covered by the health insurance company).[67]	During the 4 weeks following birth, an employee has a right to paid birth leave (*geboorteverlof*) for a duration of 1 weeks' working hours.[68] Having used paid regular birth leave, a right to unpaid additional birth leave for 5 weeks at most is obtained during the child's first 6 months. Social security benefits are provided for the latter.[69]
Paternity leave (Duty to inform employer)	Notify the employer no later than 4 weeks before the expected time of birth.[70]	Notify the employer about the expected date of birth 1 month beforehand, and inform the	To be clarified in the Family Start Time Act (*Familienstartzeitgesetz*).	If possible, notify the employer in advance about the birth.[72] Regarding both regular and additional birth leave, notify the employer at least 4 weeks before the start of the leave.[73]

		employer about the dates and duration of the leave at least 1 month before the start of each respective period of leave.[71]		
Paternity leave for equivalent second parents	Yes.	Yes.	N/A	Yes.[74]
Parental leave	In principle, between the 10th week and 1 year after birth, each parent is entitled to benefits-covered[75] leave for 32 weeks (possibility to extend to 40 or even 46 weeks)[76].[77] Possible to postpone max. 5 weeks of leave to be used after the 1st year up to the age of 9.[78]	On the condition the employee has at least 1 year of service between the expiry date of the maternity or adoption leave and the child's 3rd birthday, the employee is entitled to unpaid[79] leave for max. 1 year (which can be extended twice (3 years total)).[80]	On the condition the employee lives in the same household as the child, parental leave can be taken for up to 3 years. A portion of up to 24 months (out of 36 months) can be deferred to be taken between the child's 3rd and 8th birthday.[81]	Employees have a right to unpaid parental leave of 26 times the weekly working time in relation to each child till the age of 8. Until the child reaches the age of 1, the employee is entitled to benefits during the unpaid leave (a period not exceeding 9 times the weekly working hours).[82]
Parental leave (Duty to inform the employer)	Notify the employer within 6 weeks of the birth about the beginning of the (several periods of) absence(s) and the length(s) thereof.[83]	If parental leave follows maternity or adoption leave, notify the employer at least 1 month before the end of this leave. Otherwise, inform the employer at least 2 months before the start of the parental leave.[84]	The period of notice is 7 weeks for leave taken before the 3rd birthday. A longer notice period of 13 weeks applies for leave being taken after the 3rd birthday.[85]	Employee notifies the intention to take leave at least 2 months prior to the start of the leave.[86]
Parental leave for co-parents	Yes.	Yes.	Yes.	Yes.[87]
Flexible options	Possible to agree on part-time parental leave (relative right) or parental leave in different blocks (absolute right).[88]	Possible to work part-time but not for less than 16 hours per week (absolute right).[89]	Parents can divide parental leave into 3 blocks (more blocks require employer consent – absolute or relative right).[90] Additional conditions apply for entitlement to part-time parental leave (relative right).[91]	Possible to work part-time or to divide the leave into blocks (unless the company motivates refusal based on substantial business or service interests – both relative rights).[92]
Possibility of transferring parental leave	Non-employed mother has 14 transferable weeks of	Not transferable.	Not transferable.	Not transferable.[94]

	parental leave covered by benefits, and non-employed father has 22 weeks. Employed parents cannot transfer 9 of these weeks (hence, 5 transferable weeks for mothers and 13 for fathers).[93]			
Carers' leave	Right to 5 working days (*omsorgsorlov*) per worker each calendar year for care of relatives or a person living in the same household.[95] These days are not necessarily remunerated. Separately, there are specific care formulas for leave related to the care for sick and dying relatives.[96]	*Inter alia*,[97] right to Family Solidarity Leave (*congé de solidarité familiale*) of 3 months for life-threatening illness or dying relatives;[98] right to Caregiver Leave (*congé de proche aidant*) of 3 months (and 1 year during an entire career) for persons having a loss of autonomy.[99]	Provided the employer has at least 15 employees, a right to 6 months of Caregiver Leave (*Pflegezeit*) per family in relation to each close relative in need of care (dependency[100]). Benefits are provided in accordance with the Family Care Leave Act (*Familienpflegezeitgesetzes*).[101]	Short carers' leave (*kortdurend zorgverlof*) is a partially paid right to 2 times the weekly working time in each period of 12 consecutive months for the necessary care of relatives, or persons in the employee's household or connected through a strong social relation.[102] Long carers' leave (*langdurend zorgverlof*) is unpaid and aimed at a live-threatening illness or necessary care for a longer duration, having a duration of max. 6 times the weekly working hours in 12 consecutive months.[103]
Leave for force majeure	Right to absence for special family reasons (no concrete maximum duration) (*fravær fra arbejde af særlige familiemæssige årsager*).[104]	Firstly, unpaid Sick Child Leave (*congé pour enfant malade*) is regulated (max. 3 days a year).[105] Secondly, Parental Presence Leave (*congé de présence parentale*) of max. 310 days per child per incident.[106] Thirdly, several days for family-related events (*congés pour événements familiaux*).[107]	Firstly, *force majeure* leave from the Civil Code (a relatively insignificant period of time).[108] Secondly, short-time inability to work (*Kurzzeitige Arbeitsverhinderung*) for up to 10 working days to organize needs-based care.[109] Thirdly, leave and sickness benefits in the event of illness of a child for max. 10 working days per child per year.[110]	Paid leave for short durations is possible, among other things, for *force majeure*. The conditions are described under the heading "emergency and other short absence leave" (*calamiteiten- en ander kort verzuimverlof*).[111]
Request for flexible working arrangements	Employee may request to change working patterns for "a specified period of time" to	Possible to ask for a reduction in working hours in the form of one or more periods of at least one week.	Under the *Pflegezeitgesetz*, employee can request partial carers' leave by reaching an agreement on the reduction and distribution of working hours for maximum 6 months.[116]	All employees can file a request (if they have worked 26 weeks for the employer at the time of the proposed change in pattern).[118] Employees with a child up to age 8 or taking care of

	provide personal care.[112] Employee with child(ren) under age 9 may request a change of working hours or patterns for "a specified period of time".[113]	The working time is then fixed on an annual basis (*temps partiel annualisé pour raisons familiales*).[114] Possible to ask for individualized working hours aimed at transferring hours from one week to another.[115]	Under the *Familienpflegezeitgesetz*, requests for reduced working hours must be at least 15 hours per week for a maximum of 24 months.[117]	persons that are ill or in need of help have a stronger right to the adjustment of working hours, place of work and working time. Some of the derogations that apply to other employees, such as no-right if employer has less than 10 employees, do not apply to this group.[119]

D. Comparative Perspective on Family-related Leave

The WLB Directive was a politically sensitive initiative, as it intervened in family life, aiming to involve men more in the burdens of family life. Denmark, France, Germany and the Netherlands have a progressive approach to WLB subjects.[120] And their domestic laws reflect this, frequently going beyond the Directive's minimum requirements.

Consider the Directive's right to 10 working days of paternity leave, which must be taken immediately after birth in some Member States: French law confers a right to 25 calendar days, of which 21 days can be used within the first 6 months after birth; Dutch law even offers 6 weeks in total (1 week within the first 4 weeks and 5 weeks within the first 6 months). Differences also exist in terms of the notification procedure and the amount of allowance.[121] Similarly, an individual right to 4 months of parental leave exists under EU law (2 months cannot be transferred), but Dutch law establishes 26 weeks of non-transferable parental leave available until age 8, and Denmark provides a total of 32 weeks (some of which can be transferred between parents), most of which have to be taken in the first year after birth (5 weeks can be postponed up to age 9). Even more generously, France and Germany offer up to 3 years of non-transferable parental leave until the child is age 3 or 8, respectively. The allowances for parental leave differ significantly between countries.[122]

Regarding carers' leave, the Directive envisions 5 working days per year. While Denmark clearly introduced carers' leave of this duration per worker to comply with the Directive, many other countries offer carers' leave schemes that contain far longer periods of leave. Thus, there are 2 weeks of short carers' leave and 6 weeks of long carers' leave per worker in the Netherlands. France provides a maximum of 3 months of caregiver leave per family, whereas Germany even creates the possibility for each family to have 6 months of caregiver leave. The fact that some countries, such as France, have multiple separate carers' leave schemes makes it complicated to compare countries. Moreover, leave for *force majeure* intersects with carers' leave of short duration (especially in relation to children). In that sense, countries show varied patterns of coping with urgent leave for care (and longer periods). Similarly, Member States display a diversity of rights of parents and carers to request flexible working arrangements.[123] Notably, the Netherlands even confers this right to all workers if the employer has at least 10 employees. In light of the Directive, parents of young children and carers also enjoy it in smaller companies.

An important aspect of looking at the question of regulating work-life balance is that comparing individual components of the Directive between countries is not suitable for grasping how each country approaches the concept of WLB as a whole. For such, a comparison of the country's overall system would be necessary – for instance, the intersections between maternity, paternity and parental leave. Moreover, it should be noted that Denmark, France, Germany and the Netherlands arguably offer a distorted picture of how EU Member States transpose the Directive. Their willingness to go

beyond the Directive's minimum standards, of course, is not going to be the case for all Member States. Cultural differences across the EU may make the transposition much more difficult in more traditional societies.

E. Conclusion

EU Directives usually aim to harmonize minimum standards, after which Member States only marginally go beyond those minimum standards. The WLB Directive takes a similar approach, but the Member States continue to display a remarkable degree of variation, making an overall assessment difficult. On the one hand, the Member States studied in this report may not entirely comply with all the Directive's rules, but, on the other hand, for what concerns the general lines, these Member States tend to go (far) beyond what the Directive demands.

Droit suisse sur l'équilibre entre vie professionnelle et vie privée

A. Cadre juridique

L'art. 329*g*, al. 1, CO, prévoit un congé de 10 jours pour le père légal de l'enfant au moment de la naissance, ou qui le devient dans les six mois qui suivent la naissance. Le congé peut être pris de manière flexible par jours ou par semaines, dans les six mois qui suivent la naissance (art. 329*g*, al. 2 et 3, CO). Cette disposition va être amendée par la modification du 17 mars 2023 de la loi fédérale sur les allocations perte de gain (LAPG) (Indemnités pour le parent survivant)[i]. Le congé de paternité sera désormais intitulé "Congé de l'autre parent". Cette modification est purement terminologique dès lors que, depuis l'entrée en vigueur du « mariage pour tous » en juillet 2022, le congé bénéficie déjà tant au travailleur qu'à la travailleuse qui est l'autre parent légal à la naissance de l'enfant. Cette modification adapte le congé de paternité au droit de la filiation, qui reconnaît la parentalité originaire de l'épouse de la mère lorsque l'enfant a été conçu au moyen d'un don de sperme (art. 255*a*, al. 1, CC). De plus, la modification de loi prévoit une prolongation du congé de la mère ou de l'autre parent en cas de décès respectivement de l'autre parent ou de la mère. Le congé de paternité (futur « congé de l'autre parent ») est rémunéré par une allocation perte de gain dont le montant s'élève aux 80% du revenu, une allocation journalière ne pouvant toutefois dépasser le montant de 220.- (art. 16*l*, al. 1 et 3, LAPG[ii]). Le droit à l'allocation est accordé au parent, salarié ou indépendant, qui a cotisé à l'AVS durant les neuf mois précédant la naissance et qui a travaillé au moins 5 mois durant cette période (art. 16*i*, al. 1, LAPG).

L'art. 329h CO accorde un congé payé de 3 jours par cas mais de 10 jours par année au maximum au travailleur qui prend en charge un membre de la famille ou son ou sa partenaire atteint dans sa santé. Les membres de la famille sont les parents en ligne directe ascendante ou descendante (parents et enfants principalement, mais également grands-parents), les frères et sœurs, le conjoint et les beaux-parents[iii]. Le régime de l'art. 324a CO, qui prévoit le versement du salaire pendant un temps limité en cas d'empêchement de travailler, continue à s'appliquer en complément du congé de prise en charge de proches. Cette disposition donne droit au salaire en cas d'absence pour la prise en charge d'un proche envers lequel existe une obligation légale d'entretien, à savoir le conjoint ou un enfant[iv]. Dans les cas qui ne sont pas couverts par ces deux dispositions, l'art. 329, al. 3, CO offre la possibilité au travailleur de s'absenter au titre d'un "congé usuel", qui n'est toutefois pas rémunéré[v].

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[i] FF 2023 783.

[ii] Loi fédérale du 25 septembre 1952 sur les allocations pour perte de gain, RS 834.1.

[iii] Message du Conseil fédéral du 22 mai 2019 concernant la loi fédérale sur l'amélioration de la conciliation entre activité professionnelle et prise en charge de proches, FF 2019 3941, 3979.

[iv] Message, FF 2019 3941, 3952 et 3980.

[v] Message, FF 2019 3941, 2953.

Enfin, les travailleurs qui ont un enfant gravement atteint dans sa santé ont droit à un congé de 14 semaines (art. 329i, al. 1, CO) qui doit être pris dans un délai-cadre de 18 mois (art. 329i, al. 2, CO), en une fois ou sous la forme de journées (art. 329i, al. 4, CO). Le congé est rémunéré par une allocation de prise en charge (art. 16n ss LAPG). L'indemnité journalière est égale à 80 % du revenu moyen de l'activité lucrative obtenu avant le début du droit à l'allocation et est plafonnée à 220.-/jour (art. 16r, al. 1 et 3, LAPG).

Il n'y a en Suisse, à l'heure actuelle, pas de droit à un congé parental au niveau national. Dans le canton de Genève, le peuple a accepté, le 18 juin 2023, une initiative demandant l'introduction d'un congé parental cantonal de 24 semaines. Le canton se limite à régler le financement d'un éventuel congé donné par l'employeur. La compétence des cantons en matière de congés familiaux est discutée et se doit de respecter les compétences fédérales, en matière de droit du travail en particulier[vi].

Un droit à des horaires flexibles n'est pas prévu non plus en droit suisse du contrat de travail[vii]. Le temps et les horaires de travail se déterminent d'un commun accord dans le contrat de travail au début de la relation d'emploi, ou ultérieurement par une modification du contrat. Des solutions conventionnelles négociées par les partenaires sociaux dans des conventions collectives sont également possibles.

L'art. 36, al. 1, LTr prévoit toutefois que l'employeur doit tenir compte notamment des responsabilités familiales des travailleurs, lorsqu'il fixe les heures de travail et du repos. Sont réputées responsabilités familiales l'éducation des enfants jusqu'à l'âge de quinze ans ainsi que la prise en charge de membres de la parenté ou de proches exigeant des soins. Ces travailleurs ne peuvent être affectés à un travail supplémentaire sans leur consentement. Par ailleurs, à leur demande, une pause de midi d'au moins une heure et demie doit leur être accordée (art. 36, al. 2, LTr).

Un licenciement prononcé en raison de l'existence d'un droit au congé de paternité ou pour la prise en charge de proches, ou en raison de la prise d'un tel congé, constitue un congé abusif au sens de l'art. 336 CO et est de ce fait interdit. Un congé abusif n'est toutefois pas nul, mais est sanctionné par une indemnité fixée par le juge et plafonnée à 6 mois de salaire (art. 336a, al. 1 et 2, CO). Un licenciement prononcé alors qu'il existe un droit à un congé de prise en charge d'un enfant gravement malade est considéré comme étant donné en temps inopportun au sens de l'art. 336c CO jusqu'à la fin du sixième mois du délai-cadre (art. 336c, al. 1, let. c^{ter}, CO). Un tel licenciement est frappé de nullité (art. 336c, al. 2, CO). Une telle protection n'existe pas pour le congé de paternité (respectivement de l'autre parent).

Le droit suisse n'interdit pas en tant que tel un traitement moins favorable motivé par l'exercice des droits décrits ci-dessus. Un tel traitement peut toutefois être constitutif d'une atteinte à la personnalité du travail et constituer une violation de l'art. 328 CO.

L'employeur doit motiver le licenciement par écrit si le travailleur le demande (art. 335, al. 2, CO). La preuve du motif abusif est à la charge du travailleur. La jurisprudence lui accorde toutefois un allègement dans ce sens que seule la vraisemblance prépondérante (et non la pleine preuve) doit être apportée. Elle peut résulter d'un faisceau d'indices. Le Tribunal fédéral a ainsi jugé que "... le juge peut présumer en fait l'existence d'un congé abusif lorsque l'employé parvient à présenter des indices suffisants pour faire apparaître comme non réel le motif avancé par l'employeur. Si elle facilite la preuve, cette présomption de fait n'a pas pour résultat d'en renverser le fardeau. "[viii]

[vi] Voir notamment Iv.ct. JU 20.320 "Les cantons doivent avoir la possibilité de légiférer sur le droit et la durée d'un congé parental ou d'un congé paternité", et le débat au Conseil national, BO 2021 N 2666 ss.

[vii] A noter toutefois que le personnel fédéral dispose d'un droit à réduire le temps de travail en cas de naissance d'un enfant (art. 60*a* OPers).

[viii] ATF 130 III 699, c. 4.1.

B. Comparaison entre la règlementation suisse et la directive (UE) 2019/1158

Le droit suisse est conforme aux exigences de la directive sur plusieurs points: le congé de paternité (art. 4) et sa rémunération (art. 8, al. 1 et 2), le congé d'aidant (art. 6), l'absence pour force majeure (art. 7) le maintien des droits en matière d'emploi (art. 10) et la protection contre la discrimination et le licenciement (art. 11 et 12, par. 1 et 2). L'interdiction du licenciement à l'art. 12, par. 1 de la directive est en particulier comprise comme n'excluant pas la possibilité de sanctionner un tel licenciement par une indemnité. Nous estimons également que l'interdiction de traitements moins favorables est réalisée par l'art. 328 CO qui interdit les atteintes à la personnalité du travailleur. Constitue en effet une telle atteinte toute péjoration des conditions de travail qui ne serait pas justifiée par des motifs objectifs liés à la situation économique ou au bon fonctionnement de l'entreprise[ix]. S'ajoute à cela dans le cas précis visé à l'art. 17 de la directive le fait que la mesure prise par l'employeur l'est à titre de représailles contre le travailleur qui exerce ses droits et est de ce fait destinée à l'intimider, ce qui peut déjà en soi constituer une atteinte à la personnalité.

La durée du congé d'aidant est comprise dans la directive (UE) 2019/1158 comme une durée par année et non par cas (art. 6, al. 1 de la directive). L'art. 6, al. 2 de la directive donne toutefois la possibilité de rattacher la durée du congé à la personne ou à un événement. L'art. 329h CO prévoit un maximum annuel de 10 jours. Il est par conséquent conforme aux exigences de la directive. La limite en droit suisse à 3 jours par cas relève des possibilités données par l'art. 6, par. 2 de la directive. La directive exige uniquement qu'une personne puisse prendre au total un minimum de 5 jours de congé[x], ce que le droit suisse permet. Ce ne serait pas le cas tout au plus lorsque la prise en charge se rapporte à une seule et même affection qui nécessiterait des interventions répétées. En effet, le droit suisse n'accorde dans une telle situation qu'un seul congé de 3 jours[xi].

Le droit suisse n'est pas conforme aux exigences de la directive principalement s'agissant du congé parental (art. 5). S'agissant du congé d'aidant (art. 6), il n'est pas prévu en droit suisse pour la prise en charge d'une personne qui vit dans le même ménage que l'aidant sans être son partenaire ou faire partie de sa famille. Tout au plus ces situations pourraient-elles tomber dans le champ d'application de l'art. 329, al. 3, CO. Le droit suisse applicable au secteur privé ne reconnaît pas de droit à des formes souples de travail tel que prévu à l'art. 9 de la directive, sous réserve de l'art. 36 LTr qui ne répond toutefois que partiellement aux exigences de la directive. Enfin, si l'allègement en matière de preuve opère dès le moment où le travailleur rend vraisemblable un motif interdit de licenciement (art. 12, par. 3 de la directive), le droit suisse est plus strict en ce qu'il exige d'établir une vraisemblance prépondérante.

Pour terminer, il faut relever que le droit suisse va au-delà des exigences de la directive (UE) 2019/1158 sur les points suivants :

- Le congé de paternité peut être pris de manière flexible en Suisse (cf. supra) ; la directive ne l'impose pas, mais laisse aux Etats membres la faculté de le prévoir.
- La prise en charge de proches est définie également de manière plus large à l'art. 329h CO qu'à l'art. 6, al. 1 en relation avec l'art. 3, let. c à e de la directive. L'art. 329h CO exige en effet une atteinte à la santé qui nécessite une prise en charge et n'exige pas, comme le fait la directive, une raison médicale grave ou des soins ou une aide considérable. Le cercle des membres de la famille dans le contexte du congé d'aidant est défini de manière plus large en ce qu'il inclut en droit suisse les grands-parents et les frères et sœurs, alors que le droit de l'UE se limite aux

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ix BSK-PORTMANN/RUDOLPH, N 21g ad art. 328 CO et références citées.

x de la CORTE-RODRIGUEZ, Miguel, The Transposition of the Work-Life Balance Directive in the Members States: A long Way ahead, Commission européenne, European network of legal experts in gender equality and non-discrimination, 2022, 48, disponible sous https://www.migpolgroup.com/wp-content/uploads/2022/12/2022_GE_TR_WLB-Directive-2-2.pdf.

xi CR-CO PERRENOUD, N 11 ad art. 329h CO.

enfants, aux parents et au conjoint (art. 3, par. 1, pt. e de la directive). Le législateur suisse a de même réalisé la faculté d'inclure les partenariats de fait (partenariats civils, art. 3, pt. e de la directive)..

- Les congés fondés sur l'art. 324a ou 329h CO sont rémunérés, ce que n'exige pas l'art. 8 de la directive.
- Le droit suisse du travail reconnaît de manière plus large la possibilité de s'absenter pour des raisons familiales (art. 7 de la directive), par la combinaison des art. 324a, 329, al. 3 et 329h, CO. Il ne faut pas nécessairement une raison de force majeure liée à des raisons familiales urgentes en cas de maladie ou d'accident qui rend indispensable la présence immédiate du travailleur. Il suffit que cette présence soit nécessaire. Des congés usuels sont par ailleurs accordés, sur la base de l'art. 329, al. 3, CO, pour des événements familiaux comme un décès d'un proche ou le mariage.

[1] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the EEA Agreement.

[2] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, available at: https://www.efta.int/eea-lex/32019L1158 (24.05.2023).

[3] M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 8.

[4] Recitals 6-11 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[5] Art. 1 Directive (EU) 2019/1158 of 20 June 2019.

[6] "*With regard to paternity leave as referred to in Article 4(1), such payment or allowance shall guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health* [i.e. equivalent to the level of national sick pay]*, subject to any ceiling laid down in national law. Member States may make the right to a payment or an allowance subject to periods of previous employment, which shall not exceed six months immediately prior to the expected date of the birth of the child.*" The preamble adds that "*Member States are encouraged to provide for a payment or an allowance for paternity leave that is equal to the payment or allowance provided for maternity leave at national level.*" Recital 30 and Art. 8 Directive (EU) 2019/1158 of 20 June 2019.

[7] Recital 19 and Art. 3 (a) and 4 Directive (EU) 2019/1158 of 20 June 2019.

[8] "*With regard to parental leave as referred to in Article 5(2), such payment or allowance shall be defined by the Member State or the social partners and shall be set in such a way as to facilitate the take-up of parental leave by both parents.*" The preamble adds that "*Member States should set the payment or allowance for the minimum non-transferable period of parental leave guaranteed under this Directive at an adequate level. When setting the level of the payment or allowance provided for the minimum non-transferable period of parental leave, Member States should take into account that the take-up of parental leave often results in a loss of income for the family and that first earners in a family are able to make use of their right to parental leave only if it is sufficiently well remunerated, with a view to allowing for a decent living standard.*" Recital 31 and Art. 8 Directive (EU) 2019/1158 of 20 June 2019.

[9] Recital 20 Directive (EU) 2019/1158 of 20 June 2019.

[10] To the extent a request for full-time parental leave would seriously disrupt the good functioning of the employer, the employer must first consider whether flexible ways of taking parental leave offer an alternative solution. Only after this reflection can the granting of parental leave be entirely postponed for a reasonable period of time with the employer providing the reasons in writing. Art. 5 Directive (EU) 2019/1158 of 20 June 2019.

[11] Recital 23 Directive (EU) 2019/1158 of 20 June 2019.

[12] "*Member States are encouraged to make the right to carers' leave available with regard to additional relatives, such as grandparents and siblings.*" Recital 27 Directive (EU) 2019/1158 of 20 June 2019.

[13] Art. 3 (c) Directive (EU) 2019/1158 of 20 June 2019.

[14] "*Although Member States are free to decide whether to provide a payment or an allowance for carers' leave, they are encouraged to introduce such a payment or an allowance in order to guarantee the effective take-up of the right by carers, in particular by men.*" Recital 32 Directive (EU) 2019/1158 of 20 June 2019.

[15] "*Member States can require prior medical certification of the need for significant care or support for a serious medical reason.*" Recital 27 Directive (EU) 2019/1158 of 20 June 2019.

[16] Art. 6 Directive (EU) 2019/1158 of 20 June 2019.

[17] Recital 28 and Art. 7 Directive (EU) 2019/1158 of 20 June 2019 (right to take time off if the worker's immediate absence is essential due to force majeure).

[18] Recital 34 Directive (EU) 2019/1158 of 20 June 2019.

[19] "*When considering requests for flexible working arrangements, employers should be able to take into account, inter alia, the duration of the flexible working arrangements requested and the employers' resources and operational capacity to offer such arrangements. The employer should be able to decide whether to accept or refuse a worker's request for flexible working arrangements.*" Recital 36 Directive (EU) 2019/1158 of 20 June 2019.

[20] "*Specific circumstances underlying the need for flexible working arrangements can change. Workers should therefore have the right not only to return to their original working pattern at the end of a mutually agreed period, but should also be able to request to do so earlier where required on the basis*

of a change in the underlying circumstances." Recital 36 and Art. 9 Directive (EU) 2019/1158 of 20 June 2019.

21 After the family-related leave, the workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and entitled to any improvement in working conditions that occurred in the meantime and to which they would have been entitled if they had not taken the leave.

22 "*As provided for in Directive 2010/18/EU, Member States are required to define the status of the employment contract or employment relationship for the period of parental leave. According to the case-law of the Court of Justice, the employment relationship between the worker and the employer is maintained during the period of leave and, as a result, the beneficiary of such leave remains, during that period, a worker for the purposes of Union law. When defining the status of the employment contract or employment relationship during the period of the types of leave covered by this Directive, including with regard to the entitlement to social security, the Member States should therefore ensure that the employment relationship is maintained.*" Recital 39 Directive (EU) 2019/1158 of 20 June 2019.

23 Recital 41 and Art. 12 Directive (EU) 2019/1158 of 20 June 2019.

24 Art. 13 Directive (EU) 2019/1158 of 20 June 2019.

25 Art. 14 Directive (EU) 2019/1158 of 20 June 2019.

26 "*With a view to further improving the level of protection of the rights provided for in this Directive, national equality bodies should be competent in regard to issues relating to discrimination that fall within the scope of this Directive, including the task of providing independent assistance to victims of discrimination in pursuing their complaints.*" Recital 45 and Art. 15 Directive (EU) 2019/1158 of 20 June 2019.

27 *Lov om ændring af barselsloven (Indførelse af øremærket orlov, ligedeling af retten til barselsdagpenge og ret til overdragelse af barselsdagpenge til sociale forældre og nærtstående familiemedlemmer m.v.).*

28 *Vejledning om ret til fravær med barselsdagpenge for forældre til et barn, der er født eller modtaget fra den 2. august 2022.*

29 *Lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager*.

30 *Lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v.*

31 *Lov om aktiv socialpolitik.*

32 *Lov om ændring af lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager, lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v., lov om aktiv socialpolitik og forskellige andre love.*

33 *Aftale om implementering af EU's orlovsdirektiv og ligestilling af orlovsrettigheder mellem forældre og øremærket forældreo*; *L 172 Forslag til lov om ændring af lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager, lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v., lov om aktiv socialpolitik og forskellige andre love*. p. 25.

34 Denmark grants the Directive's new rights only to children born on or after 2 August 2022, which is said to violate the CJEU's case law. "*Put another way, DK should grant the new rights to parents, irrespective of whether children are born as of 2 August 2022 or not.*" M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 55.

35 However, Danish law does ensure that, in principle, this parental leave has to be taken within 1 year after birth, which is soon, considering that most countries want the majority of the leave to be used within 3 years after birth. M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 73.

36 Art. 18 *Loi n° 2023-171 du 9 mars 2023 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture.*

37 Art. 73 *loi n° 2020-1576 du 14 décembre 2020 de financement de la sécurité sociale pour 2021*.

38 Art. 54 *loi n° 2021-1754 du 23 décembre 2021 de financement de la sécurité sociale pour 2022.*

39 European Commission, April Infringements package: key decisions, available at: https://ec.europa.eu/commission/presscorner/detail/EN/inf_23_1808 (12.06.2023).

40 Art. L. 1225-35 and D. 1225-8 *code du travail*.

41 Art. L. 1225-47 – L. 1225-59 *code du travail*.

42 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 102.

43 *Entwurf eines Gesetzes zur weiteren Umsetzung der Richtlinie (EU) 2019/1158 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige und zur Aufhebung der Richtlinie 2010/18/EU des Rates.*

44 *Gesetz vom 27. Januar 2015 zum Elterngeld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz - BEEG)*.
45 *Gesetz 28. Mai 2008 über die Pflegezeit (Pflegezeitgesetz - PflegeZG).*
46 *Gesetz vom 6. Dezember 2011 über die Familienpflegezeit (Familienpflegezeitgesetz - FPfZG)*.
47 *Allgemeines Gleichbehandlungsgesetz (AGG) vom 14. August 2006.*
48 *Gesetz vom 19. Dezember 2022 zur weiteren Umsetzung der Richtlinie (EU) 2019/1158 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige und zur Aufhebung der Richtlinie 2010/18/EU des Rates*.
49 *Zweites Gesetz Vom 15. Februar 2021 zur Änderung des Bundeselterngeld- und Elternzeitgesetzes.*
50 S. Treichel, Zur Notwendigkeit einer Umsetzung der Vereinbarkeitsrichtlinie 2019/1158 vom 20. Juni 2019 in das geltende Arbeits- und Sozialrecht, Duncker & Humblot 2021; M. Krahl, Warum Väter in Deutschland nach der Geburt kaum frei bekommen, available at: https://www.menshealth.de/dad/job-care/warum-vaeter-in-deutschland-nach-der-geburt-kaum-frei-bekommen/ (12.06.2023).
51 M. Krahl, Warum Väter in Deutschland nach der Geburt kaum frei bekommen, available at: https://www.menshealth.de/dad/job-care/warum-vaeter-in-deutschland-nach-der-geburt-kaum-frei-bekommen/ (12.06.2023).
52 Section 15 (1) and (2) *Bundeselterngeld- und Elternzeitgesetz*.
53 Sections 3-4 *Pflegezeitgesetzes*.
54 *Wet van 14 november 2018 tot wijziging van de Wet arbeid en zorg en enige andere wetten in verband met het geboorteverlof en het aanvullend geboorteverlof teneinde bij te dragen aan de ontwikkeling van de band tussen de partner van de moeder en het kind en tevens de positie van vrouwen op de arbeidsmarkt te vergroten alsmede uitbreiding van het adoptie- en pleegzorgverlof (Wet invoering extra geboorteverlof)*.
55 *Wet van 13 oktober 2021 tot wijziging van de Wet arbeid en zorg, de Wet flexibel werken en enige andere wetten in verband met de implementatie van Richtlijn (EU) 2019/1158 van het Europees Parlement en de Raad van 20 juni 2019 betreffende het evenwicht tussen werk en privéleven voor ouders en mantelzorgers en tot intrekking van Richtlijn 2010/18/EU van de Raad (PbEU 2019, L 188) (Wet betaald ouderschapsverlof).*
56 *Besluit van 26 november 2021 tot wijziging van het Algemeen inkomensbesluit socialezekerheidswetten, het Dagloonbesluit werknemersverzekeringen en enkele andere besluiten in verband met de invoering van de Wet betaald ouderschapsverlof waarin is geregeld dat een werknemer recht heeft op een uitkering tijdens het ouderschapsverlof*.
57 Art. 4:2, 4:2a and 4:2b *wet van 16 november 2001 tot vaststelling van regels voor het tot stand brengen van een nieuw evenwicht tussen arbeid en zorg in de ruimste zin (wet arbeid en zorg)*.
58 Art. 6:1-6:4 *wet arbeid en zorg*.
59 Art. 5:1-5:6 and 5:9-5:10 *wet arbeid en zorg*.
60 Art. 2 and 2a *wet van 19 februari 2000, houdende regels inzake het recht op aanpassing van de arbeidsduur (wet flexibel werken).*
61 M. De la Corte-Rodríguez highlights that for paid leave in Denmark, "*it is necessary to have been employed for at least 160 working hours within the last four calendar months before the leave and to have been employed for a minimum of 40 hours per month in at least three of these months*". Sections 20 and 35-38 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*; M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 67.
62 Section 7, §3 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*; section 2.2.2.2. *Vejledning om ret til fravær med barselsdagpenge for forældre til et barn, der er født eller modtaget fra den 2. august 2022.*
63 Art. L. 331-8, R. 313-1 – R.313-17 and R. 331-5 – R. 331-7 *code de la sécurité sociale.*
64 Art. L. 3142-4 *code du travail*.
65 Art. L. 1225-35 and D. 1225-8 *code du travail*.
66 Section 616 *Bürgerliches Gesetzbuch*.
67 L. Onderka, Gesetzesentwurf für Vaterschaftsurlaub vorgelegt, available at: https://www.personalwirtschaft.de/news/hr-organisation/gesetzesentwurf-fuer-vaterschaftsurlaub-vorgelegt-154225/ (12.06.2023).
68 Art. 4:2 *wet arbeid en zorg*.
69 Art. 4:2a and 4:2b *wet arbeid en zorg*.
70 Section 15, §3 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*.
71 Art. L. 1225-35 and D. 1225-8 *code du travail*.
72 Art. 4:3 (1) *wet arbeid en zorg*.

73 Art. 4:3 (2) *wet arbeid en zorg*.
74 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 60-61.
75 In principle, a mother is entitled to parental benefits for 14 weeks and a father for 22 weeks. The difference relates to the difference between the paternity leave of 2 weeks and the maternity leave after birth of max. 10 weeks. Sections 21-21c *lov om ret til orlov og dagpenge ved barsel (barselsloven)*.
76 Section 3.1. *Vejledning om ret til fravær med barselsdagpenge for forældre til et barn, der er født eller modtaget fra den 2. august 2022.*
77 Sections 9 and 10 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*; section 2.2.3.1. *Vejledning om ret til fravær med barselsdagpenge for forældre til et barn, der er født eller modtaget fra den 2. august 2022.*
78 Sections 11 and 12 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*; section 3.2. *Vejledning om ret til fravær med barselsdagpenge for forældre til et barn, der er født eller modtaget fra den 2. august 2022.*
79 Besides the basic allowance of the childcare benefit, the employee can potentially use the rights acquired on his time savings account (*compte épargne temps*). Another possibility would be the shared child-raising benefit (*prestation partagée d'education de l'enfant*). Ministère du travail, du plein emploi et de l'insertion, Le congé parental d'éducation, 2023.
80 Art. L. 1225-47 – L. 1225-59 *code du travail*.
81 Section 15 (1) and (2) *Bundeselterngeld- und Elternzeitgesetz*.
82 Art. 6:1-6:4 *wet arbeid en zorg*.
83 Section 15, §4 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*.
84 Art. L. 1225-50 *code du travail*.
85 Section 16 *Bundeselterngeld- und Elternzeitgesetz*.
86 Art. 6:5 *wet arbeid en zorg*.
87 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 71-72.
88 Section 12 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*.
89 Art. L. 1225-47 *code du travail*.
90 Section 16 (1) *Bundeselterngeld- und Elternzeitgesetz*.
91 Section 15 (7) *Bundeselterngeld- und Elternzeitgesetz*.
92 Art. 6:5 (3) *wet arbeid en zorg*; M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 80-83.
93 Sections 21, §2-3 and 21 b §3 *lov om ret til orlov og dagpenge ved barsel (barselsloven)*; section 2.2.4. *Vejledning om ret til fravær med barselsdagpenge for forældre til et barn, der er født eller modtaget fra den 2. august 2022.*
94 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 72.
95 Only for "essential" or "substantial" care or support that is needed for a serious medical condition. The employer may require the employee to medically document the need for essential care. Section 1 (2.) *lov om ændring af lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager, lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v., lov om aktiv socialpolitik og forskellige andre love.*
96 Sections 118-121 *lov om social service*.
97 There are two forms of carers' leave specifically dedicated to children, which M. De la Corte-Rodriguez refers to as "short carers' leave in case of sickness of children" and "long carers' leave in case of serious sickness, disability or accident of children". M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 102.
98 Art. L. 3142-6 – L. 3142-15 *code du travail*.
99 Art. L. 3142-16 – L. 3142-27 *code du travail*.
100 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 98.
101 Sections 3-4 *Pflegezeitgesetzes*.
102 Art. 5:1-5:6 *wet arbeid en zorg*.
103 Art. 5:9-5:10 *wet arbeid en zorg*.

104 *Lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager*; M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 109.

105 Art. L. 1225-61 *code du travail.*

106 Art. L. 1225-62 – L. 1225-65 *code du travail*.

107 Art. L. 3142-1 *code du travail.*

108 Section 616 *Bürgerliches Gesetzbuch*.

109 Section 2 *Pflegezeitgesetzes*.

110 Section 45 *Sozialgesetzbuch (SGB) Fünftes Buch (V)*.

111 Art. 4:1 *wet arbeid en zorg*.

112 The employee needs to have at least 6 months' prior employment with the employer. Section 1 (3.) *lov om ændring af lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager, lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v., lov om aktiv socialpolitik og forskellige andre love.*

113 There is no length of service requirement. Section 2 (6.) *lov om ændring af lov om lønmodtageres ret til fravær fra arbejde af særlige familiemæssige årsager, lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m.v., lov om aktiv socialpolitik og forskellige andre love.*

114 Art. L. 3123-2 and 3123-7 *code du travail*.

115 Art. L. 3121-48 *code du travail*.

116 Only for employers with 15 or more employees. Section 3 and 4 *Pflegezeitgesetzes*.

117 Only for employers with 25 or more employees. Section 2 *Familienpflegezeitgesetz*.

118 Art. 2 *wet flexibel werken.*

119 Art. 2a *wet flexibel werken.*

120 A broader picture is provided in the following publication: M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022.

121 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 68-70.

122 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 91-95.

123 M. De la Corte-Rodríguez, The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead, Luxemburg: Publications Office of the European Union 2022, p. 113-119.

4. Working Time

A. Directive 2003/88/EC of 4 November 2003

i. The Objectives

Directive 2003/88/EC of 4 November 2003, in force in the EEA,[1] regulates certain aspects of the organisation of working time. It codifies the significantly amended[2] Council Directive 93/104/EC on working time, a landmark instrument.

The current Working Time Directive builds on its predecessor's pedigree by framing working time within a health and safety at work discourse.[3] From this perspective, the Directive governs workers'[4] minimum periods of daily rest between two workdays, mandatory weekly rest (such as Sunday's rest), annual leave, rest breaks when at work and maximum weekly working time. It also covers certain aspects of night work, shift work and other work "patterns" (e.g., a rotating pattern).[5] Compared to its predecessor, the Working Time Directive applies to more sectors and the weekly rest no longer preferably falls on Sundays.[6]

ii. The Content

The Directive has two main chapters. The first chapter is relevant for all workers and covers minimum rest periods and other aspects of the organization of working time. Another chapter governs more specific patterns of work, night and shift work, and only applies to the workers concerned. Before discussing these chapters, this report highlights the importance of the concept of working time under the Directive.

§ 1 The Concept of Working Time

Working time means "any period during which the worker is working, *at the employer's disposal* and carrying out his activity or duties" (to be specified per national laws and/or practice). By contrast, rest periods are periods which are not working time.[7] This dichotomy between working time and rest periods is central to the functioning of the Directive and, therefore, to the working time regulations in the different Member States.

In this vein, the CJEU has extensive case law on the classification of standby time and on-call services as working time.[8] Another contested issue is the extent to which travel time classifies as working time.[9] To the dismay of some, the CJEU decided that travel[10], standby and on-call time must be considered working time under certain circumstances. Furthermore, although the Directive does not explicitly state this, the Court ruled that domestic law must require employers to set up a system enabling the duration of time worked each day by each worker to be measured (consequences in Germany, for instance).[11]

§ 2 The Organization of Working Time

Under the Directive, workers are entitled to: (i) a minimum daily rest period of 11 consecutive hours per 24-hour period;[12] (ii) a rest break once the working day is longer than 6 hours;[13] (iii) a minimum uninterrupted rest period of 24 hours per each 7-day period (in addition to the 11 hours daily rest mentioned under (i)), hence in principle a 35 hours[14] break once a week);[15] and (iv) a maximum weekly working time not exceeding an average of 48 hours for each 7-day period, including overtime (however, derogation in Article 22 Directive).[16] Workers are also entitled to paid[17] annual leave of at least 4 weeks that may not[18] be replaced by an allowance in lieu of the leave (unless the employment relationship is terminated).[19] Employees should not be incentivized to refrain from taking leave.[20] The CJEU has had to rule on several scenarios in which employees may or may not be justified in seeing their paid annual leave days lost (such as in the case of prolonged illness).[21]

§ 3 Night, Shift and Patterns of Work

The Directive furthermore sets limits on night work, meaning work during night time, i.e. a period of not less than 7 hours, as defined by national law, including, in any case, the period between midnight and 5 a.m.[22] Normal hours of work for "night workers"[23] may not exceed *an average* of 8 hours in any 24-hour period. If special hazards or heavy physical or mental strain are involved, the number of hours is *strictly* limited to 8 in any period of 24 hours.[24] The Directive also prescribes various other safeguards, such as free health assessments before the assignment and thereafter at regular intervals, and the duty to transfer night workers to regular working hours if night workers suffer from health problems connected to night work.[25]

Both night and shift workers must benefit from safety and health protection appropriate to the nature of their work, including protection and prevention services or facilities that are available at all times.[26] More broadly, in relation to employers that intend to organise work according to a certain pattern, Member States must take measures to ensure that the general principle of adapting work to the worker applies (alleviating monotonous work and work at a predetermined work-rate, and ensuring safety and health requirements such as rest breaks).[27]

§ 4 Derogations

The Working Time Directive contains a list of potential derogations which the Member States and social partners may invoke. These possibilities for derogating from the regular rules in relation to specific sets of workers have to be interpreted restrictively by the Member States and social partners.[28] As a general rule, the workers concerned must be given equivalent compensatory rest periods in the event of a derogation.[29]

Article 17 justifies derogating from the usual working time restrictions based on the specific characteristics of the activity concerned, such as for persons with "autonomous decision-making powers"[30]. Article 18 allows derogations by means of collective agreements or agreements concluded between the "two sides of industry". Article 19 confirms that while it is possible to derogate from the Directive's general reference periods (as mentioned in Article 16), a reference period cannot exceed 6 or 12 months, depending on the circumstances. Article 20 prevents many rules from applying to "mobile workers",[31] and offshore workers can be subject to a longer reference period.[32] Article 21 offers possible derogations in relation to workers on board seagoing fishing vessels.[33]

Lastly, an important provision is Article 22, which legitimizes the controversial individual opt-out clause. Provided some safeguards[34] are in place, a Member State can decide not to apply Article 6 regarding maximum weekly working time if the worker consents[35] to perform over 48 hours a week.

B. Domestic Implementation of Directive 2003/88/EC

France

IMPLEMENTING THE DIRECTIVE – Directive 2003/88/EC is a consolidation of previous directives. Therefore, it left the implementation periods of those previous directives unaffected[36] and did not spur Member States to advance new implementation measures. Regarding its predecessor, notwithstanding the Laws of 13 June 1998 and 19 January 2000,[37] France was subject to infringement procedures for failing to transpose the original Working Time Directive 93/104/EC, specifically for the rules on night work and the 24-hour weekly rest period (that comes in addition to the 11-hour daily rest period).[38] France was again criticised for failing to transpose Directive 2000/34/EC, which amended the original Working Time Directive to broaden its sectoral scope of application.[39] Although EU law influences French law,[40] many changes to French working time law seem to derive from domestic politics rather than an attempt to comply with the EU directives.[41]

GOING BEYOND THE DIRECTIVE – French working time law goes beyond the EU requirements in several respects, such as its (maximum) weekly working time limits, including a reference period of 12 weeks (below the EU's threshold of 4 months). Also, France offers more leave than required.[42]

Germany

IMPLEMENTING THE DIRECTIVE – The Directive 93/104/EC gave rise to the Working Time Act 1994 (*Arbeitszeitgesetz*). This Act has been amended several times. Some of these changes were prompted by EU law, such as the Law[43] of 24 December 2003, which amended German law in light of the CJEU's *SIMAP* ruling regarding doctors' on-call time.[44]

GOING BEYOND THE DIRECTIVE – Rest breaks under German statutory law are longer than in many other countries.[45] In principle, the daily working time limit is also lower (standing at 8 hours, but possibly increased).[46]

The Netherlands

IMPLEMENTING THE DIRECTIVE – Implementing the original Working Time Directive,[47] the Law of 23 November 1995 governs working time and rest periods.[48] Frequent amendments in the 2000s are said to have reduced the various levels of protection which the Law initially offered.[49] The Decree of 4 December 1995 has also been adopted to complement it.[50] The Decree was amended in 2005 to take into account the CJEU's rulings on on-call services.[51]

GOING BEYOND THE DIRECTIVE – Antoine Jacobs argues that while the initial Law of 1995 went significantly beyond the EU's minimum standards, in 2005, under pressure from politicians and business, trade unions forged a compromise in the Social Economic Council with employers "*laying the new level of protection somewhat halfway the EU minima and the level of the 1996-legislation.*"[52] For example, Dutch law is relatively generous with respect to rest breaks.[53] It also has particularly detailed provisions on standby and on-call time.

The United Kingdom

IMPLEMENTING THE DIRECTIVE – The United Kingdom has generally been opposed to EU initiatives on working time,[54] unsuccessfully challenging the validity of the original Directive before the CJEU.[55] Subsequently, it transposed the Directive through The Working Time Regulations 1998, which had to be amended several times to better align with the EU provisions.[56] Among other things, because the UK did not adopt the measures necessary to implement workers' rights to daily and weekly rest, the CJEU ruled the country did not adequately transpose the original Directive.[57]

GOING BEYOND THE DIRECTIVE – The UK system relied on more dispersed, sectoral protections than the Directive's approach of conferring (almost) universal minimum entitlements. Yet, even while opposing the approach, the country goes beyond the Directive's requirements in some respects. For example, almost all workers are entitled to 5,6 weeks of annual leave.[58] Considering the contentious relationship between the UK and Working Time Directives, Brexit created uncertainty about the future entitlements of employees under the Working Time Regulations.[59] Minor changes were made via the Employment Rights (Amendment) (EU Exit) Regulations 2019. The UK public authorities envision more impactful measures, particularly abolishing the working hour recording obligations and re-introducing rolled-up holiday pay (both are largely based on CJEU case law).[60]

C. Comparative Table

The table presents the general rule for employment in the private sector; it skims over all the possible exemptions, derogations and additional protections under domestic law, such as through collective bargaining agreements. It should be noted that due to the many derogations and additional protections possible, these general rules might not be applicable.

	France	Germany	The Netherlands	The United Kingdom
Definition of working time	The time during which the employee is at the employer's disposal and complies with the employer's instructions without being free to pursue personal interests.[61]	The time from the beginning to the end of work without rest breaks.[62]	The time the employee performs work under the employer's authority.[63]	(a) Any period during which the worker is working, at his employer's disposal and carrying out his activity or duties, (b) any period during which he is receiving relevant training, and (c) any additional period which is to be treated as working time under a "relevant agreement".[64]
Is travel time working time?	Business travel time is not working time.[65]	Possibly yes, along the lines of German and CJEU jurisprudence.[66]	Possibly yes, along the lines of Dutch and CJEU jurisprudence (hence, the question of being under the employer's authority is important).[67]	Travel time can, at times, count as working time.[68]
Are standby periods working time?	Yes, along the lines of Art. L. 3121-9 *et seq.* in light of CJEU jurisprudence.[69] "Equivalence systems" are allowed for.[70]	Yes, along the lines of German and CJEU jurisprudence.[71]	Differentiation between standby service (*aanwezigheidsdienst*)[72] and on-call service (*bereikbaarheidsdienst*)[73]. Both can be considered working time along the lines of Dutch and CJEU jurisprudence. Particular limitations apply to standby[74] and on-call[75] services. Additionally, the law uses the concept of a consignment (*consignatie*)[76] to which likewise specific articles apply.[77]	On-call or standby time can count as working time if the employee performs work required by the employer.[78]
Daily rest	At least 11 consecutive hours.[79]	At least 11 uninterrupted hours after the end of their daily working hours.[80]	At least 11h of continuous rest in each continuous period of 24h (which can be reduced to 8h once in every 7-day period if the nature of the work brings this with it).[81]	At least 11 consecutive hours in each 24-hour period.[82]
Rest breaks	Once daily working time reaches 6h, entitled to a break of at least 20m.[83]	Predetermined breaks of at least 30m for working hours of more than 6 to 9h and 45m for working hours above 9h in total (possible to divide rest breaks into periods of at least 15m each).[84]	A break of at least 30m (possibly split into multiple breaks of at least 15m) if the employee works more than 5,5h; A break of at least 45m (possibly split into multiple breaks of at least 15m) if the employee performs more than 10h of work.[85]	A rest break of an uninterrupted period of not less than 20m if the daily working time is more than 6h.[86]
Weekly rest period	Prohibited to have employees work more than 6 days a week. At least 24 consecutive hours of weekly rest in addition to daily rests, preferably on a Sunday.[87]	Not explicitly provided; however, employment on Sundays is, in principle, prohibited (and, if allowed, results in a substitute day of rest).[88]	A continuous rest period of at least 36h in each continuous period of 7 times 24; or a continuous rest period of at least 72h in each continuous period of 14 times 24h (possibly split into rest periods of at least 32h each).[89]	A rest period of not less than 24h in each 7-day period.[90]

Sunday work	In the interest of employees, weekly rest is given on Sundays.[91] The public administration's website indicates if an employee fits under a legal exemption, making Sunday work possible.[92]	Employees may not be employed on Sundays and public holidays.[93] Section 10 of the *Arbeitszeitgesetz* lists the many derogations to this prohibition, and section 11 governs the compensation for employment on Sundays.	The employer organizes the work in such a way that the employee does not work on Sundays, unless it results from the nature of the work and the contrary has been stipulated (in agreement with a representative body or the worker). Furthermore, the employer organizes the work in such a way that the employee does not work on at least 13 Sundays for any period of 52 consecutive weeks (unless a derogation is made through a collective agreement).[94]	The *Working Time Regulations 1998* do not contain an explicit prohibition to work on Sundays.[95] Nevertheless, in view of its section 11, the public administration is of the opinion that having to work on a Sunday depends on whether it is mentioned in either the person's employment contract or written statement of terms and conditions. Workers can only be made to work on Sundays if they agree to it.[96]
Maximum daily working time	Daily working time may, in principle, not exceed 10h.[97]	Working days may, in principle, not exceed 8h (can be extended to 10h if kept at 8h on average).[98]	Work at most 12h per shift.[99]	The daily limit is 13h because workers should enjoy 11h of rest each day.[100]
Maximum weekly working time	During the same week, the maximum weekly working time is 48h.[101] Over a period of 12 consecutive weeks, it may not exceed 44h.[102]	Not explicitly clarified; however, German law assumes at most a 6-day work week of 8h a day (hence, 48h per week).[103]	Work at most 60h per week; additionally, the employee may only work on average 48h per week in each period of 16 consecutive weeks and on average 55h per week in each period of 4 consecutive weeks.[104]	In a reference period of 17 weeks, work at most an average of 48h for every 7 days (but easy opt-out).[105]
Normal weekly working hours	Set at 35h per week for full-time employees (but many derogations possible).[106] In fact, the OECD states that the average usual weekly hours worked on the main job was 36.3 in 2022.[107]	No statutory limit on normal weekly hours. Nonetheless, the OECD states that the average usual weekly hours worked on the main job was 34.5 in 2022.[108]	No statutory limit on normal weekly hours. Nevertheless, the OECD states that the average usual weekly hours worked on the main job was 30.4 in 2022.[109]	No statutory limit on normal weekly hours. Still, the OECD states that the average usual weekly hours worked on the main job was 36.6 in 2022.[110]
Annual leave	30 days for a complete work year (at a rate of 2,5 days a month).[111]	24 days per year in case of 6-day work week (20 days for a 5-day week) (full entitlement is acquired after 6 months of employment – with possible entitlement to 1/12th the annual leave for each full month of employment).[112]	Annual leave of at least 4 times the agreed weekly working hours for each year that the employee had a right to a salary for the entire duration.[113]	4 weeks of annual leave in each leave year, combined with an additional annual leave of 1,6 weeks' leave. Therefore, a total entitlement to 5,6 weeks paid annual leave (28 days).[114]
Definition of night worker	Performs twice a week or more at least 3h of night work per day	Normally performs night work, i.e. performs more than 2h of work in a	A night shift (*nachtdienst*) means a shift in which more than 1h of work is performed between	The night period is, in principle, from 11 p.m. to 6 a.m. Night workers work, as a normal cause

	(roughly between 21 p.m. and 7 a.m.) or 270h of night work over a year.[115]	period between 23 p.m. and 6 a.m., in alternating shifts, or performs night work for at least 48 days per calendar year.[116]	midnight and 6 a.m.[117] The rules and protections are designed around this concept of a night shift, not that of a night worker.	(meaning the majority of their work days), at least 3h of their daily working time during night time.[118]
Night work protections	Max. 8h of work a day. Max. 40h of work per week on average over a reference period of 12 weeks. Obligatory compensation in the form of compensatory rest or, where appropriate, a salary benefit.[119]	Max. 8h of work a day (possible extension to 10h). Right to an appropriate number of paid days off or an appropriate supplement to the gross remuneration.[120]	Max. 10h of work a day. The weekly working time can be max. 40h on average in each period of 16 consecutive weeks in which the employee performs at least 16 times a night shift. While these are the basic rules, there are derogations and additional protections.[121]	Max. 8h on average for every 24h over a reference period of, in principle, 17 weeks. The limit of 8h is stricter if the work involves special hazards or heavy strain.[122]
General derogations from regular working time law[123]	General derogation for managers that fulfil a number of conditions, such as a high salary.[124]	The Law does not apply to senior executives, heads of public services, employees living in a domestic community (e.g., as a carer) and religious communities.[125]	The Law does not fully apply to executives and senior staff, volunteers, volunteer fire brigade, sports, scientific research, family home parent, performing artists, medical specialists and school and holiday camps, the royal household service, trading companies and spiritual institutions.[126]	Partial derogations for, among other individuals, workers with a significant degree of control over their working time and workers for whom working time controls are considered inappropriate or impractical.[127]
Individual opt-out clause for maximum weekly hours	Limited opt-out for jobs that make extensive use of on-call time.[128]	Limited opt-out for jobs that make extensive use of on-call time.[129]	Limited opt-out for jobs that make extensive use of on-call time.[130]	Broad possibility to obtain the worker's agreement in writing to exceed the average 48h per week limit.[131]
Combining multiple contracts	Workers with several employment contracts are subject to the maximum weekly working time. Exceeding that duration without having obtained a derogation is punishable.[132]	Employers are obliged to look at the total working hours of their workers (based on all employment contracts). Employees have to therefore inform their employers about the other contracts.[133]	Employers are obliged to look at the total working hours of their workers (based on all employment contracts). Employees have to therefore inform their employers about the other contracts.[134]	The working time regulations are mostly applied per worker (not per contract).[135]

D. Comparative Perspective on Working Time

<u>Some important decisions are left to the Member States</u>

Regulating working time is a key concern in labour law. It is a cornerstone of wage policy, social security, occupational safety and health, work-life balance, and many other employment-related areas. The Working Time Directive provides countries quite a bit of leeway to adapt the Directive's provisions due to the many derogations it allows for. Additionally, important decisions, such as whether working time law will apply per contract or per worker, are not settled in the Directive. For such reasons, EU Member States continue to diverge significantly.

The Directive structurally impacts countries' domestic laws

Nevertheless, there is no mistaking the Working Time Directive's major domestic impact. For example, the questions of whether travel, standby and on-call time classify as working time have been hugely influenced by the CJEU's case law, which is in favour of classification as working time under certain circumstances. This has far-reaching consequences for the working time schedules of all employers concerned. A significant effort was even undertaken to legislatively overrule the CJEU's case law by amending the Working Time Directive.[136] As these attempts failed (and a revision of the Directive remains politically unrealistic), the European Commission issued a non-binding interpretative communication in 2017, also covering some of the Directive's flashpoints.[137]

Member States show significant differences within limits posed by the Directive

Meanwhile, domestic courts must abide by the CJEU's interpretation of the Directive and, for instance, (attempt to) interpret the nationally varying definitions of "working time" in a directive-compliant manner. This can lead to tensions. Other differences between countries also persist.[138] Moreover, it should be stressed that the working time law on the books does not always accurately depict "working time practice". For example, not only do collective bargaining and other agreements lead to significant deviations, but OECD statistics show that the "average usual weekly hours worked on the main job" is the lowest in the Netherlands, recording 30.4 hours. France, the only country among the four countries covered in this report with a statutory limit on normal weekly hours (in addition to maximum weekly hours), namely 35 hours, has a far higher average of 36.3 hours.[139] Eurofound's European Working Conditions Surveys likewise evidence notable factual differences.[140]

E. Conclusion

The Working Time Directive has impacted domestic working time law significantly. Nonetheless, within the limits set by the Directive, Member States retain much freedom to develop their working time policies. Member States domestic laws and practices continue to diverge significantly in law and facts.

Droit suisse sur le temps de travail

A. Cadre juridique

En Suisse, les règles relatives à la durée du travail et du repos sont principalement fixées dans la loi sur le travail (LTr) et ses ordonnances (OLT 1 et OLT 2) qui sont des dispositions de droit public.

Tandis que certains congés comme le congé annuel minimum relèvent du droit privé et trouvent leur fondement dans le code des obligations suisse (CO). Par ailleurs, la rémunération du temps de travail n'est pas réglée dans la loi sur le travail mais relève du droit privé tout comme la question de la rémunération de formes particulière de travail telles que le travail sur appel ou le temps d'attente dans le cadre de travail de plateforme. Ces aspects sont abordés dans l'exposé sur la directive (UE) 2019/1152 qui traite des conditions de travail transparente.[i]

§ 1 Le concept de temps de travail

En vertu de l'article 13 de l'ordonnance 1 sur le travail (OLT 1), est réputé temps de travail le temps pendant lequel le travailleur doit se tenir à disposition de l'employeur, indistinctement du lieu où il se trouve : « (…) *qu'il s'agisse de l'entreprise, d'un train ou de tout autre endroit, le lieu en soi n'est pas*

[i] Voir le chapitre sur la directive (UE) 2019/1152.

pris en considération »[ii]. Il n'y a pas non plus d'exigence relative au fait d'être productif. Le simple fait de se tenir à disposition de l'employeur suffit.

Selon le SECO, « *toutes les activités et mesures qui doivent être effectuées ou prises, par exemple pour des raisons de sécurité ou d'hygiène au travail, avant que l'acte de travail à proprement dit puisse débuter comptent comme temps de travail. L'habillage et le changement de vêtements nécessaires au processus de travail en font partie :* » [iii].

L'article 13 OLT 1 règle également la prise en compte du trajet comme temps de travail : le temps de trajet entre le domicile du travailleur et son lieu de travail n'est pas réputé temps de travail. Toutefois, lorsque le travailleur doit exercer son activité ailleurs que sur son lieu de travail habituel et que la durée du trajet s'en trouve rallongée, le surplus de temps ainsi occasionné par rapport au trajet ordinaire est réputé temps de travail[iv].

Lorsqu'un travailleur effectue un service de piquet dans l'entreprise, l'intégralité du temps mis à la disposition de l'employeur compte comme durée du travail[v]. Lorsque le service de piquet est effectué en dehors de l'entreprise, seul le temps effectivement consacré aux interventions et le trajet pour se rendre sur le lieu de travail et en revenir comptent comme durée du travail[vi]. Le SECO précise dans son commentaire que lorsque le travailleur doit intervenir dans un délai extrêmement bref (par exemple 15 minutes après l'appel), les cantons doivent évaluer la situation afin de déterminer si l'entier du service de piquet doit être comptabilisé comme temps de travail[vii].

Enfin, lorsque le travailleur n'est pas autorisé à quitter sa place de travail durant sa pause, celle-ci compte comme temps de travail[viii].

§ 2 L'organisation du temps de travail

Droit public du travail

L'article 15a de la loi sur le travail (LTr) dispose que le travailleur doit bénéficier d'un repos quotidien d'au moins de 11 heures consécutives en principe pris pendant l'intervalle de la nuit (entre 23h00 et 06h00). Pour les travailleurs adultes, il est possible de réduire à 8 heures le repos quotidien, une fois par semaine, pour autant que la moyenne du repos sur deux semaines atteigne 11 heures.

L'article 15 LTr prévoit des temps de pauses minimaux en fonction de la durée effective de travail : quinze minutes si la journée de travail dure plus de cinq heures et demi[ix] ; une demi-heure si la journée de travail dure plus de sept heures[x] et une heure si la journée de travail dure plus de neuf heures[xi].

L'article 21 OLT 1 dispose que la durée cumulée du jour de repos hebdomadaire et du repos quotidien est de 35 heures consécutives au moins.

La durée maximale hebdomadaire est prévue à l'article 9 de la loi sur le travail et dépend de la profession exercée par le travailleur. Elle est fixée à 45 heures pour les travailleurs occupés dans les entreprises industrielles ainsi que pour le personnel de bureau, le personnel technique et les autres employés y compris le personnel de vente des grandes entreprises de commerce de détail. La durée

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[ii] SECO, Commentaire de l'article 13 OLT 1, p. 1.
[iii] *Ibidem*.
[iv] OLT 1, art. 13, al. 1 et 2.
[v] OLT 1, art. 15, al. 1.
[vi] *Op. Cit*., art. 15, al. 2.
[vii] SECO, Commentaire de l'article 15 OLT 1.
[viii] LTr, art. 15, al. 2.
[ix] *Op. Cit*., art. 15, al. 1, let. a.
[x] *Op. Cit*., art. 15, al. 1, let. b.
[xi] *Op. Cit*., art. 15, al. 1, let. c.

de 50 heures d'applique à tous les autres travailleurs. La durée maximum de la semaine de travail peut être prolongée temporairement de quatre heures, pour certaines catégories d'entreprises ou de travailleurs, à condition qu'elle ne soit pas dépassée en moyenne annuelle[xii]. L'article 22 de l'OLT 1 fixe les limites et les conditions auxquelles est subordonnée cette prolongation.

Droit privé du travail

L'octroi d'un congé annuel payé (vacances) est prévu à l'article 329a du Code des obligations (CO) qui stipule que l'employeur accorde au travailleur, chaque année de service, quatre semaines de vacances au moins et cinq semaines au moins aux travailleurs jusqu'à l'âge de 20 ans révolus. Les conventions collectives de travail vont souvent au-delà de ce minimum légal.

Les temps de repos prescrits par la législation sur le travail et la durée des vacances en vertu du code des obligations ne peuvent pas être remplacés par des prestations en argent ou d'autres avantages sauf à la cessation des rapports de travail[xiii].

§ 3 Travail de nuit, posté et rythmes de travail

En Suisse, l'occupation des travailleurs la nuit est en principe interdite[xiv]. Des dérogations sont possibles par voie d'autorisation[xv] ou pour certaines catégories d'entreprises ou de travailleurs dans la mesure où leur situation particulière le rend nécessaire[xvi]. Le travail de nuit est celui qui est réalisé au cours de la période de nuit, prévue en principe entre 23h00 et 06h00[xvii]. Dans son commentaire, le SECO précise qu'il y a travail de nuit dès qu'une partie du travail est fournie au cours de la période de nuit, même s'il est réalisé sur une courte période[xviii]. En principe, la durée maximale du travail quotidien effectué de nuit est fixée à neuf heures ou dix heures pauses incluses[xix].

Lorsque le travailleur est occupé un minimum de 25 nuits par an, il a le droit, à sa demande, à un examen médical et aux conseils qui s'y rapportent, tous les deux ans puis tous les ans dès 45 ans révolus[xx]. Lorsque le travailleur occupé de nuit est exposé, dans le cadre de son travail, à des activités pénibles ou dangereuses ou lorsqu'il est exposé à des situations pénibles ou dangereuses, l'examen médical et les conseils qui s'y rapportent deviennent obligatoires préalablement à l'affectation du travailleur et est répété tous les deux ans. Les travailleurs que le médecin déclare inaptes à cette forme de travail ou qui refusent de se soumettre à l'examen ne peuvent être affectés de nuit aux activités dangereuses ou pénibles[xxi]. En vertu de l'article 17d LTr, chaque fois que cela est réalisable, l'employeur doit affecter le travailleur déclaré inapte au travail de nuit pour des raisons de santé, à un travail de jour similaire auquel il est apte.

Pour autant que les circonstances l'exigent, l'employeur doit prendre des mesures particulières, destinées à la protection des travailleurs, en cas de travail de nuit régulier. Selon l'article 17e de la loi sur le travail, il s'agit notamment de mesures assurant la sécurité sur le chemin du travail, de l'organisation des transports, des possibilités de se reposer et de s'alimenter, ainsi que de la prise en charge des enfants.

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xii *Op. Cit.*, art. 9, al. 3.
xiii *Op. Cit.*, art. 22; CO, art. 329d, al. 2.
xiv *Op. Cit.*, art. 16.
xv *Op. Cit.*, art. 17.
xvi *Op. Cit.*, art. 27; OLT 2.
xvii *Op. Cit.*, art. 16.
xviii SECO, Commentaire de l'art. 17a LTr.
xix LTr, art. 17a, al. 1.
xx OLT 1, art. 44.
xxi *Op. Cit.*, art. 45.

Le travail du dimanche est aussi interdit, en principe[xxii]. Comme pour le travail de nuit, des dérogations à cette interdiction sont possibles par voie d'autorisation[xxiii] ou pour certaines catégories d'entreprises ou de travailleurs lorsque leur situation particulière le rend indispensable[xxiv].

Selon le SECO, l'employeur doit prêter une attention particulière à l'aménagement des horaires du travail en équipe, afin de préserver autant que possible les travailleurs des dangers menaçant leur santé et du surmenage[xxv]. Le principe de l'alternance des équipes le jour, le soir et la nuit est inscrit dans la loi[xxvi]. En vertu de l'article 34, al. 1 OLT 1, l'aménagement du travail en équipe doit prendre en considération les connaissances acquises dans les domaines de la médecine et des sciences du travail. Dans son commentaire, le SECO liste 14 principes permettant de réduire au maximum les nuisances inhérentes au travail en équipe et ainsi minimiser son impact sur la santé des travailleurs[xxvii]. Cet article prévoit également des exigences particulières applicables aux systèmes d'exploitation comportant trois ou plusieurs équipes à la totalité desquelles le travailleur participe successivement : l'employeur doit, en particulier, aménager la rotation des équipes du matin vers le soir, et du soir vers la nuit[xxviii]. Enfin, le travail continu est soumis à autorisation[xxix].

§ 4 Dérogations

La législation sur le travail contient une liste d'entreprises[xxx] et de professions[xxxi] exclues du champ d'application de la loi sur le travail et donc, *de facto*, aux règles relatives à la durée du travail et du repos[xxxii]. Par exemple, les entreprises soumises à la législation fédérale sur le travail dans les entreprises de transports publics[xxxiii], les entreprises soumises à la législation fédérale sur la navigation maritime sous pavillon suisse[xxxiv], les travailleurs exerçant une fonction dirigeante élevée[xxxv], les enseignants des écoles privées et les surveillants occupés dans des établissements[xxxvi]. En vertu du principe d'application générale de la loi, ces exceptions doivent être interprétées de façon restrictive.

Pour les entreprises soumises à la loi, des dérogations aux règles générales relatives à la durée du travail et du repos sont aussi possibles par voie d'autorisation[xxxvii] et pour certaines catégories d'entreprises ou de travailleurs dans la mesure où leur situation particulière le rend nécessaire[xxxviii]. L'Ordonnance 2 de la loi sur le travail (OLT 2) précise les possibilités de dérogations aux prescriptions en matière de durée du travail et du repos et désigne les catégories d'entreprises et de travailleurs auxquels s'appliquent ces dérogations[xxxix].

[xxii] LTr, art. 18, al. 1.
[xxiii] *Op. Cit*., art. 19.
[xxiv] *Op. Cit*., art. 27; OLT 2.
[xxv] SECO, Commentaire de l'article 34 OLT 1, p. 1.
[xxvi] LTr, art. 25.
[xxvii] SECO, Commentaire de l'article 34 OLT 1, p. 2 et 3.
[xxviii] OLT 1, art. 34, al. 4.
[xxix] LTr, art. 24.
[xxx] *Op. Cit*., art. 2.
[xxxi] *Op. Cit*., art. 3.
[xxxii] Voir articles 2 et 3 LTr.
[xxxiii] LTr, art. 2 let. b.
[xxxiv] *Op. Cit*., art. 2, let. c.
[xxxv] *Op. Cit*., art. 3, let. d.
[xxxvi] *Op. Cit*., art. 3, let. e.
[xxxvii] En particulier, art. 9, al. 4; 17; 19 LTr.
[xxxviii] LTr, art. 27.
[xxxix] OLT 2, art. 1.

B. Comparaison entre le droit suisse et la directive (UE) 2003/88/CE du 4 novembre 2003

Contrairement à la directive européenne, la législation suisse sur le travail ne définit pas la notion de temps de repos. Il faut toutefois comprendre le « temps de repos » comme étant toute période qui n'est pas considérée comme du temps de travail, selon la même logique que la directive.

La directive européenne donne la faculté aux Etats membres de déroger à certains articles en raison de caractéristiques particulières déterminées par l'activité exercée ou par les travailleurs eux-mêmes[xl]. La loi sur le travail prévoit aussi des dérogations à l'application de la loi et donc des règles relatives à la durée du travail et du repos en fonction du type d'entreprise[xli] ou de l'activité exercée par le travailleur[xlii].

Il est intéressant de relever que l'exclusion du champ d'application de la LTr, et donc des règles relatives à la durée du travail et du repos, des « travailleurs qui exercent une fonction dirigeante élevée »[xliii] correspond à la possibilité d'exclusion octroyée par la directive aux Etats membres pour les « cadres dirigeants ou d'autres personnes ayant un pouvoir de décision autonome »[xliv].

Le droit suisse[xlv] prévoit expressément que l'employeur doit tenir à disposition des organes d'exécution toutes les données nécessaires à l'exécution de la loi, en particulier celles relatives à la durée du temps de travail comme la durée quotidienne et hebdomadaire du travail[xlvi], l'horaire et la durée des pauses d'une durée égale ou supérieure à une demi-heure[xlvii], les jours de repos accordés[xlviii]. Des assouplissements à cette exigence ont été introduit en 2016 avec la possibilité d'enregistrer de manière simplifiée[xlix] le temps de travail ou même d'y renoncer[l], sous certaines conditions.

Le droit suisse prévoit le même nombre d'heures de repos que la directive (11 heures pour le repos journalier et 35 heures pour le repos hebdomadaire) toutefois avec la possibilité de diminuer le repos quotidien à 8 heures une fois par semaine.

Les temps de pauses minimaux sont fixés en fonction de la durée effectif du travail fourni par le travailleur et le droit à la première pause naît déjà après 5 heures 30 de travail. Les conditions d'octroi ainsi que les modalités sont également arrêtées par la loi[li].

Contrairement à la directive européenne, le droit suisse prévoit deux durées maximales de travail hebdomadaire. En Suisse, ce sont les salariés du secteur primaire[lii] qui accomplissent la charge de travail la plus élevée par semaine, avec une durée de travail effective moyenne de 44 heures et 58 minutes[liii]. Ce secteur est en principe exclut de la législation sur le travail et donc des règles relatives minium relatives à la durée du travail et du repos[liv].

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xl Directive (UE) 2003/88/CE du 4 novembre 2003, art. 17.

xli LTr, art. 2.

xlii *Op. Cit*., art. 3.

xliii Op. Cit., art. 3, al. 1, let. d, OLT 1, art. 9.

xliv Directive (UE) 2003/88/CE du 4 novembre 2003, art. 17, par. 1, let. a.

xlv LTr, art. 46; OLT 1, art. 73.

xlvi OLT 1, art. 73, al. 1, let. e.

xlvii *Op. Cit*., art. 73, al. 1, let. e.

xlviii *Op. Cit*., art. 73, al. 1, let. d.

xlix *Op. Cit*., art. 73b.

l *OP. Cit*., art. 73a.

li Voir à ce sujet l'article 18 OLT 1.

lii Agriculture, viticulture.

liii OFS, *Hausse du nombre d'heures travaillées en 2022 en Suisse*, Communiqué de presse du 22.05.2023, p. 1, https://dam-api.bfs.admin.ch/hub/api/dam/assets/24905936/master, consulté le 15.09.2023.

liv LTr, art. 2, al. 1, let. d et e.

La durée minimale des vacances est fixée dans le code des obligations, qui règle la relation contractuelle de travail entre l'employeur et le travailleur. La durée minimale de 4 semaine est conforme avec la directive.

La définition de la période du travail de nuit correspond à la « période nocturne » définie par la directive[lv]. Le droit suisse interdit le travail de nuit. Comme expliqué précédemment, des dérogations à cette interdiction sont possibles. La législation suisse prévoit une durée du travail de nuit plus longue que la directive européenne (9 heures au lieu de 8 heures). Cette durée ne change pas lorsque le travail comporte des activités pénibles ou dangereuses ou que le travailleur est exposé à des situations pénibles ou dangereuses. La législation suisse prévoit deux types d'examen médical : un examen facultatif lorsqu'un travailleur est occupé au minimum de 25 nuits par année et un examen obligatoire préalable en cas de travail de nuit avec activité pénibles ou dangereuses. Dans les deux cas, l'intervalle est fixé à deux ans. A partir de 45 ans, le droit à un suivi médical peut être exercé chaque année[lvi].

Les travailleurs occupés la nuit et les travailleurs occupés en équipe sont soumis à des dispositions particulières afin de protéger leur santé. Pour ce qui concerne la sécurité de ces travailleurs, il n'y a pas de disposition spéciale. Le principe général de prévention des accidents et des maladies professionnelles s'applique[lvii].

Le droit suisse interdit en principe le travail du dimanche. La question du travail du dimanche n'est pas réglée dans la directive européenne.

Pour ce qui concerne la possibilité de déroger aux règles sur la durée du temps de travail et du repos via les conventions collectives de travail, l'article 358 du code des obligations précise que le droit impératif de la Confédération et des cantons l'emporte sur la convention ; toutefois, les dérogations stipulées en faveur des travailleurs sont valables, à moins que le droit impératif ne s'y oppose expressément. En matière de durée du temps de travail, l'employeur peut toujours accorder du temps de repos supplémentaire ou plus de semaines de vacances que ce que la législation ne le prévoit.

Le consentement du travailleur ne permet pas à lui seul de déroger aux dispositions relatives à la durée du travail et du repos. Les conditions permettant de déroger aux règles générales sont inscrites dans la loi sur le travail. Quant à la durée minimale des vacances, il s'agit d'une règle de nature relativement impérative c'est-à-dire qu'il n'est pas possible d'y déroger au détriment du travailleur[lviii].

[lv] Directive (UE) 2003/88/CE du 4 novembre 2003, art. 2, par. 3.

[lvi] OLT 1, art. 44, al. 2.

[lvii] LAA, art. 82, al. 1.

[lviii] CO, art. 362.

[1] Annex XVIII on Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women to the EEA Agreement.

[2] Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive.

[3] This is particularly clear in relation to night work, for example. The preamble mentions that: "*Research has shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organisation and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace.*" Recital 7 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[4] The Directive contains an autonomous concept of a worker, as a result of which, for example, persons bound by educational commitment contracts in kids' camps were considered covered by the Directive. CJEU 14 October 2010, Case C-428/09, *Union syndicale Solidaires Isère v. Premier ministre and Others*; C. Barnard, EU Employment Law, Oxford: OUP 2012, p. 536-537.

[5] Art. 1 Directive 2003/88/EC of 4 November 2003.

[6] T. Nowak, The turbulent life of the Working Time Directive, 2018 Maastricht Journal of European and Comparative Law 25(1): 118-129.

[7] Art. 2 Directive 2003/88/EC of 4 November 2003.

[8] CJEU 21 February 2018, Case C-518/15, *Ville de Nivelles v. Rudy Matzak*; CJEU 9 March 2021, Case C-344/19, *D. J. v. Radiotelevizija Slovenija*; CJEU 9 September 2021, Case C-107/19, *XR v. Dopravní podnik hl. m. Prahy, a.s.*

[9] CJEU 10 September 2015, Case C-266/14, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v. Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA*.

[10] The time spent commuting from home to work is usually not considered working time, unless the worker has no fixed workplace and, for example, frequently travels from home to a first client. Bbs law, Is Travelling for Work, Working Time?, available at: https://bbslaw.co.uk/is-travelling-for-work-working-time/ (05.07.2023).

[11] CJEU 14 May 2019, Case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*; T. Hey, Recording of working time: draft legislation on German Working Time Act has been published, available at: https://www.twobirds.com/en/insights/2023/germany/update-arbeitszeiterfassung-referentenentwurf-des-bmas (30.06.2023).

[12] Art. 3 Directive 2003/88/EC of 4 November 2003; CJEU 17 March 2021, Case C-585/19, *Academia de Studii Economice din Bucureops ti v. Organismul Intermediar pentru Programul Operaţional Capital Uman – Ministerul Educaţiei Naţionale*.

[13] Art. 4 Directive 2003/88/EC of 4 November 2003.

[14] CJEU 2 March 2023, Case C-477/21, *IH v. MÁV-START Vasúti Személyszállító Zrt.*

[15] The reference period to this end may not exceed 14 days. Art. 5 and 16 Directive 2003/88/EC of 4 November 2003.

[16] The reference period to this end may not exceed 4 months. Art. 6 and 16 Directive 2003/88/EC of 4 November 2003; CJEU 11 April 2019, Case C-254/18, *Syndicat des cadres de la sécurité intérieure v. Premier ministre, Ministre de l'Intérieur, Ministre de l'Action et des Comptes publics*.

[17] Rolled-up holiday pay is not possible. CJEU 16 March 2006, Case C-131/04 and C-257/04, *C. D. Robinson-Steele v. R. D. Retail Services Ltd, Michael Jason Clarke v. Frank Staddon Ltd* and *J. C. Caulfield and Others v. Hanson Clay Products Ltd*. Paid leave is based on someone's "*basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.*" CJEU 15 September 2011, Case C-155/10, *Williams and Others v. British Airways plc*.

[18] CJEU 6 April 2006, Case C-124/05, *Federatie Nederlandse Vakbeweging v. Staat der Nederlanden*. While statutory paid leave, as entitled to under the Directive, is well protected, EU law does not cover additional (paid) holiday days beyond these 4 weeks. CJEU 19 November 2019, Case C-609/17 and C-610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan liitto ry*, and *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v. Satamaoperaattorit ry*.

[19] Art. 7 Directive 2003/88/EC of 4 November 2003.

[20] CJEU 13 January 2022, Case C-514/20, *DS v. Koch Personaldienstleistungen GmbH*.

[21] For example, a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses was evaluated in CJEU 22 November 2011, Case C-214/10, *KHS AG v. Winfried Schulte*. Losing paid annual leave in the context of a progressive retirement scheme and due to illness was also subject to a ruling, CJEU 27 April 2023, Case C-192/22, *Bayerische Motoren Werke*. Another recent case is CJEU 22 September 2022, C-518/20 and C-727/20, *XP v. Fraport AG Frankfurt Airport Services Worldwide* and *AR v. St. Vincenz-Krankenhaus GmbH*.

[22] Art. 2 Directive 2003/88/EC of 4 November 2003.

[23] Night worker "*means: (a) on the one hand, any worker, who, during night time, works at least three hours of his daily working time as a normal course; and (b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned: (i) by national legislation, following consultation with the two sides of industry; or (ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level*". Art. 2 Directive 2003/88/EC of 4 November 2003.

[24] CJEU 24 February 2022, Case C-262/20, *VB v. Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*; CJEU 4 May 2023, Case C-529/21, *OP et al. v. Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' kam Ministerstvo na vatreshnite raboti*.

[25] Art. 8-12 Directive 2003/88/EC of 4 November 2003.

[26] Art. 12 Directive 2003/88/EC of 4 November 2003.

[27] Art. 13 Directive 2003/88/EC of 4 November 2003.

[28] E.g., CJEU 3 October 2000, Case C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*; CJEU 9 September 2003, Case C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger*; CJEU 14 October 2010, Case C-428/09, *Union syndicale Solidaires Isère v. Premier ministre and Others*.

[29] Recital 16 Directive 2003/88/EC of 4 November 2003.

[30] CJEU 7 September 2006, Case C-484/04, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland.*

[31] Mobile worker "*means any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway*". Art. 2 Directive 2003/88/EC of 4 November 2003. See also Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA); Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities; and Council Directive 2005/47/EC of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector.

[32] Offshore work "*means work performed mainly on or from offshore installations (including drilling rigs), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydrocarbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel*". Art. 2 Directive 2003/88/EC of 4 November 2003.

[33] See also Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports.

[34] The Member State has to take the necessary measures to ensure that "*(b) no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work; (c) the employer keeps up-to-date records of all workers who carry out such work; (d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours; (e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b).*" Art. 22 (1.) Directive 2003/88/EC of 4 November 2003.

[35] CJEU 5 October 2004, Cases C-397/01 to C-403/01, *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*.

36 K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 407.

37 The Law of 1998 was, for example, relevant for the rest break that workers are entitled to once they work for more than 6 hours. The Law of 2000 was important to ensure the weekly rest period of 24 hours is applied in addition to the daily rest period of 11 hours (without the two cancelling one another out). *Loi n° 98-461 du 13 juin 1998 d'orientation et d'incitation relative à la réduction du temps de travail (dite loi Aubry)*; *loi n° 2000-37 du 19 janvier 2000 relative à la réduction négociée du temps de travail*.

38 CJEU 8 June 2000, Case C-46/99, *Commission of the European Communities v. French Republic*.

39 CJEU 17 November 2005, Case C-73/05, *Commission of the European Communities v. French Republic*.

40 The Law of 22 March 2012 offers another example; in light of CJEU case law, the legislature abolished the condition of a minimum duration of effective work in the reference year for entitlement to paid leave, as the right to 4 weeks of paid leave under the Directive is rather absolute in the view of the Court. *Loi n° 2012-387 du 22 mars 2012 relative à la simplification du droit et à l'allégement des démarches administratives*.

41 For instance, the Law of 8 August 2016 has been very impactful. *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*.

42 Art. L. 3141-3 *code du travail*.

43 *Gesetz vom 24. Dezember 2003 zu Reformen am Arbeitsmarkt.*

44 CJEU 3 October 2000, Case C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*; K. Riesenhuber, European Employment Law: A Systematic Exposition, Cambridge: Intersentia 2012, p. 407.

45 Section 4 *Arbeitszeitgesetz (ArbZG)*.

46 Section 3 *Arbeitszeitgesetz (ArbZG)*.

47 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time.

48 *Wet van 23 november 1995, houdende bepalingen inzake de arbeids- en rusttijden* (*Arbeidstijdenwet*).

49 A. Jacobs, Labour Law in the Netherlands, Alphen aan den Rijn: Wolters Kluwer 2015, p. 127.

50 *Besluit van 4 december 1995, houdende nadere regels inzake de arbeids- en rusttijden (Arbeidstijdenbesluit)*.

51 *Besluit van 22 november 2005 tot wijziging van het Arbeidstijdenbesluit in verband met een arrest van het Hof van Justitie van de Europese Gemeenschappen betreffende aanwezigheidsdiensten.*

52 A. Jacobs, Labour Law in the Netherlands, Alphen aan den Rijn: Wolters Kluwer 2015, p. 127.

53 Art. 5:4 *Arbeidstijdenwet*.

54 E. Ales & J. Popma, Occupational Health and Safety and Working Time, in T. Jaspers *et al.* (eds.), European Labour Law, Cambridge: Intersentia 2019, p. 478-479.

55 CJEU 12 November 1996, Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union.*

56 E.g., The Working Time (Amendment) Regulations 2002; The Working Time (Amendment) Regulations 2009; The Working Time (Amendment) (No. 2) Regulations 2009.

57 CJEU 7 September 2006, Case C-484/04, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland.*

58 Sections 13 and 13a The Working Time Regulations 1998. Gov.uk, Holiday entitlement, available at: https://www.gov.uk/holiday-entitlement-rights (30.06.2023).

59 H. Collins, K.D. Ewing & A. McColgan, Labour Law, Cambridge: CUP 2019, p. 291.

60 CJEU 16 March 2006, Case C-131/04 and C-257/04, *C. D. Robinson-Steele v. R. D. Retail Services Ltd, Michael Jason Clarke v. Frank Staddon Ltd* and *J. C. Caulfield and Others v. Hanson Clay Products Ltd*; CJEU 14 May 2019, Case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*; Department for Business & Trade, Smarter regulation to grow the economy, London 2023.

61 Art. L. 3121-1 – L. 3121-3 *code du travail*.

62 Section 2 *Arbeitszeitgesetz (ArbZG)*.

63 Art. 1:7 *Arbeidstijdenwet*.

64 Relevant agreement means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer. Section 2 The Working Time Regulations 1998.

65 Art. L. 3121-4 *code du travail*.

66 S. Lunk, Die arbeitszeitrechtliche Behandlung von Dienstreisen, 2022 NZA, p. 881 *et seq*.

67 J. van Drongelen, Art. 5:3 – Arbeidstijdenwet, in Sdu Commentaar Arbeidsrecht Thematisch, 2022.

68 Acas, Working time for someone who travels for their job, available at: https://www.acas.org.uk/working-time-rules/working-time-for-someone-who-travels-for-their-job (30.06.2023).
69 Art. L. 3121-9 *code du travail*.
70 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
71 Wolfhard Kohte, Ulrich Faber & Dörte Busch, Gesamtes Arbeitsschutzrecht, ArbZG § 2 Rn. 23, 24, beck-online 2023.
72 A continuous period of no more than 24 hours in which the employee, if necessary in addition to performing the stipulated work, is obliged to be present at the workplace in order to perform the stipulated work as soon as possible when called up. Art. 1:1 *Arbeidstijdenbesluit*.
73 A continuous period of no more than 24 hours during which the employee, if necessary in addition to performing the stipulated work, is obliged to be available to perform the stipulated work as soon as possible when called up. Art. 1:1 *Arbeidstijdenbesluit*.
74 E.g., Art. 4.8:1 *et seq.*, 5.3:4 and 5.3:5 *Arbeidstijdenbesluit*.
75 E.g., Art. 5.19:3 *et seq.*, 5.20:4 *et seq*. *Arbeidstijdenbesluit*.
76 A period between two consecutive shifts or during a break, in which the employee is only obliged to be reachable in the event of unforeseen circumstances on call to perform the stipulated work as soon as possible. Art. 1:7 *Arbeidstijdenwet*.
77 Art. 5:9 *et seq. Arbeidstijdenwet.* See also various provisions of *Arbeidstijdenbesluit*.
78 Acas, Being on call, https://www.acas.org.uk/working-time-rules/employees-who-are-on-call-or-sleep-in (30.06.2023).
79 Art. L. 3131-1 *code du travail*.
80 Section 5 *Arbeitszeitgesetz (ArbZG)*.
81 Art. 5:3 *Arbeidstijdenwet*.
82 Section 10 The Working Time Regulations 1998.
83 Art. L. 3121-16 *code du travail*.
84 Section 4 *Arbeitszeitgesetz (ArbZG)*.
85 Art. 5:4 *Arbeidstijdenwet*.
86 Section 12 The Working Time Regulations 1998.
87 Art. L. 3132-1 – L.3132-3 *code du travail*.
88 Section 9 and 11 *Arbeitszeitgesetz (ArbZG)*.
89 Art. 5:5 *Arbeidstijdenwet*.
90 Section 11 The Working Time Regulations 1998.
91 Art. L. 3132-3 code du travail.
92 Service-Public.fr, Travail le dimanche d'un salarié du secteur privé, vérifié le 9 novembre 2021.
93 Section 9 *Arbeitszeitgesetz (ArbZG)*.
94 Art. 5:6 *Arbeidstijdenwet*.
95 Section 11 The Working Time Regulations 1998.
96 Gov.UK, Sunday working.
97 Art. L. 3121-18 *code du travail*.
98 Section 3 *Arbeitszeitgesetz (ArbZG)*.
99 Art. 5:7 *Arbeidstijdenwet*.
100 Department for Transport, European Union (EU) rules on drivers' hours and working time: Simplified guidance, London.
101 Art. L. 3121-20 *code du travail*.
102 Art. L. 3121-22 *code du travail*.
103 Wissenschaftliche Dienste, Fragen zum Arbeitszeitgesetz unter Beachtung europäischer Vorgaben, Berlin: Deutscher Bundestag 2022, 6.
104 Art. 5:7 *Arbeidstijdenwet*.
105 Section 4 The Working Time Regulations 1998
106 Art. L. 3121-27 *code du travail*.
107 OECD.stat, Average usual weekly hours worked on the main job, available at: https://stats.oecd.org/Index.aspx?DatasetCode=AVE_HRS (30.06.2023).
108 OECD.stat, Average usual weekly hours worked on the main job, available at: https://stats.oecd.org/Index.aspx?DatasetCode=AVE_HRS (30.06.2023).
109 OECD.stat, Average usual weekly hours worked on the main job, available at: https://stats.oecd.org/Index.aspx?DatasetCode=AVE_HRS (30.06.2023).

110 OECD.stat, Average usual weekly hours worked on the main job, available at: https://stats.oecd.org/Index.aspx?DatasetCode=AVE_HRS (30.06.2023).
111 Art. L. 3141-3 *code du travail*.
112 Sections 3-5 *Mindesturlaubsgesetz für Arbeitnehmer (Bundesurlaubsgesetz)*.
113 Art. 7:634 *Burgerlijk Wetboek*.
114 Sections 13 and 13a The Working Time Regulations 1998. Gov.uk, Holiday entitlement, available at: https://www.gov.uk/holiday-entitlement-rights (30.06.2023).
115 Art. L. 3122-3 and L. 3122-5 *code du travail*.
116 Section 2 *Arbeitszeitgesetz (ArbZG)*.
117 Art. 1:7 *Arbeidstijdenwet*.
118 Section 2 The Working Time Regulations 1998.
119 Art. L. 3122-5 – L. 3122-14 *code du travail*.
120 Section 6 *Arbeitszeitgesetz (ArbZG)*.
121 Art. 4:9 and 5:8 *Arbeidstijdenwet*.
122 Section 6 The Working Time Regulations 1998.
123 Please note that there are many possible derogations in relation to specific aspects of working time law. This row only mentions the general derogations, disapplying most of working time law in its entirety.
124 Art. L. 3111-2 *code du travail*.
125 Section 18 *Arbeitszeitgesetz (ArbZG)*.
126 Art. 2.1:1 *et seq*. *Arbeidstijdenbesluit*.
127 Sections 20 and 21 The Working Time Regulations 1998; S. Deakin & G. S. Morris, Labour Law, Oxford: Hart Publishing 2009, p. 290-291.
128 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
129 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
130 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
131 Section 4 (1) The Working Time Regulations 1998; Gov.uk, Opting out of the 48 hour week, available at: https://www.gov.uk/maximum-weekly-working-hours/weekly-maximum-working-hours-and-opting-out (30.06.2023).
132 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
133 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
134 European Commission, Commission Staff Working Document: Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2023.
135 European Commission, Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, Brussels: European Commission 2017.
136 T. Nowak, The turbulent life of the Working Time Directive, 2018 Maastricht Journal of European and Comparative Law 25(1): 118-129.
137 Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, 2017/C 165/01.
138 German and Dutch statutory law seems to confer longer breaks than the laws in France and the United Kingdom. The Netherlands also has a slightly more employee-friendly provision for the weekly rest period. The maximum weekly working time provisions range wildly, i.e., from an indirect limit in Germany, where, in principle, a maximum daily working time of 8 hours is combined with a 6-day week at most, to 44/48 hours in France, 48/55/60 hours in the Netherlands and 48 hours in the United Kingdom (with a broadly available opt-out). Some countries offer more annual leave than others. The definition of a night worker is also quite different, which interlinks with the related protections.
139 OECD.stat, Average usual weekly hours worked on the main job, available at: https://stats.oecd.org/Index.aspx?DatasetCode=AVE_HRS (30.06.2023).

[140] For example, in 2015, the percentage of workers responding that once or more times a month they work more than 10 hours a day was 24 in Germany, 30 in Switzerland, 38 in the Netherlands, 40 in France and 44 in the United Kingdom. Eurofound, Sixth European Working Conditions Survey: 2015, Dublin 2015.

OTHER INSTRUMENTS RELATED TO THE EU LABOUR MARKET: The Recommendation on a Reinforced Youth Guarantee and Directive on Public Procurement

1. The Reinforced Youth Guarantee

A. Council Recommendation 2020/C 372/01 of 30 October 2020

i. The Objectives

With a view to addressing youth unemployment, Council Recommendation 2020/C 372/01 of 30 October 2020, called "A Bridge to Jobs – Reinforcing the Youth Guarantee", replaces the Recommendation of 22 April 2013, which first established the so-called *Youth Guarantee*. The term *Youth Guarantee* refers to a situation in which young people are (re)incorporated into the labour market following a job loss or graduation.[1]

The 2020 Recommendation reinforces[2] the Youth Guarantee concept, aiming to ensure that all people under 30[3] receive a good quality offer of employment, continued education, an apprenticeship or a traineeship within four months of becoming unemployed or leaving formal education. The starting point is for young persons to register with a Youth Guarantee provider.[4]

ii. The Content

The ultimate goal of the Recommendation is to tackle the issue of young people not in employment, education or training ("NEETS")[5] (taking into account the COVID-19 pandemic). The Recommendation is thus a labour *market* instrument rather than a labour *law* instrument. The Council's Recommendation suggests a line of action without imposing legal obligations. Member States should develop "Youth Guarantee schemes", which are made up of four phases: mapping, outreach, preparation and offer.

§ 1 Youth Guarantee schemes

Mapping entails that the Youth Guarantee schemes must identify the target group of NEETS, available services and skills needs. Related to this mapping exercise, countries should strengthen tracking and early warning systems to identify the young people at risk and to prevent youth from ending education and training prematurely.[6]

Outreach implies that the Youth Guarantee schemes have to raise awareness and target communication in a modern, youth-friendly and recognisable visual style. Additional efforts have to be made to reach out to vulnerable NEET groups.[7]

The actors involved in the Youth Guarantee schemes need to devote attention to preparing their services. In this respect, profiling and screening tools should be improved to match the needs and responses of the individual young person, and Youth Guarantee providers should have adequate staff capacity to be able to give each youth such attention. Public employment services' counselling processes should also be strengthened.

Regarding the individual offer's preparation, providers should improve their services with individualized[8] person-centred counselling, guidance and mentoring. A more holistic approach to counselling, guidance and mentoring is also advocated by referring young people to other partners, such as education and training institutions. The Recommendation furthermore emphasizes digital skills; the digital skills of persons registering in the Youth Guarantee must be assessed. Also, it is important to validate and recognize non-formal and informal learning outcomes the young person

might have obtained. Lastly, the preparatory phase should facilitate upskilling and re-skilling "*geared mainly towards digital, green, language, entrepreneurial and career management skills*"[9].[10]

Concerning the actual offers under the Youth Guarantee scheme, the Recommendation aims for targeted and well-designed employment incentives and start-up incentives. Employment offers should be aligned with the European Pillar of Social Rights principles. The education on offer should be diversified, easing young people back into education and training. The support for quality apprenticeships should also be intensified, adhering to the minimum standards laid out in the European Framework for Quality and Effective Apprenticeships.[11] It should likewise be ensured that traineeship offers adhere to the minimum standards laid out in the Quality Framework for Traineeships.[12] Finally, the Recommendation highlights that Member States should expand continued post-placement support for young people.[13]

§ 2 Crosscutting Enablers, Including Funds

The Recommendation stresses the need to: (i) strengthen partnerships and promote protocols for cooperation between Youth Guarantee providers and others; (ii) promote further development of integrated service models, such as one-stop shops; (iii) enrich follow-up data by strengthening systems that track young people after taking up an offer; and (iv) encourage the wider sharing of tracking, profiling and follow-up data.[14]

Importantly, the Recommendation calls for "adequate national resources" and wants "full and optimal use" of the EU funds provided.[15] The Recommendation's preamble mentions the different funding resources.[16]

§ 3 Effective rights

Article 10 of the Directive protects the acquired rights of workers and their position at the company subsequent to the leave.[17] Related to this, Member States must define the status of the employment contract or employment relationship during the period of leave, bearing in mind the CJEU's case law.[18] Article 11 obliges Member States to prohibit less favourable treatment of workers on grounds related to the Directive's rights. Along these lines, there is also special protection from dismissal.[19] The Directive furthermore refers to penalties that have to exist for infringements of national provisions implementing this Directive,[20] protections against adverse treatment for complaints and legal proceedings,[21] and the enforcement competence of equality bodies (in addition to labour inspectorates).[22]

B. Domestic Action Related to Youth Guarantees

Denmark

IMPLEMENTING THE RECOMMENDATION – The initial Youth Guarantee Recommendation did not receive much attention in Denmark;[23] this can possibly be explained by the fact that youth guarantees are a Scandinavian concept.[24] Therefore, such domestic practices existed before the EU institutions put their weight behind them.[25] Nevertheless, a Youth Guarantee Implementation Plan was filed in 2014. There are also some specific Youth Guarantee schemes (see the comparative table below). Regarding the 2020 Recommendation, the Ministry of Employment *prima facie* considered making any changes to Danish law unnecessary in light of the draft Recommendation.[26] No new legislative/regulatory initiatives were found deriving from this new Recommendation.

GOING BEYOND THE RECOMMENDATION – In the Youth Guarantee country report on Denmark from 2020, the Employment Committee acknowledges that "*Denmark has a very advanced and well-established system for implementing the Youth Guarantee which shows strong political commitment.*" The system operates well. "*However, there are concerns over the outreach to inactive unregistered NEETS who do not receive any benefits, and the share of early leavers from education and training has increased in recent years.*"[27]

France

IMPLEMENTING THE RECOMMENDATION – A 2013 plan to combat poverty launched the concept of *la Garantie jeunes* through local pilot projects.[28] The initial Youth Guarantee Recommendation also resulted in the National Action Plan from 20 December 2013.[29] French scholars have studied the related developments,[30] and a scientific committee was tasked with evaluating the Youth Guarantee's pilot projects.[31] Since 2017, the practice has been generalized. Accordingly, the Labour Code now contains a right to support for young people.[32] In light of 2020's Recommendation, a new initiative was launched, *Plan 1 jeune, 1 solution*.[33] Since 2022, *la Garantie jeunes* has been replaced by the concept of youth engagement contracts (*Contrat d'engagement jeune*).

GOING BEYOND THE RECOMMENDATION – In the Youth Guarantee country report on France from 2020, the Employment Committee mentions that "*[t]he delivery of the Youth Guarantee in France is well advanced. […] The Youth Guarantee has high coverage. France has developed a comprehensive range of measures which also focus on vulnerable groups.*" Still, "*the share of traineeship offers given to Youth Guarantee beneficiaries could be improved.*"[34]

Germany

IMPLEMENTING THE RECOMMENDATION – The initial Youth Guarantee Recommendation gave rise to the National Implementation Plan of April 2014.[35] Core actors in the German structure are the Youth Employment Agencies (*Jugendberufsagenturen*), which have been the subject of several publications.[36] The Government Coalition Agreement of 2021 stresses the government's goal to expand vocational orientation and youth employment agencies.[37] Additionally, there is an emphasis on so-called "educational chains" (*Bildungsketten*).

GOING BEYOND THE RECOMMENDATION – In the Youth Guarantee country report on Germany from 2020, the Employment Committee points out that the implementation is very advanced. "*There have been continuous efforts to improve the Youth Guarantee with a number of initiatives in place, such as the youth employment agency service point, the expansion of the instrument for assisted training, and the local youth empowerment programme.*" Yet, "*regional differences exist, and cooperation in rural areas could be improved.*"[38]

The Netherlands

IMPLEMENTING THE RECOMMENDATION – The Dutch term for a youth guarantee, *jongerengarantie*, does not seem to have gained much importance in Dutch policymaking, which remains domestically driven. An expert opinion in 2009 informed an action plan on youth unemployment with concrete measures.[39] A Law of 2009 promoted young people's occupational integration but expired in January 2012 (becoming integrated into a broader legal framework for active labour markets[40]).[41] Due to the initial Youth Guarantee Recommendation, an implementation report summarized the situation in 2016.[42] An interdepartmental policy analysis took place in 2019.[43] Considering the findings, a Work Agenda was drawn up in 2021 to pursue 2009's action plan.[44] It consolidates the country's regional approach, drawing, for instance, on regional mobility teams (*regionale mobiliteitsteams*) and regional action plans[45].

GOING BEYOND THE RECOMMENDATION – In the Youth Guarantee country report on the Netherlands of 2020, the Employment Committee remarks that the country is very advanced, with a NEET rate well below the EU average. The "*[f]ocus has moved away from youth unemployment in general to supporting youth in vulnerable positions and preventing school dropouts.*" Nonetheless, "*[t]he challenge is to target the specific problems of youth in more vulnerable situations.*"[46]

C. Comparative Table

	Denmark	France	Germany	Netherlands
Youth unemployment rate[47]	9.2%	16.5%	5.9%	8.0%
Youth Guarantee schemes[48]	Building Bridge to Education (*Brobygning til uddannelse*) Job Bridge to Education (*Job-Bro til Uddannelse*)	Guarantee for Youth (*Garantie jeunes*)[49] Youth Engagement Contract (*Contrat d'engagement jeune*)	Alliance for Initial and Further Training (*Allianz für Aus- und Weiterbildung*) Career Entry Support (*Berufseinstiegsbegleitung*) Education & Business Cooperation (*Zusammenarbeit von Wirtschaft und Schule zur Berufsorientierung*)	No mentions.
Rights/duties related to young people's employment	Act on municipal action for young people under the age of 25[50] Act on Active Employment Efforts[51]	Labour Code's right to support young people towards employment and independence (*Droit à l'accompagnement des jeunes vers l'emploi et l'autonomie*)[52]	Section 29 *et seq*. Social Code, Third Book[53] Section 16h *et seq*. Social Code, Second book[54] Sections 11-14 Social Code, Eighth Book[55]	Article 10f and other articles of the Participation Law[56]

D. Comparative Perspective on Youth Guarantee Schemes

In a comparative study prepared for the European Commission in 2018, Marco Caliendo *et al.* cluster Denmark, Germany and the Netherlands together in the group of Member States with previous youth guarantee experience and a low initial NEET rate (NEETS are usually with a low educational background or youth with a disability). The countries have ambitious implementation goals and an improved capacity for public employment services, providing diversified offers of employment. In contrast, France is grouped in another cluster, bringing together the Member States with NEET challenges of an intermediate magnitude but strong efforts from the public employment agencies to reach out to those in need.[57] From a European perspective, it is critical to highlight that countries with relatively high youth unemployment receive significant funding. Only France tends to receive some funding from the four countries covered in this study.[58]

The concept of Youth Guarantee schemes is more closely related to labour market policy than labour (market) law. That said, as illustrated by young people's right to support in the French Labour Code, there can be clear links to labour rights and labour law.[59] Notably, legislatures also impose duties upon labour market institutions indicating what is expected from them in addressing youth unemployment; for example, Danish job centres and municipalities have obligations in relation to young employees (e.g., establishing municipal youth guidance centres[60]),[61] and Dutch municipalities treat persons under the age of 27 differently than older jobseekers.[62] Germany's Social Code governs the relationship between employment agencies and young persons.[63] Nonetheless, Youth Guarantee schemes, as such, generally[64] do not seem to be the subject of extensive legislation.

Such schemes are often implemented on a local or regional level where actors, like municipalities, regional employment agencies or local missions[65], receive the autonomy required to serve local needs (within the boundaries of what the national action plan sets out to achieve). In this regard, discussing national Youth Guarantee schemes in isolation risks sketching a distorted picture. Looking at youth unemployment through this lens, countries seem reluctant to legislate on the issue centrally. However, other measures adopted by EU Member States, such as subsidies to enterprises for employing young

people, youth quota and various kinds of support for apprenticeships and traineeships, are based on strict laws and are centrally organized to tackle youth unemployment. Therefore, there are more “hard law” components to youth unemployment than an analysis of Youth Guarantee schemes would suggest.

E. Conclusion

The Council Recommendations on the (reinforced) Youth Guarantee have influenced policymaking in the Member States. However, the countries covered in this report, which score well on youth unemployment, have not overhauled their practices based on these Recommendations. It is important to consider that although the EU might put Youth Guarantee schemes at the center of its policies, these schemes are often only one factor in a broader domestic policy on youth unemployment.

Schweizer Recht und eine verstärkte Jugendgarantie

A. Berufliche Bildung

Ein Bildungssystem von hoher Qualität von der obligatorischen Schule über Sekundarstufe II und Tertiärstufe bis zur Weiterbildung ist Grundlage für persönliche Entfaltung und Integration in den Arbeitsmarkt und ermöglicht das lebenslange Lernen.
In den gesetzlichen Grundlagen auf eidgenössischer Ebene gibt es keine Regelung, die das Recht auf eine nachobligatorische Aus- oder Weiterbildung festlegt oder eine Arbeitsstelle für junge Erwachsene garantiert.

Bund, Kantone und Organisationen der Arbeitswelt sorgen in ihren jeweiligen Zuständigkeiten und Kompetenzen für die verbundpartnerschaftliche Weiterentwicklung der Berufsbildung und die Abstimmung der Ausbildungsangebote auf den Bedarf der Wirtschaft (Art. 1 BBG[i]). Der Bund ist für die strategische Steuerung und die Weiterentwicklung des Gesamtsystems zuständig. Die Organisationen der Arbeitswelt definieren die Bildungsinhalte und sorgen mit den Arbeitgebenden für Ausbildungsplätze. Die Kantone verantworten den Vollzug und die Aufsicht.

Das Berufsbildungssystem basiert auf der Dualität zwischen Theorie und Praxis. In der beruflichen Grundbildung (Sekundarstufe II) zeigt sich die Dualität primär in der Kombination der verschiedenen Lernorte: Betrieb, Berufsfachschule und überbetriebliche Kurse. Die Berufsbildung baut auf klar definierten Bildungsangeboten und nationalen Qualifikationsverfahren auf und ist von einer hohen Durchlässigkeit geprägt. Die höhere Berufsbildung (Tertiärstufe) kombiniert den theoretischen Unterricht mit der früheren und aktuellen Berufspraxis der Studierenden. Die Dualität und die verbundpartnerschaftliche Zusammenarbeit in der Berufsbildung stellt die Arbeitsmarktnähe der Ausbildungen sicher.

Im Rahmen der Berufsbildung gibt es Maßnahmen, die den Übergang von der obligatorischen Schule in die Sekundarstufe II unterstützen, die Jugendliche bzw. jungen Erwachsene während der beruflichen Grundbildung fördern oder zu einem besseren Übergang von der beruflichen Grundbildung in den Arbeitsmarkt beitragen. Die Kantone stellen dafür unter anderem Angebote zur Berufswahl, die Berufsberatung, Coaching und Mentoring, Brückenangebote, und das Case Management Berufsbildung zur Verfügung. Die Kantone sind auch zuständig für die Begleitung der Lehvertragsparteien.

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[i] Bundesgesetzes vom 13. Dezember 2002 über die Berufsbildung (BBG; SR 412.10).

Die im europäischen Vergleich anhaltend tiefe Jugendarbeitslosenquote (1,7% im Juni 2023[ii]) zeigt, dass sich das System bewährt. Anzumerken ist, dass laut Eurostat die Arbeitslosenquote von Jugendlichen unter 25 Jahren in der Schweiz bei 8% liegt.[iii].

B. Maßnahmen gegen Jugendarbeitslosigkeit

In der Schweiz gibt es mehrere arbeitsmarktliche Maßnahmen, die im Arbeitslosenversicherungsgesetz (AVIG) verankert sind und zur Bekämpfung der Jugendarbeitslosigkeit dienen. Zwei davon richten sich speziell an arbeitslos gemeldete Jugendliche, die eine Ausbildung oder Berufserfahrung suchen (Motivationssemester und Berufspraktika). Motivationssemester wurden 1994 eingeführt und richten sich an Schulabgänger ohne Lehrstelle, an Jugendliche, die ihre Ausbildung abgebrochen haben und nach einer anderen Ausbildung suchen, sowie an Jugendliche, deren Berufspläne unklar sind. Berufspraktika wiederum richten sich insbesondere an junge Hochschulabsolventen, die auf der Suche nach ersten Berufserfahrungen sind. Die übrigen bestehenden arbeitsmarktpolitischen Maßnahmen stehen auch jungen Menschen offen, obwohl sie nicht speziell auf sie zugeschnitten sind.

C. Vergleich zwischen der Schweizer Gesetzgebung und der Empfehlung (EU) 2020/C 372/01

Die Empfehlung 2020/C 372/01 ist für die Schweiz nicht von großem Belang, da bereits Mittel vorhanden sind, um Jugendliche beim Übergang in den Arbeitsmarkt zu unterstützen und/oder sie vor Arbeitslosigkeit zu bewahren.

Der Geltungsbereich der schweizerischen Gesetzgebung zur Bekämpfung der Jugendarbeitslosigkeit geht in die Richtung der Empfehlung und sogar noch weiter, da die schweizerische Gesetzgebung konkrete Maßnahmen zugunsten von Jugendlichen enthält, um ihnen bei der Eingliederung oder Wiedereingliederung in den Arbeitsmarkt zu helfen.

Andererseits nahm der Ständerat im September 2020 das Postulat Jositch mit dem Titel "Berufserfahrung von arbeitslosen Lehrabgängerinnen und Lehrabgängern in der Corona-Krise stärken"[iv] . Der Grund dafür ist, dass es für die Schweiz wichtig ist, schnell in den Arbeitsmarkt einzutreten, um eine erste Ausbildung oder Berufserfahrung zu erwerben. Tatsächlich ist der Erwerb einer Berufsausbildung oder Berufserfahrung für junge Erwachsene besonders wichtig, da sie ihr Berufsleben noch vor sich haben.

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ii arbeit.swiss.

iii Eurostat, Arbeitslosendaten für Jugendliche unter 25 Jahren, März 2023, https://ec.europa.eu/eurostat/databrowser/view/UNE_RT_M__custom_6398911/default/table (aufgerufen am 28.08.2023).

iv Postulat 20.3480 Jositsch Daniel.

[1] Recital 5 Council Recommendation of 22 April 2013 on establishing a Youth Guarantee.

[2] P. Giannoni, Youth Policies and Unemployment in Europe, Leiden: Brill 2021, p. 49 *et seq*.

[3] The age range of the Youth Guarantee used to be 15-24 years old. The Recommendation from 2020 increased it to 15-29 years old. Recital 22 Council Recommendation of 30 October 2020 on A Bridge to Jobs – Reinforcing the Youth Guarantee and replacing the Council Recommendation of 22 April 2013 on establishing a Youth Guarantee 2020/C 372/01.

[4] Section 1 Council Recommendation of 30 October 2020.

[5] "*NEETs are a heterogeneous group. For some young people, being a NEET can be a symptom of multiple and engrained disadvantages and may indicate a longer-term disengagement from society and therefore require longer interventions. Some young people are especially vulnerable, for example early leavers from education and training or those with inadequate education or training, who often have limited social protection coverage, restricted access to financial resources, precarious work conditions or may face discrimination. For others, such as highly-skilled young people or those who already have significant and still-relevant work experience, being a NEET is likely to be a temporary status since they face low barriers to labour market entry and have no inherent vulnerabilities.*" Recital 23 Council Recommendation of 30 October 2020.

[6] Sections 2-4 Council Recommendation of 30 October 2020.

[7] Sections 5-7 Council Recommendation of 30 October 2020.

[8] "*A reinforced Youth Guarantee should recognise that NEETs require an individualised approach: for some NEETs a lighter approach may be sufficient, whereas other, more vulnerable, NEETs may need more intensive, lengthy and comprehensive interventions. Interventions should be based on a gender-sensitive approach, taking into account differences between national, regional and local circumstances.*" Recital 23 Council Recommendation of 30 October 2020

[9] "*Preparatory training before taking up an offer, carried out according to individual needs and related to specific skill domains such as digital, green, language, entrepreneurial and career management skills, should be part of a reinforced Youth Guarantee, when deemed appropriate. This hands-on training can be a stepping stone towards a full vocational training course, a taster of the world of work, or supplement existing education or work experience before the start of the Youth Guarantee offer. The short-term, informal nature of such preparatory training, which should not prolong the duration of the four-month preparatory phase, distinguishes it from the offer itself.*" Recital 25 Council Recommendation of 30 October 2020.

[10] Sections 8-14 Council Recommendation of 30 October 2020.

[11] Council Recommendation of 15 March 2018 on a European Framework for Quality and Effective Apprenticeships.

[12] Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships.

[13] Sections 15-20 Council Recommendation of 30 October 2020.

[14] Sections 21-24 Council Recommendation of 30 October 2020.

[15] Sections 25-27 Council Recommendation of 30 October 2020.

[16] The Youth Employment Initiative (YEI) and European Social Fund (ESF) have been a key financial resource so far. Going forward, under the umbrella of the Recovery Plan for Europe and Next Generation EU, additional funding will come from the Recovery and Resilience Facility, the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) and the European Social Fund Plus (ESF+). Recital 28 Council Recommendation of 30 October 2020.

[17] After the family-related leave, the workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and entitled to any improvement in working conditions that occurred in the meantime and to which they would have been entitled if they had not taken the leave

[18] "*As provided for in Directive 2010/18/EU, Member States are required to define the status of the employment contract or employment relationship for the period of parental leave. According to the case-law of the Court of Justice, the employment relationship between the worker and the employer is maintained during the period of leave and, as a result, the beneficiary of such leave remains, during that period, a worker for the purposes of Union law. When defining the status of the employment contract or employment relationship during the period of the types of leave covered by this Directive, including with regard to the entitlement to social security, the Member States should therefore ensure that the employment relationship is maintained.*" Recital 39 Directive (EU) 2019/1158 of 20 June 2019.

[19] Recital 41 and Art. 12 Directive (EU) 2019/1158 of 20 June 2019.

[20] Art. 13 Directive (EU) 2019/1158 of 20 June 2019.

[21] Art. 14 Directive (EU) 2019/1158 of 20 June 2019.

[22] "*With a view to further improving the level of protection of the rights provided for in this Directive, national equality bodies should be competent in regard to issues relating to discrimination that fall within the scope of this Directive, including the task of providing independent assistance to victims of discrimination in pursuing their complaints.*" Recital 45 and Art. 15 Directive (EU) 2019/1158 of 20 June 2019.

[23] P. Rasmussen & T. M. Juul, Ungdomsgaranti: EU politik og dansk praksis, Aalborg Universitetsforlag 2020.

[24] V. Escudero & E. L. Mourelo, La Garantie européenne pour la jeunesse : Bilan systématique des mises en œuvre dans les pays membres, 2018 (1) Travail et emploi, p. 89 *et seq*.

[25] E.g., Styrket beskæftigelsesindsats for unge under 30 år - aftale om initiativerne på beskæftigelsesområdet.

[26] Beskæftigelsesministeriet, GRUND- OG NÆRHEDSNOTAT: Forslag til rådshenstilling om styrket ungegaranti, Copenhagen 2020.

[27] European Commission, Youth Guarantee country by country: Denmark, Brussels: European Commission 2020, p. 6.

[28] Comité interministériel de lutte contre les exclusions, Plan pluriannuel contre la pauvreté et pour l'inclusion sociale, République Française, 2013.

[29] Premier ministre, Plan national de mise en œuvre de la garantie européenne pour la jeunesse, république française, 2013.

[30] E.g., M. Loison-Leruste, J. Couronné & F. Sarfati, La Garantie jeunes en action. Usages du dispositif et parcours de jeunes, Centre d'études de l'emploi et du travail, 2016.

[31] Comité scientifique en charge de l'évaluation de la Garantie Jeunes, Rapport final d'évaluation de la Garantie Jeunes, 2018.

[32] Art. L. 5131-3 – L. 5131-6-1 and R. 5131-4 – R. 5131-25 *code du travail*. Le Gouvernement, La Garantie jeunes, available at : https://www.gouvernement.fr/action/la-garantie-jeunes (19.06.2023).

[33] République française, 1 jeune 1 solution, 2020.

[34] European Commission, Youth Guarantee country by country: France, Brussels: European Commission 2020, p. 6.

[35] Bundesministerium für Arbeit und Soziales, Nationaler Implementierungsplan zur Umsetzung der EU-Jugendgarantie in Deutschland, 2014.

[36] Geschäftsstelle des Deutschen Vereins, Erfolgsmerkmale guter Jugendberufsagenturen. Grundlagen für ein Leitbild, 2016; Bundesagentur für Arbeit, Bericht zum Stand der Umsetzung und Weiterentwicklungsperspektiven: Entwicklungsstand der Jugendberufsagenturen im Bundesgebiet und in den Ländern, 2018; Servicestelle Jugendberufsagenturen im Bundesinstitut für Berufsbildung, Jugendberufsagenturen bundesweit. Ergebnisse aus der Erhebung zu rechtskreisübergreifenden Kooperationsbündnissen am Übergang Schule, Bonn 2022.

[37] Koalitionsvertrag 2021-2025.

[38] European Commission, Youth Guarantee country by country: Germany, Brussels: European Commission 2020, p. 5.

[39] The action plan contains concrete measures: (i) keep young people with a poor employment outlook in school; (ii) establish employment plans tailored to each region; (iii) improve matching between supply and demand; (iv) create additional jobs, apprenticeships, traineeships and voluntary work for young people; and (v) create opportunities for vulnerable young people. H. de Boer, Tegen de stroom in: Advies aan het Kabinet voor een Actieplan Jeugdwerkloosheid, Noordwijk 2009; Ministerie van Sociale Zaken en Werkgelegenheid, Actieplan Jeugdwerkloosheid, Den Haag 2009.

[40] Similar to other persons looking for work, the young people were also brought under the Participation Law. Wet van 9 oktober 2003, houdende vaststelling van een wet inzake ondersteuning bij arbeidsinschakeling en verlening van bijstand door gemeenten (Participatiewet).

[41] Wet van 1 juli 2009, houdende bevordering duurzame arbeidsinschakeling jongeren tot 27 jaar (Wet investeren in jongeren); verordening Werkleeraanbod Wet investeren in jongeren.

[42] Youth Guarantee Implementation Plan in the Netherlands, Dutch initiatives to prevent and tackle youth unemployment, 2016.

[43] Ministerie van Financiën, Interdepartementaal Beleidsonderzoek: Jongeren met (risico op) een afstand tot de arbeidsmarkt – zichtbaar en zelfstandig maken, Den Haag 2019.

[44] Rijksoverheid, Werkagenda Samen werk maken van de Aanpak Jeugdwerkloosheid, Den Haag 2021.

[45] E.g., Actieplan Jeugdwerkloosheid regio Rivierenland 2021-2025, available at: https://rw-poarivierenland.nl/wp-content/uploads/2021/09/Bijlage-4b_Regionaal-actieplan-jeugdwerkloosheid-

regio-Rivierenland.pdf (19.06.2023); B. Errico *et al*., The local implementation of the Reinforced Youth Guarantee, Brussels: European Committee of the Regions 2022, p. 23.

46 European Commission, Youth Guarantee country by country: Netherlands, Brussels: European Commission 2020, p. 5.

47 Based on Eurostat data for the age class of less than 25 years for March 2023, available at: https://ec.europa.eu/eurostat/databrowser/view/UNE_RT_M__custom_6398911/default/table?lang=en (31.05.2023).

48 The Youth Guarantee schemes reported here are predominantly based on the European Commission's Youth Guarantee – Knowledge Centre, available at: https://ec.europa.eu/social/main.jsp?catId=1327&langId=en (31.05.2023).

49 B. Errico *et al*., The local implementation of the Reinforced Youth Guarantee, Brussels: European Committee of the Regions 2022, p. 56-57.

50 Lov om kommunal indsats for unge under 25 år Nr. 298 af 30. april 2003.

51 Lov om en aktiv beskæftigelsesindsats Nr. 548 af 7. maj 2019.

52 Art. L. 5131-3 – L. 5131-6-1 and R. 5131-4 – R. 5131-25 *code du travail*.

53 Sozialgesetzbuch (SGB) Drittes Buch (III) – Arbeitsförderung.

54 Sozialgesetzbuch (SGB) Zweites Buch (II) - Bürgergeld, Grundsicherung für Arbeitsuchende.

55 Sozialgesetzbuch (SGB) Achtes Buch (VIII) - Kinder- und Jugendhilfe.

56 *Wet van 9 oktober 2003, houdende vaststelling van een wet inzake ondersteuning bij arbeidsinschakeling en verlening van bijstand door gemeenten (Participatiewet)*.

57 M. Caliendo, Study on the Youth Guarantee in light of changes in the world of work (Part 1), Brussels: European Commission, 2018, p. 39.

58 V. Escudero & E. L. Mourelo, The Youth Guarantee programme in Europe: Features, implementation and challenges, Geneva: ILO 2015.

59 Art. L. 5131-3 – L. 5131-6-1 and R. 5131-4 – R. 5131-25 *code du travail*.

60 Ministry of Children and Education, Youth Guidance Centres, available at: https://eng.uvm.dk/educational-and-vocational-guidance/youth-guidance-centres (19.06.2023).

61 Lov om kommunal indsats for unge under 25 år Nr. 298 af 30. april 2003; Lov om en aktiv beskæftigelsesindsats Nr. 548 af 7. maj 2019.

62 Art. 7 (3) a., 10f, 13 (2) c. and d., 41, 43 and 44 Participatiewet. E.g., for the city of Utrecht, Redactie, Gemeente Utrecht blijft afwijken van wet door jongeren eerder aan bijstandsuitkering te helpen, available at: https://www.duic.nl/algemeen/gemeente-utrecht-blijft-afwijken-van-wet-door-jongeren-eerder-aan-bijstandsuitkering-te-helpen/ (19.06.2023).

63 Sozialgesetzbuch (SGB) Zweites Buch (II) - Bürgergeld, Grundsicherung für Arbeitsuchende; Sozialgesetzbuch (SGB) Drittes Buch (III) – Arbeitsförderung; Sozialgesetzbuch (SGB) Achtes Buch (VIII) - Kinder- und Jugendhilfe; J. Münder & A. Hofmann, Jugendberufshilfe Zwischen SGB III, SGB II und SGB VIII, Düsseldorf: Hans-Böckler-Stiftung 2017.

64 For example, the *Contrat d'engagement jeune*, which is covered by provisions from the French Labour Code, forms an exception. Art. L. 5131-3 – L. 5131-6-1 and R. 5131-4 – R. 5131-25 *code du travail*.

65 In France, https://www.mission-locale.fr/ (20.06.2023).

2. Employment Aspects of Public Procurement

A. Directive 2014/24/EU of 26 February 2014

i. The Objectives

Directive 2004/18/EC of 31 March 2004 coordinated the procedures for awarding public works contracts, public supply contracts and public service contracts.[1] Its revision should enable procurers to better use public procurement to support common societal goals.[2] Directive 2014/24/EU of 26 February 2014, in force in the EEA,[3] replaced it, establishing rules on procurement procedures for public contracts and design contests.[4] A separate Directive, not discussed here, governs procurement by entities operating in the water, energy, transport and postal services.[5]

Directive 2014/24/EU allows public procurement, at least in theory, to be used to pursue multiple social and environmental goals.[6] The discussion below centres on the employment aspects of these procedures, leaving most of the Directive's articles unaddressed.

ii. The Content

§ 1 Sheltered employment

Article 20 of the Directive 2014/24/EU clarifies that Member States may reserve the right to participate in public procurement procedures to sheltered workshops and other economic actors that aim to integrate disadvantaged[7] persons, provided that at least 30% of the employees of these workshops/actors are disadvantaged. The underlying idea is that without such treatment, these businesses might not be able to obtain contracts "*under normal conditions of competition*".[8] The CJEU has clarified that Article 20 allows Member States to impose additional criteria beyond those laid down by that provision, provided the additional criteria comply with the principles of equal treatment and proportionality.[9]

§ 2 Guaranteeing compliance with social and labour law

Article 18 of the Directive obliges Member States to take appropriate measures to ensure that economic operators comply with applicable social and labour law obligations in the performance of public contracts, including the international obligations stemming from international agreements listed in Annex X.[10] Controlling for the observance of these provisions should be performed at least at the time: (i) of applying the general principles governing the choice of participants and the award of contracts; (ii) when applying the exclusion criteria; (iii) and when verifying abnormally low tenders.[11]

Particular attention is paid to abnormally low tenders, in which case the economic operator might have to give an explanation.[12] The tender has to be rejected if the contracting authority establishes that the abnormally low price or costs are due to non-compliance with mandatory social or labour laws.[13]

§ 3 Employment-related contract award criteria

Article 57 of the Directive contains reasons for blocking an economic operator from participating in a procurement procedure. Those convicted of using child labour or undeniably in breach of their duty to pay social security contributions must be excluded. Member States may choose to block those violating other labour and social law obligations.[14]

Article 67 of the Directive specifies that public contracts are awarded based on the "most economically advantageous" tender. Identified through a cost-effectiveness approach (e.g., life-cycle costing), Article 67 states that it *may*[15] include an assessment of qualitative aspects of the best price-quality ratio, "including […] social aspects" to the extent these aspects relate to the procured public work, good or service.[16] Therefore, from its terms, Article 67 enshrines the social aspects as part of the criteria used for the price-quality ratio. The social aspects are also not mentioned in the calculation of

the life-cycle costing analysis set out in Article 68. The latter pays attention to environmental externalities but does not refer to the social aspects.

Article 70 of the Directive stresses that contracting authorities may lay down special conditions, including social or employment-related considerations, relating to the performance of a contract. The conditions must be linked to the subject matter of the contract.[17]

§ 4 Subcontracting

While permitting subcontracting,[18] the Directive acknowledges the importance of ensuring subcontractors comply with labour laws[19] and obliges the competent national authorities to act to do so.[20] For example, authorities could require transparency in the subcontracting chain or make subcontractors jointly liable with the contractor. The contracting authority might also want to verify if any subcontractors violate an (optional) exclusion ground (Art. 57 of the Directive).[21] Furthermore, subcontractors need to be protected in certain circumstances, e.g., the Directive enables direct payments from the contracting authority to the subcontractor.

B. Domestic Implementation of Directive 2014/24/EU

France

IMPLEMENTING THE DIRECTIVES – The Decree of 26 September 2014 amended the provisions of the Public Markets Code (*code des marchés publics*) to transpose Directive 2014/24/EU. This does not seem to have substantially touched upon employment aspects.[22] Subsequently, the Ordinance of 23 July 2015 abolished the Code mentioned above, issuing new rules on public procurement,[23] which, in turn, were abrogated in 2018 through the Ordinance of 26 November 2018.[24] Correspondingly, the Decree of 25 March 2016 (related to the Ordinance of 2015) was abolished by the Decree of 3 December 2018 (related to the Ordinance of 2018).[25]

The Ordinance from 2018, containing the legislative part, and the Decree with the regulatory provisions, introduced the Public Procurement Code (*code de la commande publique*). It is currently still in force and is complemented by various annexes.

GOING BEYOND THE DIRECTIVES – French law is stricter than EU law because various labour law violations that are less severe than child labour can lead to a tenderer being excluded from the outset.[26] The Code also contains plenty of provisions on subcontracting, giving the administration firm authority over the subcontractors used by the entity mandated to execute the work (and the subcontractors have a right to direct payment).[27]

Germany

IMPLEMENTING THE DIRECTIVES – The Law[28] of 17 February 2016 transposed Directive 2014/24/EU by amending parts of the Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*).[29] Related to this, the Ordinance[30] of 12 April 2016 brought forth the Ordinance on the Award of Public Contracts (*Verordnung über die Vergabe öffentlicher Aufträge*).[31] An additional guideline exists for prequalifying companies within the construction industry for public works.[32] The Minimum Wage Law also contains a section on the exclusion of minimum wage offenders from public contracts.[33]

GOING BEYOND THE DIRECTIVES – There is no clear indication that the general provisions in the Law or Ordinance on public procurement go beyond what the Directive requires concerning employment aspects. However, using a prequalification procedure is interesting and may allow for filtering out enterprises that commit social abuses.[34] Furthermore, the provision in the Minimum Wage Law is forward-looking.[35]

The Netherlands

IMPLEMENTING THE DIRECTIVES – The Procurement Act of 1 November 2012 (*Aanbestedingswet 2012*)[36] contains the relevant Dutch legislative provisions. It was amended by the Law of 22 June 2016 to comply with Directive 2014/24/EU.[37] The Procurement Decree of 11 February 2013 (*Aanbestedingsbesluit*)[38] contains the corresponding regulatory provisions and was likewise amended in 2016.[39]

GOING BEYOND THE DIRECTIVES – Dutch domestic law does not evidently go beyond what the Directive demands in relation to employment aspects. However, one can note that the price-quality ratio is a mandatory component of determining the most economically advantageous tender under Dutch law, whereas the price-quality ratio is only optional/recommended under the Directive.[40] In principle, this strengthens the position of social considerations (as part of the price-quality ratio) within the overall procurement process.

The United Kingdom

IMPLEMENTING THE DIRECTIVES – Directive 2014/24/EU was transposed through The Public Contracts Regulations 2015.[41] Due to Brexit, The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 were issued.[42] The Explanatory Memorandum claims that the framework and principles underlying the procurement regime remain unchanged for the most part; changes are limited to those appropriate to reflect the UK's position outside the EU and give effect to the Withdrawal Agreement. As such, non-UK economic operators will, in principle, be treated equally regardless of whether they originate from an EU Member State (subject to international agreements such as the GPA Agreement).[43] Various changes have occurred after Brexit, yet these do not appear to directly impact employment.

GOING BEYOND THE DIRECTIVES – UK domestic law does not evidently go beyond what the Directive demands in relation to employment aspects. Nevertheless, there is an interesting emphasis on the timely payment of (sub)contractors' undisputed invoices.[44]

C. Comparative Table

	France	Germany	Netherlands	United Kingdom
Reserving work for entities employing vulnerable persons	Entity employs at least 50% vulnerable persons or persons with disabilities.[45] Specification for prisons.[46]	Entity employs at least 30% disadvantaged workers or persons with disabilities.[47]	Entity employs at least 30% disadvantaged workers or persons with disabilities.[48]	Entity employs at least 30% disadvantaged workers or persons with disabilities.[49]
Excluded from public procurement due to labour law infractions	*Travail dissimulé*, *marchandage*, illegal posting, work permit violations, (gender) discrimination, violate collective bargaining obligation.[50]	Forced labour, exploitation of labour.[51] Minimum wage violations.[52]	Child labour.[53]	Modern slavery.[54]
Abnormally low tenders	The evaluation of subcontractors' abnormally low tenders.[55]	Nothing particular.[56]	Nothing particular.[57]	Nothing particular.[58]
Subcontracting	Inform the contracting authority about	Inform the contracting authority about	Inform the contracting authority about subcontracting. Authority	Inform the contracting authority about subcontracting. The

	subcontracting. Subsequently, conditions of acceptance exist for the authority's approval of the subcontractor and his payment terms.[59] Subcontractor has a right to direct payment.[60]	subcontracting. The authority must exclude the subcontractor if, after mandatory verification, there are compelling grounds and may if there are optional grounds.[61]	can contractually stipulate the need to exclude the subcontractor that violates the compelling/optional grounds.[62]	authority must exclude the subcontractor if, after optional verification, there are compelling grounds and may if there are optional grounds.[63] Emphasis on having suppliers pay their subcontractors' undisputed invoices within 30 days.[64]

D. Comparative Perspective on Employment Aspects of Public Procurement

Even if a Member State can use public procurement law to safeguard labour rights or encourage better working conditions,[65] the analysis of the four legal systems' laws does not indicate that this takes place purposefully. Along similar lines, it is relatively uncommon to find a discussion of public procurement in a coursebook on EU labour law. Public procurement law is rarely treated as an EU labour law subject.

Nevertheless, this does not mean that there are no important differences between countries. At a more structural level, for example, the Netherlands obliges to take the price-quality ratio into account to determine the most economically advantageous tender (which could increase the importance of social considerations). Furthermore, among the four countries analysed, predominantly France seems to go beyond what the EU Directive requires in some employment-related respects (e.g, adding more exclusion grounds). The German provision on minimum wages is also noteworthy in this respect. Yet, even then, French and other legal scholars do not seem particularly interested in the intersection between labour and public procurement law. Despite calls for more "social public procurement" throughout the EU,[66] many Member States' laws are not formulated in a way that explicitly encourages this.

That being said, one should not overgeneralize. There are EU Member States other than the ones mentioned in this report that do rather deliberately wield public procurement law to bring about social effects.[67]

E. Conclusion

Although social public procurement is gaining momentum, achievements in the legal field remain rather limited. Parties are generally only excluded from public tenders for the worst labour law violations (e.g., modern slavery). Furthermore, it generally remains up to the contracting authority to autonomously decide whether or not to build social criteria into the deliberation process (without much encouragement, let alone binding guidelines, from the central authorities).

Schweizer Recht zum öffentlichen Beschaffungswesen

A. Rechtlicher Rahmen

Das Recht des öffentlichen Beschaffungswesens stützt sich auf das Übereinkommen über das öffentliche Beschaffungswesen (GPA)[i] der Welthandelsorganisation (WTO) sowie auf das Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über bestimmte

[i] Revidiertes Übereinkommen über das öffentliche Beschaffungswesen (RS 0.632.231.422).

Aspekte des öffentlichen Beschaffungswesens[ii], das auf Bundesebene durch das Bundesgesetz über das öffentliche Beschaffungswesen und dessen Ausführungsverordnung und auf Kantonsebene durch die Interkantonale Vereinbarung über das öffentliche Beschaffungswesen (IVöB) umgesetzt wird.

§ 1 geschützte Beschäftigung

Nach Artikel 10 Abs. 1 Bst. e des Bundesgesetz über das öffentliche Beschaffungswesen (BöB)[iii] findet das Gesetz keine Anwendung auf Aufträge an Behinderteninstitutionen, Organisationen der Arbeitsintegration, Wohltätigkeitseinrichtungen und Strafanstalten.

Tritt eine dieser Institutionen als Anbieterin auf, ist der Auftrag allenfalls nicht vom Beschaffungsrecht erfasst. Handelt es sich um eine der genannten Institutionen, ist zu prüfen, ob diese in Bezug auf den Auftrag ideell und nicht kommerziell tätig ist.

Entscheidend ist einerseits, dass die Anbieterin nicht aus kommerziellen Motiven handelt, andererseits aber auch, dass die Anbieterin von der Auftraggeberin nicht auf kommerzieller Basis beauftragt wird. Der ideell motivierte, nicht kommerziell beauftragte Anbieter bzw. Leistungserbringer ist somit kein Wettbewerbsteilnehmer, weil er nicht mit wirtschaftlichen Mitteln um wirtschaftliche Vorteile wettstreitet, sondern sich anerbietet, dem Gemeinwohl zu dienen. In diesem Sinne dürfen in der Schweiz Aufträge an Behinderteninstitutionen, Organisationen der Arbeitsintegration sowie Wohltätigkeitseinrichtungen und Strafanstalten außerhalb des Vergaberechts vergeben werden (Art. 10 Böb / IVöB 2019).

Diese Ausnahmebestimmung erfährt auf kantonaler Ebene eine weitere Einschränkung (Art. 63 Abs. 4 IVöB 2019): «Die Kantone können unter Beachtung der internationalen Verpflichtungen der Schweiz Ausführungsbestimmungen insbesondere zu den Artikeln 10, 12 und 26 erlassen.»

Diese Bestimmungen geben den Kantonen die Möglichkeit, in ihrer kantonalen Gesetzgebung solche Aufträge dennoch zu unterstellen. Deutschschweizer Kantone sahen bisher regelmäßig eine Ausschreibungspflicht vor und werden dies wohl auch künftig beibehalten.

Bei Aufträgen, die nicht internationalen Abkommen unterliegen, kann die Vergabestelle zusätzlich berücksichtigen, inwieweit die Anbieter Ausbildungsplätze für Lernende in der beruflichen Grundbildung, Arbeitsplätze für ältere Arbeitnehmer oder die Wiedereingliederung von Langzeitarbeitslosen anbieten[iv].

§ 2 Gewährleistung der Einhaltung des Sozial- und Arbeitsrechts

Artikel 12 des Bundesgesetzes über das öffentliche Beschaffungswesen befasst sich mit der Einhaltung der Arbeitsschutzbestimmungen, der Arbeitsbedingungen, der Lohngleichheit und des Umweltrechts. Die Auftraggeberin hat im Rahmen des Vergabeverfahrens sicherzustellen, dass die Anbieterin die Anforderungen erfüllt. Insbesondere werden öffentliche Aufträge für in der Schweiz zu erbringende Leistungen nur an Anbieter vergeben, welche die am Ort der Leistungserbringung geltenden Arbeitnehmerschutzbestimmungen und Arbeitsbedingungen, die im Bundesgesetz vom 17. Juni 2005 gegen die Schwarzarbeit (BGSA) erwähnten Melde- und Bewilligungspflichten sowie Bestimmungen über die Lohngleichheit von Frau und Mann einhalten.[v].

Öffentliche Aufträge über im Ausland zu erbringende Leistungen dürfen nur an Anbieter vergeben werden, die mindestens die in Anhang 6 aufgeführten Kernübereinkommen der Internationalen Arbeitsorganisation (ILO) einhalten. Die Vergabestelle kann darüber hinaus die Einhaltung und den

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[ii] Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Europäischen Gemeinschaft über bestimmte Aspekte des öffentlichen Beschaffungswesens (RS 0.172.052.68).

[iii] Bundesgesetz über das öffentliche Beschaffungswesen (BöB; SR 172.056.1).

[iv] BöB, Art. 29 Abs. 2.

[v] *Op. Cit*., Art. 12 Abs. 1.

Nachweis der Einhaltung weiterer wichtiger internationaler Arbeitsnormen verlangen und die Durchführung von Kontrollen vereinbaren.[vi].

Die in Anhang 6 des BöB aufgeführten ILO-Konventionen sind identisch mit den in Anhang X der EU-Richtlinie aufgeführten. Zu beachten ist, dass ab 2022 zwei zusätzliche Übereinkommen einzuhalten sind. Diese wurden jedoch noch nicht vom Parlament ratifiziert und konnten daher noch nicht in das Bundesgesetz über das öffentliche Beschaffungswesen aufgenommen werden. [vii].

Die Festlegung der zu erbringenden Nachweise liegt im Ermessen der Auftraggeberin. Sie hat in den Ausschreibungsunterlagen bekannt zu geben, zu welchem Zeitpunkt welche Nachweise einzureichen sind. Die Wahl der Nachweise soll projektspezifisch und risikobasiert erfolgen. Bei Projekten, bei denen aufgrund einer Risikoabklärung (beispielsweise im Rahmen einer Markt- oder Signifikanzanalyse) ein erhöhtes Risiko für eine Nichterfüllung der Anforderungen der Ausschreibung vermutet werden muss, sollen mehr Nachweise gefordert resp. diese detaillierter geprüft werden.

Die ausgefüllte und unterzeichnete Selbstdeklaration der Anbieterin stellt regelmäßig einen rechtsgenüglichen Nachweis dar. Auch die Aufnahme in ein Verzeichnis ist eine zulässige Form des Nachweises.

Ungewöhnlich niedrige Ausschreibungen

Grundsätzlich darf die Auftraggeberin einem solchen Dumpingangebot den Zuschlag erteilen. Sie muss jedoch zweckdienliche Erkundigungen darüber einholen, ob die Teilnahmebedingungen eingehalten sind und die weiteren Anforderungen der Ausschreibung verstanden wurden[viii].

§ 3 arbeitsverhältnisverbunderes Zuschlagskriterium für Verträge

Die Auftraggeberin kann

- eine Anbieterin von einem Vergabeverfahren ausschliessen,
- aus einem Verzeichnis streichen oder
- einen ihr bereits erteilten Zuschlag widerrufen

wenn festgestellt wird, dass auf die betreffende Anbieterin, ihre Organe, eine beigezogene Drittperson oder deren Organe beispielsweise einer der folgenden Sachverhalte zutrifft:

- sie erfüllen die Voraussetzungen für die Teilnahme am Verfahren nicht oder nicht mehr
- ihr Verhalten beeinträchtigt den rechtskonformen Ablauf des Vergabeverfahrens
- sie widersetzen sich angeordneten Kontrollen
- sie bezahlen fällige Steuern oder Sozialabgaben nicht[ix]

Die Auftraggeberin kann die oben genannten Massnahmen zudem ergreifen, wenn hinreichende Anhaltspunkte dafür vorliegen, dass auf die Anbieterin, ihre Organe, eine beigezogene Drittperson oder deren Organe insbesondere einer der folgenden Sachverhalte zutrifft:

- sie reichen ein ungewöhnlich niedriges Angebot ein, ohne auf Aufforderung hin nachzuweisen, dass die Teilnahmebedingungen eingehalten werden, und bieten keine Gewähr für die vertragskonforme Erbringung der ausgeschriebenen Leistungen
- sie missachten die Arbeitsschutzbestimmungen, die Arbeitsbedingungen, die Bestimmungen über die Gleichbehandlung von Frau und Mann in Bezug auf die Lohngleichheit, die Bestimmungen über

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vi *Op. Cit.*, Art. 12 Abs. 2;
Verordnung über das öffentliche Beschaffungswesen (VöB; RS 172.056.11), Art. 4.

vii Übereinkommen 155 über Arbeitsschutz und Arbeitsumwelt, 1981; Übereinkommen 187 über den Förderungsrahmen für den Arbeitsschutz, 2006.

viii LMP, art. 38, al. 3.

ix *Op. Cit.*, art. 44, al. 1, let. a, f et g.

die Vertraulichkeit und die Bestimmungen des schweizerischen Umweltrechts oder die vom Bundesrat bezeichneten internationalen Übereinkommen zum Schutz der Umwelt

- sie haben Melde- oder Bewilligungspflichten nach dem BGSA verletzt[x]

Bei vielen Güter- und Bauleistungsbeschaffungen können die Betriebs- und Unterhaltskosten ein Mehrfaches der reinen Anschaffungskosten betragen. Auch Entsorgungskosten sind zu beachten. Die Lebenszykluskosten umfassen zusätzlich zu den TCO die externen sozialen und ökologischen Kosten. Sofern anerkannte Methoden zur Berücksichtigung vorliegen, können Sie auch diese integrieren.

Soziale Anliegen sind zulässig, sofern entweder ein sachlicher Bezug zum Beschaffungsgegenstand besteht oder eine formell-gesetzliche Grundlage gegeben ist (vgl. soziale Teilnahmebedingungen). So ist z.B. die Festlegung einer Fair-Trade Anforderung als Zuschlagskriterium zulässig, sofern diese Anforderung zu einem Mehrwert des zu beschaffenden Produktes führt. Unzulässiges Beispiel: Ob ein bestimmter Bauunternehmer über ein Sozialmanagementsystem verfügt, spielt für seine Eignung, einen bestimmten Bauauftrag auszuführen, keine Rolle. Ausserhalb des Staatsvertragsbereichs kann die Auftraggeberin ergänzend berücksichtigen, inwieweit die Anbieterin Ausbildungsplätze für Lernende in der beruflichen Grundbildung, Arbeitsplätze für ältere Arbeitnehmende oder eine Wiedereingliederung für Langzeitarbeitslose anbietet. Die Berücksichtigung dieses Zuschlagskriteriums liegt im pflichtgemässen Ermessen der Auftraggeberin und soll unter Beachtung des Gleichbehandlungsgrundsatzes erfolgen. Die Anzahl der Ausbildungsplätze ist dabei in Relation zur Gesamtzahl an Arbeitsstellen der jeweiligen Anbieterin zu setzen, um eine Benachteiligung von kleinen Betrieben zu verhindern.

§ 4 Untervergabe von Aufträgen

Bietergemeinschaften und Subunternehmerinnen sind zugelassen, soweit die Auftraggeberin dies in der Ausschreibung oder in den Ausschreibungsunterlagen nicht ausschließt oder beschränkt[xi]. Die charakteristische Leistung ist grundsätzlich von der Anbieterin zu erbringen[xii].

Wenn Subunternehmer zugelassen werden, müssen sie die in den Absätzen 1 bis 3 von Art. 12 BöB festgelegten Anforderungen, wie sie in § 2 dieses Kapitels ausgeführt werden, erfüllen. Diese Verpflichtung muss in den Vereinbarungen, die die Anbieter mit ihren Subunternehmern treffen, erwähnt werden[xiii].

Für eine effektive Gewährleistung der Einhaltung der ökologischen, sozialen und wirtschaftlichen Anforderungen müssen auch diese Dritten in geeigneter Weise miteinbezogen werden. Die Anbieterin ist verantwortlich für alle ihre Dritten. Die Auftraggeberin macht die Anbieterin in den Ausschreibungsunterlagen darauf aufmerksam, dass auch von Dritten, die von der Anbieterin zur Vertragserfüllung beigezogen werden, die Einhaltung sämtlicher Anforderungen verlangt wird. Die Anbieterin muss deshalb ihre Lieferantenkette kennen. Die Anbieterin muss die Pflichten zur Einhaltung der sozialen und ökologischen Mindestvorschriften vertraglich auf alle Dritten überbinden. Sie tut dies direkt vertraglich mit den von ihr beigezogenen Dritten bzw. verpflichtet diese dazu, die Pflichten weiter zu überbinden. Aus verwaltungsökonomischen Gründen können nicht alle Dritten in eine Kontrolle der Einhaltung der Anforderungen eingebunden werden.

Die Auftraggeberin kontrolliert daher im Bedarfsfall nur bei folgenden Dritten, ob die Anforderungen eingehalten sind:

- sie erfüllen entweder einen wesentlichen Teil des Auftrags,

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[x] *Op. Cit.*, art. 44, al. 2, let c, f, g.

[xi] *Op. Cit.*, art. 31, al. 1.

[xii] *Op. Cit.*, art. 31, al. 3.

[xiii] *Op. Cit.*, Art. 12 Abs. 4; Musterverträge und Dokumentensammlungen der Koordinationskonferenz der Bau- und Liegenschaftsorgane der öffentlichen Bauherren KBOB (KBOB).

- sie liefern einen erheblichen Bestandteil,
- sie erbringen eine erhebliche Teilleistung oder
- die sind in einem besonders risikoanfälligen Bereich oder Produktionsschritt tätig. Beispiel: Beschafft die Auftraggeberin einen Kampfstiefel für die Armee, gehören diejenigen Dritten, die das Leder bzw. die Sohle liefern, zu den wichtigen Dritten, da dies erhebliche Bestandteile des Beschaffungsgegenstands sind.

Die Auftraggeberin umschreibt in den Ausschreibungsunterlagen im Einzelfall, welcher Dritter darunterfällt. Dabei kommt ihr ein Ermessensspielraum zu. Weiter macht die Auftraggeberin in den Ausschreibungsunterlagen darauf aufmerksam, welche Nachweise der Einhaltung der Teilnahmebedingungen diese Dritten mit ihrer Offerte einzureichen haben.

Die Anbieterin muss mit Sanktionen rechnen, sollte eine Kontrolle bei Dritten ergeben, dass diese gegen die Anforderungen Verstoßen. Die Konsequenzen für die Anbieterin hängen dabei von den Umständen und der Schwere des Verstoßes ab, wobei die Auftraggeberin die Verhältnismäßigkeit wahren muss.

B. Vergleich der schweizerischen Regelung mit der Richtlinie (EU) 2014/24/EU

Die Schweizer Gesetzgebung im Bereich des öffentlichen Beschaffungswesens scheint den Anforderungen der EU-Richtlinie 2014/24/EU vom 26. Februar 2014 zu entsprechen. Dies ist vor allem darauf zurückzuführen, dass die Schweiz und die Länder der Europäischen Union Mitglieder der Welthandelsorganisation (WTO) sind und dem WTO-Übereinkommen über das öffentliche Beschaffungswesen (GPA) beigetreten sind. Darüber hinaus hat die Eidgenossenschaft ein Abkommen mit der Europäischen Gemeinschaft über bestimmte Aspekte des öffentlichen Beschaffungswesens ratifiziert.

Es sei darauf hingewiesen, dass die EU-Richtlinie den Mitgliedsstaaten die Möglichkeit gibt, das Recht auf Teilnahme an Verfahren zur Vergabe öffentlicher Aufträge Wirtschaftsteilnehmern vorzubehalten, deren Hauptzweck die soziale und berufliche Eingliederung behinderter oder benachteiligter Menschen ist, oder die Ausführung solcher öffentlichen Aufträge im Rahmen von Programmen für geschützte Arbeitsplätze vorzusehen[xiv]. Das Bundesgesetz über das öffentliche Beschaffungswesen sieht diese Möglichkeit nicht vor und schließt die Anwendung des Schweizer Rechts auf Aufträge mit Behinderteneinrichtungen, Einrichtungen zur sozialberuflichen Eingliederung, Wohlfahrtsverbänden oder Strafvollzugsanstalten aus.[xv]

Im Hinblick auf die Umsetzung der Richtlinie ist es interessant festzustellen, dass das schweizerische Recht einen Mechanismus für den Ausschluss vom Vergabeverfahren vorsieht, der strenger ist als die Anforderungen der Richtlinie, ähnlich wie in Frankreich. So kann die Vergabestelle einen Anbieter bereits dann ausschließen, wenn insbesondere hinreichende Anhaltspunkte dafür vorliegen, dass der Anbieter die geltenden Arbeitnehmerschutzbestimmungen oder Arbeitsbedingungen nicht einhält.
Im Gegensatz zu Deutschland gibt es in der Schweiz keinen Ausschlussgrund, der sich explizit auf die Nichteinhaltung eines Mindestlohns bezieht. Die vom Dienstleistungserbringer einzuhaltenden "am Ort der Leistungserbringung geltenden Arbeitsbedingungen" verweisen jedoch insbesondere auf die Einhaltung der geltenden Mindestlöhne (durch Gesamtarbeitsvertrag, Normalarbeitsvertrag, kantonalen Mindestlohn oder ortsüblich)[xvi]

[xiv] Directive (UE) 2014/24/UE, art. 20, par. 1.

[xv] BöB, Art. 10 Abs. 1 Bst. e.

[xvi] BöB, Art. 12 Abs. 1.

Allgemeiner wurde die Frage, ob die Schweiz über einen Mindestlohn verfügt, im Bericht zur Richtlinie (EU) 2022/2041 vom 19. Oktober 2022 diskutiert. Für weitere Details zu diesem Thema verweisen wir auf diese Darstellung.[xvii]

[xvii] Siehe Kapitel zur EU-Richtlinie 2022/2041.

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. A more specialized Directive also existed, called the Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

[2] Recital 2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[3] Annex XVI on Procurement to the EEA Agreement.

[4] Art. 4 sets out the thresholds above which the rules apply. Article 4 Directive 2014/24/EU of 26 February 2014. These thresholds vary with the type of procurement: for construction projects (Euro 5'186'000); for central government goods and services contracts (Euro 134'000); for subnational government goods and services contracts (Euro 207'000); and for specific "social and other" service contracts (Euro 750'000). Defense contracts, however, are only partially subjected to these thresholds. Id.

[5] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[6] E. Van den Abeele, Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?, Brussels: Etui 2014; M. Kullmann, Promoting social and environmental sustainability: What role for public procurement?, 2018 (1) Comparative labor law & policy journal, p. 109 *et seq*; A. Sanchez-Graells, Regulatory Substitution Between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts, 2018 (2) European Public Law, p. 229 *et seq*.

[7] Recital 36 points out that besides persons with disabilities, for example, also the unemployed, members of disadvantaged minorities and other socially marginalised groups are considered disadvantaged persons. Recital 36 Directive 2014/24/EU of 26 February 2014.

[8] Recital 36 Directive 2014/24/EU of 26 February 2014.

[9] CJEU 6 October 2021, case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee) v. Diputación Foral de Guipúzcoa and Federación Empresarial Española de Asociaciones de Centros Especiales de Empleo (Feacem)*.

[10] See also recital 37 Directive 2014/24/EU of 26 February 2014.

[11] Recital 40 Directive 2014/24/EU of 26 February 2014.

[12] Art. 69 Directive 2014/24/EU of 26 February 2014.

[13] Recital 103 Directive 2014/24/EU of 26 February 2014.

[14] Art. 57 (4) Directive 2014/24/EU of 26 February 2014.

[15] The Directive's recitals do indicate that the most economically advantageous tender *should* be assessed based on the best price-quality ratio from Article 67, which includes social aspects. Recital 90 Directive 2014/24/EU of 26 February 2014.

[16] Art. 67 Directive 2014/24/EU of 26 February 2014.

[17] Recitals 98 and 99 further offer guidance in terms of the social considerations that are appropriate as award criteria or special contract performance conditions – among other things, social aspects "*should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party.*" Recitals 98-99 Directive 2014/24/EU of 26 February 2014.

[18] One could even argue that the Directive supports subcontracting. For example, Italian law provided that, in principle, any subcontracting shall not exceed 30% of the total amount of the public contract for works, services or supplies. The CJEU ruled that "*Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.*" CJEU 26 September 2019, case no. C-63/18, *Vitali SpA v. Autostrade per l'Italia SpA*.

[19] Recital 105 Directive 2014/24/EU of 26 February 2014.

[20] Art. 71 Directive 2014/24/EU of 26 February 2014.

[21] Recital 105 Directive 2014/24/EU of 26 February 2014. In a case in which an Italian contracting authority found that one of the subcontractors of Tim, the tenderer, violated an exclusion ground, the CJEU confirmed that "*[a]rticle 57(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC does not preclude*

national legislation under which the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is established in respect of one of the subcontractors mentioned in that operator's tender. However, that provision, read in conjunction with Article 57(6) of that directive, and the principle of proportionality preclude national legislation providing for the automatic nature of such an exclusion." CJEU 30 January 2020, case no. C-395/18, *Tim SpA - Direzione e coordinamento Vivendi SA v. Consip SpA and Ministero dell'Economia e delle Finanze*.

22 *Décret n° 2014-1097 du 26 septembre 2014 portant mesures de simplifications applicables aux marchés publics*.

23 *Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics*.

24 *Ordonnance n° 2018-1074 du 26 novembre 2018 portant partie législative du code de la commande publique.*

25 *Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics*; *Décret n° 2018-1075 du 3 décembre 2018 portant partie réglementaire du code de la commande publique*.

26 Art. L. 2141-4 *code de la commande publique.*

27 Art. L. 2193-1 – L. 2193-14 *code de la commande publique.*

28 *Gesetz vom 17. Februar 2016 zur Modernisierung des Vergaberechts (Vergaberechtsmodernisierungsgesetz -VergRModG).*

29 *Gesetz vom 26. August 1998 gegen Wettbewerbsbeschränkungen (GWB).*

30 *Verordnung vom 12. April 2016 zur Modernisierung des Vergaberechts.*

31 *Verordnung vom 12. April 2016 über die Vergabe öffentlicher Aufträge.*

32 *Bekanntmachung der Leitlinie vom 23. September 2016 für die Durchführung eines Präqualifikationsverfahrens*.

33 Section 19 *Gesetz vom 11. August 2014 zur Regelung eines allgemeinen Mindestlohns (Mindestlohngesetz - MiLoG).*

34 *Bekanntmachung der Leitlinie vom 23. September 2016 für die Durchführung eines Präqualifikationsverfahrens*.

35 Section 19 *Mindestlohngesetz - MiLoG.*

36 *Wet van 1 november 2012, houdende nieuwe regels omtrent aanbestedingen (Aanbestedingswet 2012).*

37 *Wet van 22 juni 2016 tot wijziging van de Aanbestedingswet 2012 in verband met de implementatie van aanbestedingsrichtlijnen 2014/23/EU, 2014/24/EU en 2014/25/EU.*

38 *Besluit van 11 februari 2013, houdende de regeling van enkele onderwerpen van de Aanbestedingswet 2012 (Aanbestedingsbesluit)*.

39 *Besluit van 24 juni 2016 tot wijziging van het Aanbestedingsbesluit in verband met de implementatie van aanbestedingsrichtlijnen 2014/23/EU, 2014/24/EU en 2014/25/EU (Besluit wijziging Aanbestedingsbesluit inzake aanbestedingsrichtlijnen 2014/23/EU, 2014/24/EU en 2014/25/EU).*

40 Art. 2.114 *Aanbestedingswet 2012*.

41 See also Crown Commercial Service, The Public Contracts Regulations 2015: Guidance on social and environmental aspects, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/558032/20160912socialenvironmentalguidancefinal.pdf (05.05.2023).

42 These regulations were preceded by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 (2019/560) and The Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (2019/623).

43 E.g., section 25a The Public Contracts Regulations 2015.

44 Section 113 The Public Contracts Regulations 2015.

45 Art. R. 2113-7 *code de la commande publique*.

46 Art. L. 2113-13-1 *code de la commande publique.*

47 Section 118 *Gesetz gegen Wettbewerbsbeschränkungen*.

48 Art. 2.83 *Aanbestedingswet 2012*.

49 Section 20 The Public Contracts Regulations 2015.

50 Art. L. 2141-4 *code de la commande publique.*

51 Section 123 *Gesetz gegen Wettbewerbsbeschränkungen*.

52 Section 19 *Mindestlohngesetz.*

53 Art. 2.86 *Aanbestedingswet 2012*.

54 Section 57 The Public Contracts Regulations 2015.

55 Art. L. 2193-8 – L. 2193-9, R. 2193-9 and R. 2152-3 – R. 2152-5 *code de la commande publique.*

56 Section 60 *Verordnung über die Vergabe öffentlicher Aufträge*.

57 Art. 2.116 *Aanbestedingswet 2012*.

58 Section 69 The Public Contracts Regulations 2015.
59 Art. L. 2193-5 and L. 2193-6, R. 2193-1 – R. 2193-9 *code de la commande publique*.
60 Art. L. 2193-10 – L. 2193-13, R. 2193-16 *code de la commande publique*.
61 Section 36 *Verordnung über die Vergabe öffentlicher Aufträge*.
62 Art. 2.79 *Aanbestedingswet 2012*.
63 Section 71 The Public Contracts Regulations 2015.
64 Section 113 The Public Contracts Regulations 2015.
65 E. Van den Abeele, Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?, Brussels: Etui 2014; M. Kullmann, Promoting social and environmental sustainability: What role for public procurement?, 2018 (1) Comparative labor law & policy journal, p. 109 *et seq*; A. Sanchez-Graells, Regulatory Substitution Between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts, 2018 (2) European Public Law, p. 229 *et seq*.
66 S. De Spiegelaere, Put your money where your mouth is: Why and how the EU needs to change its public spending policies to promote a social Europe, Brussels: Uni Europa 2021; OECD, The power of the public purse: leveraging procurement to support jobs and training for disadvantaged groups, Leed@40 2022.
67 See, for example, Commission for Economic Policy, Assessing the implementation of the 2014 Directives on public procurement: challenges and opportunities at regional and local level, Brussels: European Committee of the Regions 2019, p. 27-28.

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ANNEX A – MANAGEMENT SUMMARY IN FRENCH

En 1992, la Suisse a refusé d'adhérer à l'Espace économique européen (EEE) lors d'une votation. A la suite de cet événement, le pays a adapté de manière autonome certaines parties du droit du travail suisse pour correspondre au droit de l'Union européenne. Depuis, le droit du travail de l'UE a continué à évoluer. Sous l'impulsion du socle européen des droits sociaux de 2017, l'UE a été particulièrement active ces derniers temps pour renforcer l'ensemble des directives et autres instruments définissant la politique sociale de l'UE (l'acquis social de l'UE). Le droit du travail suisse ne reflète pas encore ces évolutions plus récentes.

Même en l'absence d'obligation d'intégrer l'acquis social de l'UE, diverses directives de l'UE ont directement inspiré le législateur suisse par le passé. Ce rapport présente les similitudes et les différences entre le droit du travail de l'UE et le droit du travail suisse afin d'alimenter un débat sur les éléments potentiels du droit du travail de l'UE qui mériteraient d'être pris en compte dans le droit suisse.

Le droit du travail de l'UE s'est considérablement développé au cours des trente dernières années. Le présent rapport n'en couvre donc qu'une partie, en examinant douze directives et une recommandation de l'UE. La sélection s'est faite sur la base des questions posées dans le postulat 22.3872. Le rapport analyse comment et dans quelle mesure la France, l'Allemagne, les Pays-Bas et le Royaume-Uni (ou, lorsque le Royaume-Uni n'a pas transposé une directive en raison de son retrait de l'UE, le Danemark) ont transposé les instruments sélectionnés. La discussion comparative fournit des informations supplémentaires sur la pratique du droit du travail de l'UE et sur la manière dont les directives influencent respectivement les systèmes nationaux. L'Institut suisse de droit comparé a choisi ces pays en concertation avec le Secrétariat d'Etat à l'Economie en raison des différences entre leurs traditions juridiques et approches du droit du travail de l'UE, tout en étant assez comparables au contexte socio-économique suisse.

Les principales conclusions de l'étude sont les suivantes :

- Le droit de l'UE a considérablement influencé le droit du travail suisse à certains égards, en particulier dans le cadre de l'adaptation autonome du droit suisse au droit de l'UE dans les années 1990. Ce rapprochement entre le droit européen et le droit suisse a eu un impact, par exemple sur les droits des travailleurs en cas de transferts d'entreprises et de licenciements collectifs et, dans une certaine mesure, sur les droits des travailleurs en matière d'information et de consultation. Ces domaines du droit du travail de l'UE ont été modifiés depuis que le droit suisse a été initialement adapté au droit de l'UE et le droit suisse ne reflète pas nécessairement ces modifications européennes.

- Le droit du travail de l'UE doit tenir compte de nombreux systèmes juridiques et pratiques d'emploi différents. Lorsqu'elle aborde des questions sensibles, l'UE cherche donc une harmonisation minimale et utilise une terminologie polyvalente avec laquelle tous les États membres peuvent travailler. Étant donné l'imprécision des termes utilisés dans la législation, la Cour de justice de l'UE joue un rôle clé dans l'élaboration et l'interprétation des directives relatives au droit du travail, en particulier les plus techniques d'entre elles. Les interprétations de la Cour sont décisives et peuvent contraindre les États membres à procéder à des modifications législatives des décennies après la transposition initiale d'une directive. Bien que cette étude fasse référence à ces arrêts de la Cour, elle n'explore pas en profondeur l'impact de ses arrêts et n'étudie pas non plus la dynamique entre la Cour de justice de l'UE et le Tribunal fédéral suisse.

- Certains domaines du droit du travail de l'UE ne peuvent pas être facilement retranscrits dans le droit interne suisse parce que la Suisse n'est pas un État membre de l'UE et qu'il n'existe pas d'accords bilatéraux en la matière. Cela peut causer des difficultés. C'est particulièrement le cas à l'encontre des entreprises suisses qui ne sont pas originaires d'un État membre de l'UE et qui sont

alors empêchées d'opérer dans le cadre uniforme mis en place par des instruments spécifiques de l'UE. Ce problème structurel se manifeste notamment dans le cadre de la Directive 2001/86/CE sur l'implication des travailleurs dans les sociétés européennes. Elle concerne également, bien que dans une moindre mesure, les protections accordées dans le contexte des fusions transfrontalières (directive 2017/1132) et des comités d'entreprise européens (directive 2009/38/CE).

- Des directives européennes plus récentes ont conféré aux travailleurs des droits individuels importants. En particulier, la Directive sur les conditions de travail transparentes et prévisibles (2019/1152) et la Directive sur l'équilibre entre vie professionnelle et vie privée (2019/1158) contiennent une série de droits clairement formulés. Du point de vue du droit du travail comparé, ces normes seraient les plus simples à intégrer dans le contexte juridique suisse. En outre, certaines des directives européennes les plus établies, telles que la Directive sur la sécurité et la santé au travail (89/391/CEE), la Directive sur l'information et la consultation des travailleurs (2002/14/CE), la Directive sur le temps de travail (2003/88/CE) et, au cas par cas, la Directive sur les marchés publics (2014/24/UE), peuvent contenir des protections des travailleurs et des principes dont il serait utile de s'inspirer.

- Certains instruments de l'UE ne sont pleinement applicables qu'aux États membres qui remplissent certains critères. La Suisse pourrait ne pas remplir ces critères, ce qui rendrait ces instruments inapplicables. Par exemple, bien que les règles de la Directive sur le salaire minimum (2022/2041) relatives à la promotion de la négociation collective sur la fixation des salaires s'appliquent, les règles sur les salaires minimaux légaux ne s'appliquent qu'aux États membres qui ont librement décidé de fixer des salaires minimaux légaux, ce qui n'est pas le cas de la Suisse au niveau fédéral. En outre, la Recommandation du Conseil renforçant la garantie pour la jeunesse (2020/C 372/01) est importante en tant que référence pour l'obtention d'un financement de l'UE pour lutter contre le chômage des jeunes. La Suisse étant considérée comme un pays à faible taux de chômage des jeunes, il est probable qu'elle ne bénéficierait pas d'un tel financement.

- Certaines directives européennes sont transposées de la même manière dans tous les États membres de l'UE parce que l'objectif des instruments exige des États membres qu'ils prennent des mesures hautement coordonnées. Cependant, les exemples d'harmonisation aussi poussée sont en fait rares et des différences structurelles majeures entre les systèmes nationaux de droit du travail persistent, découlant de la tradition juridique et des institutions juridiques de chaque État membre. Bien que les instruments européens influencent dans une large mesure les droits du travail nationaux, les États membres conservent une marge de manœuvre considérable dans le cadre des directives et les États membres étudiés continuent à en faire usage en mettant l'accent sur des aspects qui les différencient lors de la transposition des directives.

- Enfin, les États membres analysés dans ce rapport offrent souvent aux travailleurs des niveaux de protections plus importants que ceux exigés par les directives européennes. Ceci est illustré, par exemple, dans les chapitres sur les licenciements collectifs, l'information et la consultation des travailleurs, le temps de travail et l'équilibre entre vie professionnelle et vie privée.

ANNEX B – MANAGEMENT SUMMARY IN GERMAN

Aufgrund eines Referendums im Jahre 1992 lehnte es die Schweiz ab, dem Europäischen Wirtschaftsraum (EWR) beizutreten. Infolgedessen hat das Land seinerseits Teile des schweizerischen Arbeitsrechts an das Recht der Europäischen Union (EU) angepasst. Gleichzeitig hat sich das europäische Arbeitsrecht stetig weiterentwickelt. Angetrieben durch die Europäische Säule sozialer Rechte von 2017 hat die EU zuletzt besonders aktiv den Bestand der europäischen Richtlinien und anderen Instrumente verstärkt, welche die Sozialpolitik der EU definieren (den sozialen Besitzstand). Im schweizerischen Arbeitsrecht finden sich diese neueren Entwicklungen noch nicht.

Auch ohne Pflicht, den europäischen sozialen Besitzstand zu berücksichtigen, hat sich die Schweizer Gesetzgebung in der Vergangenheit direkt an verschiedenen EU-Richtlinien orientiert. Der vorliegende Bericht skizziert die Gemeinsamkeiten und Unterschiede zwischen dem europäischen und dem schweizerischen Arbeitsrecht als Grundlage für eine Debatte über solche Elemente des europäischen Arbeitsrechts, die möglicherweise auch für das Schweizer Recht von Interesse sein könnten.

Das europäische Arbeitsrecht wurde im Laufe der letzten 30 Jahre erheblich erweitert. Der vorliegende Bericht befasst sich daher nur mit einer Untergruppe davon, nämlich mit zwölf EU-Richtlinien und einer Empfehlung. Diese Auswahl basiert auf den im Ratsbetrieb aufgeworfenen Fragen. Der Bericht untersucht, wie und in welchem Umfang Frankreich, Deutschland, die Niederlande und das Vereinigte Königreich (oder alternativ Dänemark, wenn das Vereinigte Königreich eine Richtlinie aufgrund seines Ausstiegs aus der EU nicht umgesetzt hat) die ausgewählten Instrumente umgesetzt haben. Die vergleichende Diskussion gibt zusätzliche Informationen über die Praxis des europäischen Arbeitsrechts sowie darüber, wie die betreffenden Richtlinien das nationale System beeinflussen. Das SIR hat diese Rechtsordnungen in Absprache mit dem SECO aufgrund ihrer unterschiedlichen Rechtstraditionen und ihrer unterschiedlichen Herangehensweise an das europäische Arbeitsrecht ausgewählt, und da ihr sozio-ökonomischer Kontext gleichzeitig weitestgehend vergleichbar ist mit demjenigen der Schweiz.

Die wichtigsten Ergebnisse der Studie sind die Folgenden:

- Das europäische Recht hat das schweizerische Arbeitsrecht in einigen Bereichen massgebend beeinflusst, insbesondere im Rahmen der freiwilligen Anpassung des Schweizer Rechts an das EU-Recht in den 1990er Jahren. Diese Annäherung zwischen dem europäischen und dem schweizerischen Recht hatte beispielsweise Auswirkungen auf die Rechte der Arbeitnehmenden im Falle eines Betriebsübergangs oder von Massenentlassungen sowie in gewissem Masse auch auf die Rechte der Arbeitnehmenden auf Unterrichtung und Anhörung. Diese Bereiche des europäischen Arbeitsrechts wurden seit der ursprünglichen Anpassung des Schweizer Rechts an das EU-Recht geändert, jedoch finden sich diese Neuerungen des EU-Rechts nicht unbedingt im Schweizer Recht.

- Das europäische Arbeitsrecht muss zahlreiche verschiedene Rechtssysteme und Beschäftigungspraktiken berücksichtigen. Im Hinblick auf sensible Themen verfolgt die EU eine Politik der minimalen Harmonisierung und verwendet auslegungsfähige Begriffe, mit denen alle Mitgliedstaaten arbeiten können. Durch das Verwenden solch vager Begriffe spielt der Europäische Gerichtshof eine entscheidende Rolle bei der Fortentwicklung und Auslegung der arbeitsrechtlichen Richtlinien, insbesondere bei den technischeren unter ihnen. Die Interpretationen des Europäischen Gerichtshof sind massgebend und können Mitgliedstaaten dazu zwingen, auch Jahrzehnte nach Umsetzung der Richtlinie noch ihre Gesetzgebung zu ändern. Zwar nimmt diese Studie auf solche Gerichtsentscheidungen Bezug, allerdings erforscht sie weder im Detail die Auswirkungen dieser Entscheidungen noch untersucht sie die Dynamik zwischen dem Europäischen Gerichtshof und dem schweizerischen Bundesgericht.

- Einige Bereiche des europäischen Arbeitsrechts können nicht ohne Weiteres in das schweizerische Recht übernommen werden, da die Schweiz kein Mitgliedstaat der EU ist und es an den jeweils

relevanten bilateralen Abkommen fehlt. Dies gilt insbesondere für Fälle, in denen die Tatsache, dass ein Unternehmen seinen Sitz in der Schweiz und nicht in einem EU-Mitgliedstaat hat, dieses Unternehmen daran hindert, in dem einheitlichen Rahmen zu agieren, den spezifische EU-Instrumente geschaffen haben. Dieses strukturelle Hindernis zeigt sich besonders im Hinblick auf die Richtlinie 2001/86/EG über die Beteiligung der Arbeitnehmenden in einer Europäischen Gesellschaft. Ebenso wird dieses Hindernis, wenn auch in geringerem Masse, deutlich bei den Schutzmechanismen, die im Zusammenhang mit grenzüberschreitenden Fusionen (Richtlinie (EU) 2017/1132) und Europäischen Betriebsräten (Richtlinie 2009/38/EG) wirken.

- In der jüngeren Vergangenheit haben EU-Richtlinien Arbeitnehmenden wichtige individuelle Arbeitnehmerrechte gewährt. Insbesondere die Richtlinie (EU) 2019/1152 über transparente und vorhersehbare Arbeitsbedingungen sowie die Richtlinie (EU) 2019/1158 zur Vereinbarkeit von Beruf und Privatleben enthalten zahlreiche explizit ausformulierte Rechte. Aus Sicht des vergleichenden Arbeitsrechts sind dies die Vorschriften, die am einfachsten in den schweizerischen Rechtsrahmen integriert werden könnten. Darüber hinaus können auch einige der bereits seit längerem etablierten EU-Richtlinien Arbeitnehmerschutznormen und Prinzipien enthalten, die es wert sein könnten, übernommen zu werden. Dies gilt zum Beispiel für die Richtlinie 89/391/EWG über die Sicherheit und den Gesundheitsschutz der Arbeitnehmenden, die Richtlinie 2002/14/EG über die Unterrichtung und Anhörung der Arbeitnehmenden, die Richtlinie 2003/88/EG über die Arbeitszeitgestaltung sowie, im Einzelfall, für die Richtlinie 2014/24/EU über die öffentliche Auftragsvergabe.

- Einige EU-Instrumente finden lediglich auf solche Mitgliedstaaten vollständig Anwendung, die bestimmte Voraussetzungen erfüllen. Es ist möglich, dass die Schweiz diese Kriterien nicht erfüllt, wodurch die Instrumente hier nicht anwendbar wären. Sind beispielsweise die Vorschriften über die Förderung kollektiver Tarifverhandlungen zur Lohnfestsetzung aus der Richtlinie 2022/2041 über angemessene Mindestlöhne anwendbar, so finden die Vorschriften über Mindestgehälter dennoch nur dann Anwendung, wenn die Mitgliedstaaten sich aus eigenen Stücken für einen Mindestlohn in ihrem Land entschieden haben. Dies ist in der Schweiz auf Bundesebene jedoch nicht der Fall. Ebenso stellt die Empfehlung des Rates 2020/C 372/01 zur Stärkung der Jugendgarantie einen wichtigen Massstab dar, um EU-Mittel für das Bewältigen von Jugendarbeitslosigkeit zu erhalten. Da die Schweiz allerdings eine geringe Jugendarbeitslosenquote hat, würde sie wahrscheinlich keine solchen Mittel erhalten.

- Einige EU-Richtlinien werden in allen EU-Mitgliedstaaten sehr ähnlich umgesetzt, da der jeweilige Zweck dieser Instrumente von den Mitgliedstaaten ein höchst koordiniertes Vorgehen erfordert. Es gibt jedoch nur wenige Beispiele für eine solch weitgehende Harmonisierung und strukturelle Unterschiede zwischen den verschiedenen nationalen Arbeitsrechtssystemen bleiben, ausgelöst durch die unterschiedlichen nationalen Rechtstraditionen und -institutionen. Obwohl die EU-Institutionen das nationale Arbeitsrecht in grossem Umfang beeinflussen, behalten die Mitgliedstaaten im Rahmen der Richtlinien einen beachtlichen Spielraum und die hier untersuchten Mitgliedstaaten legen weiterhin jeweils unterschiedliche Schwerpunkte bei der Umsetzung der Richtlinien.

- Schliesslich gewähren die hier untersuchten Mitgliedstaaten den Arbeitnehmenden regelmässig mehr Schutz als es die EU-Richtlinien verlangen. Dies wird beispielsweise deutlich in den Kapiteln über Massenentlassungen, Unterrichtung und Anhörung der Arbeitnehmenden, Arbeitszeit sowie die Vereinbarkeit von Berufs- und Privatleben.