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First Synthesis Report

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Introduction

Recent data show that the world of work has become more digital rapidly in the very recent past. In 2023, more than 44 million employees teleworked across the EU, i.e. a doubling of employees teleworking since 2019,[1] and Eurofound (2023) expects that this upward trend is set to resume, with the consolidation of hybrid work.[2] Telework is not a strictly national phenomenon, though. In practice, employees 'sit and work', thus are located in different states, but nevertheless work together by using digital tools and modern ways to communicate. Other teleworkers do not necessarily cooperate in this traditional way, but perform crowdwork via platforms. In both scenarios, one could speak of a 'digital workplace'.

Yet, when it comes to workplace representation in a digital world of work, many questions are still unsolved. According to the EU-Commission's 2022-2023 Work Programme, a more digital EU should cater for the respective rights at the digital workplace. To focus on the impact of digitalisation in the world of work is also one of the 2024-2028 Commission's priorities (cf. the mission letter to Commissioner Roxana Mînzatu by President von der Leyen). However, workplace representation is still rather shattered in the 27 MS. Furthermore, workplace representation exists on average in only 3 out of 10 private sector undertakings with more than ten employees (Eurofound 2020). Thus, it does not come as a surprise when we read in the cited mission letter that President von der Leyen wants to 'steer our renewed commitment to strengthening European social dialogue in a time of economic and

[1] Alice Zucconi, Oscar Vargas Llave, Michele Consolini, Flexible work increases post-pandemic, but not for everyone, https://www.eurofound.europa.eu/en/resources/article/2024/flexible-work-increases-post-pandemic-not-everyone (25 October 2024).

[2] See the key findings of the following Eurofound report, https://www.eurofound.europa.eu/en/publications/2022/rise-telework-impact-working-conditions-and-regulations (25 October 2024). Eurofound (2022), The rise in telework: Impact on working conditions and regulations, Publications Office of the European Union, Luxembourg.

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social change. Together with European trade unions and employers, you will deliver a new Pact for European Social Dialogue in early 2025'.

The DIGILARE project addresses two major challenges related to the digital workplace in its first two coordinates: The personal scope of application of information and consultation rights ("WHO", 1.) and the question of the applicable law in a cross-border context ("WHERE", 2.).

I. The personal scope of application of information and consultation rights

1.1. Status quo: Information and consultation of workers at EU-level

The meaning of the term 'employee' or 'worker' depends on the applicable Union legislation. In the absence of a definition, for example, the term 'worker' in Art. 45 TFEU (freedom of movement for workers) has to be interpreted autonomously.[3] Some secondary EU law Directives do not define 'employee' or 'worker' either, whilst in others, reference is made to the national concepts of employment. Some scholars are of the opinion that the ECJ uses this formula developed for the concept of worker in Art. 45 TFEU as a uniform definition of an employee in European labour law, especially, when EU law does not refer to national legislative definitions.[4] More recent directives[5] refer to a twofold concept of worker; according to this 'new' formula a worker covered by the respective directive is a person who has 'an employment contract or employment relationship as defined by law, collective agreements and/or practice in force in each MS with consideration to the case-law of the Court of Justice'.[6] Most interestingly, in some of these 'new

[3] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* (3 July 1986), para 17.
[4] U. *Preis/ K. Morgenbrodt*, 'Die Rotkreuzschwester zwischen Arbeitnehmerbegriff und Beschäftigungsverhältnis' (2017) EuZA 418, 422; *T. Dullinger*, 'Arbeitnehmerbegriff(e) des Unionsrechts und das österreichische Arbeitsrecht' (2018) ZAS 4, 5; on the question of whether such a uniform definition exists, see *M. Risak/ T. Dullinger*, The concept of ‚worker' in EU law: Status quo and potential for change (2018) ETUI Report 140, 2018; *A. Sagan*, 'Der Begriff des Arbeitnehmers im Unionsrecht: Entwicklungslinien, Tendenzen und Umbrüche' (2020) ZESAR 3.
[5] 2019/2251, 2019/1158, 2022/2041, for example.
[6] See e.g. most recently Art. 2 para 2 Pay Transparency Directive.

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generation'-directives, in a footnote to the recitals reference is made to the Court's case law that the legislator apparently refers to, including the contentious *FNV Kunsten* case.[7] Although there is no reference to particular paragraphs in the cited judgements, one could well argue that by doing so, the EU legislator opens up to a potentially broader interpretation of the term worker, or at least giving leeway to the Court to do so.

Irrespective of this potential broadening of the term 'worker', up until now the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.[8] Indications for the latter are, for example, a short working time per week or a low remuneration.[9] It is questionable whether this 'uniform' definition of an employee is also suitable for platform workers such as crowdworkers, for example, as they regularly work on micro-jobs, i.e. jobs of very short duration.

Thus, in various fields of the labour market, working patterns that fall outside the scope of standard employment relationship exist. What seems particularly interesting is that most recently, the Platform Work Directive[10] recognizes this fact by broadening the scope of some of its rules to platform workers who are not employees *stricto sensu*. From a teleological point of view, the Commission seems to follow a similar approach as within the Guidelines on Collective Agreements for solo self-employed:[11] In case non-workers face the same challenges and difficulties as (co-)workers and thus are in the same need of protection, the same rules apply.

[7] See recital 18, footnote 5 Pay Transparency Directive, e.g.
[8] E.g. Case C-316/13 *Gérard Fenoll v Centre d'aide par le travail 'La Jouvene', Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* (6 March 2015), para 27.
[9] Case C-14/09 *Hava Genc v Land Berlin* (4 February 2010).
[10] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (2024) OJ LXX/XX (Platform Work Directive).
[11] Communication from the Commission - Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02, OJ C 374, 30 September 2022, 2-13. See for a first analysis Brameshuber in Miranda Boto/Brameshuber (Hart 2022) 227 ff. Ratti in Miranda Boto/Brameshuber (Hart 2022) 52 f.

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One could also state that by doing so, the Commission has adopted a more purposive approach.

This is also reflected by less recent legislation (application of the principle of non-discrimination also to self-employed activities, e.g.; see in this respect Directive2000/78/EC[12], Art. 3(1)a; Directive 2000/43/EC[13], Art. 3(1)a; Directive (EU) 2010/41[14]). Furthermore, the legal situation in some Member States (e.g. Poland, Germany or Romania) can be brought forward as recognising the need to extend – even collective – labour law protection to certain non-standard employment relationships.

The definition of non-standard workers in this report is based on the definition of solo self-employed persons comparable to workers from the Commissions Guidelines for collective bargaining, which is implied not least from a systematic point of view, given the fact that we are talking about collective labour law. The Guidelines distinguish between economically dependent solo self-employed persons who provide their services exclusively or predominantly to one counterparty and solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty.

Yet, it is still unclear whether core fundamental labour rights, such as the one on information and consultation (Art. 27 EU-CFR), apply to these non-standard workers too. The same difficulties exist as regards the respective Directives, e.g. the Framework Directive[15]. Could – and should – it be that certain non-standard workers have the right to collective bargaining, but are not covered by information

[12] Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000) OJ L303/16.
[13] Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000) OJ L180/22.
[14] Directive (EU) 2010/41 of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (2010) OJ L180/1.
[15] 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 (2002) OJ L80/29 (Framework Directive).

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and consultation rights? If Art. 27 EU-CFR is interpreted broadly, also guaranteeing such rights for non-employees might even be required at national level, at least in those cases where EU law is implemented according to Art. 51 (1) EU-CFR. Furthermore, it could be argued that the fundamental right to democracy (see, e.g., Art. 21 Universal Declaration of Human Rights) should also cover workplace democracy for non-standard workers, including economically dependent self-employed, in particular in those cases where the economic dependency derives from an integration into the contract partner's business.

In the area of Information and Consultation of Workers (ICW), in addition to Art. 27 EU-CFR, there are eighteen key directives that the report by Lidia Gil Otero and Christina Schnittler (Milestone 3 of the project, accepted for publication in the European Labour Law Journal) analyzed in more detail with respect to the personal scope of application.

- Directives whose main purpose is to ensure ICW (Framework Directive and the EWC Directive[16]) and other directives providing rights designed to be exercised by employee representatives, and which concern the collective organisation of the company (Collective Redundancies Directive[17], SE and SCE Directives[18], Directive (EU) 2017/1132[19] on cross-border mergers and CSR-Directive[20] – in the following: directives considering 'collective rights'

[16] 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 (2009) OJ L122/28 (EWC Directive).
[17] Directive 98/59/EC of the Council of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (1998) OJ L225/16 (Collective Redundancies Directive).
[18] Directive 2001/86/EC of the Council of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (2001) OJ L294/22 (SE Directive); Directive 2003/72/EC of the Council of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (2003) OJ L207/25 (SCE Directive).
[19] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (2017) OJ L169/46.
[20] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (2022) OJ L322/15 (CSR-Directive).

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- Directives which also deal with company restructuring, but whose focal point is the preservation of individual rights (Acquired Rights Directive[21] and Insolvency Directive[22])
- Directives on so-called atypical employment relationships (Part-time Work Directive[23], Fixed-term Work Directive[24], Temporary Agency Work Directive[25])
- Directives on Fundamental rights (OSH Directive[26], Directive 2006/54/EC[27], Directive 2000/78/EC, Directive 2000/43/EC, Directive (EU) 2010/41 and the Pay Transparency Directive[28])

Throughout the project, it became clear, though, that ICW within the equal treatment directives is of such marginal relevance, in particular as regards the general goals of ICW, that this report does not focus on these directives. This might change, however, with the advent of the Pay Transparency Directive, which, up until now, no Member State has implemented. In addition to the above, ICW

[21] Directive 2001/23/EC of the Council 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 (2001) OJ L82/16 (Acquired Rights Directive).
[22] Directive (EU) 2019/1023 41 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (2019) OJ L172/18 (Insolvency Directive).
[23] Directive 97/81/EC of the Council of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (1997) OJ L14/9 (Part-time Work Directive).
[24] Directive 1999/70/EC of the Council of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (1999) OJ L175/43 (Fixed-term Work Directive).
[25] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (2008) OJ L327/9 (Temporary Agency Work Directive).
[26] Directive 89/391/EEC of the Council of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (1989) OJ L183/1 (OSH Directive).
[27] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (2006) OJ L204/23.
[28] Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (2023) OJ L132/21 (Pay Transparency Directive).

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provisions also take centre stage in the Artificial Intelligence Act[29], as a measure to improve algorithmic transparency, and in the Platform Work Directive.

Since most directives refer to national law as regards their personal scope of application, based on the Gil Otero/Schnittler-Report we then examined the national implementation of provisions relating to personal scope of application, based on the above-mentioned categorization.

1.2. Information and consultation of workers in the Member States

1.2.1. Directives on "collective rights"

As regards the first category of directives, those considering collective rights, in 11 countries, the personal scope is restricted to 'employees' under national law. These countries are Austria, Estonia, Germany, Hungary, Ireland, Luxembourg, Netherlands, Poland, Portugal, Spain and Turkey. However, the coverage of 'employee' differs from country to country, often quite significantly. For example, in Ireland the definition is quite limited (based significantly on the concept of a 'contract of service', which in turn is developed and fleshed out by case law). The situation is similar in **Austria**, although 'Heimarbeiter' (homeworkers) are explicitly included in the scope of most of the transposing legislation. Homeworkers are, by legal definition, persons creating hand-crafted work from home; thus this definition comprises a relatively small group of persons. Those persons are considered employees according to the relevant ICW provisions, even though they do not fall under the standard definition of an employee according to the prevailing doctrine in Austria.[30] The relevant provision, § 36 ArbVG, therefore extends the rights and

[29] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (2024) OJ L 2024/1689 (Artificial Intelligence Act).

[30] They are in a situation somewhat comparable to that of workers, although they do not provide services under the direction of their counterparty. However, they do not bear the counterparty's commercial risks of their activity or enjoy any independence as regards the performance of the economic activity concerned.

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duties established by the subsequent provisions to those homeworkers (including, e.g., the right to vote as regards employee representative bodies, most importantly, the works council)[31]. Yet, it follows *e contrario* from the limited scope of application/very specific definition of 'Heimarbeiter' that *de lege lata*, a general extension to other non-standard employees cannot be argued for.[32] In **Poland**, the formal definition of the employment relationship is relatively broad: the performance of work for the benefit of the employer, under the employer's direction, in place and time determined by the employer (Art. 22 par. 1 of the Labour Code). However, compared to other countries, there are much more cases of abusing non-employee status. As a result, 2-3 million of potential employees do not enjoy employee rights to information and consultation.

In four countries, we observed more nuances: First, in **Sweden**, although the personal scope is confined to 'employees', the definition of 'employee' is relatively wide. In addition, the Co-determination Act (1976:580), which is the central legislative act in the area of trade union representation and thus also for the right to information and consultation (or in the wording of the law: negotiation), also applies to dependent contractors. 'Dependent contractors' are defined by law as persons who work for another, and at that time is not employed by the other, but has a position that is essentially the same as that of an employee.[33] The practical importance of this provision has been limited, and even more so as the concept of employee has expanded to nearly totally overlap the said category.[34] In recent debates, however, the category 'dependent contractors' has been described as somewhat dormant, but with a potentially new relevance in the digital economy.[35]

[31] Martin Gruber-Risak, Crowdwork, ZAS 2015/3.
[32] See, among others, *Mosler*, Brauchen wir einen neuen Arbeitnehmer*innenbegriff?, DRdA 2022, 2019 (225).
[33] Co-determination Act (1976:580).
[34] Engblom, Samuel (2003) Self-employment and the Personal Scope of Labour Law Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States, European University Institute, p. 160. Government Bill Prop. 1975/76:105, Appedix 1, p. 169, Government Report Ds 2002:56 Hållfast arbetsrätt – för ett föränderligt arbetsliv, p. 125, p. 133.
[35] Selberg, Niklas (2023) 'Autonomous regulation of work in the gig economy: The first collective bargaining agreement for riders in Sweden', *European Labour Law Journal* Vol. 14(4) 609–627;

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In most cases, solo self-employed persons under the Commission Guidelines would be considered employees in Sweden.[36] If not classified as employees, the persons would most probably be considered dependent contractors.[37] In any of these capacities, these persons would enjoy information and consultation rights exercised via their membership of a trade union under the Co-determination Act (1976:580).

Secondly, in **France**, we can observe that the legislator has an approach which involves the historical application of the Labour Code to defined cohorts of non-employees. It is a very heterogeneous group, which encompasses journalists, freelancers, entertainers, models, concierges, residential building employees, domestic workers, branch managers, sales representatives, employee-entrepreneurs associated to a cooperative of activity and employment, and home workers. Most of those workers are assimilated to employees; they must be considered as such. They have all the rights of employees, particularly in terms of information and consultation (journalists, home workers).[38] For others, their rights are restricted by the specific provisions of the Code (domestic workers). Contrary to that, for platform workers, the so-called ARPE-process[39] brought about special rules granting platform workers access to social dialogue and collective bargaining at branch level.

Thirdly, in **Italy**, we see that the personal scope excludes 'CoCoCos'[40], but rights granted under certain directives (notably the Framework Directive, and Collective

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Westregård, Annamaria, Sweden, In: Schubert, Claudia, *Economically-dependent Workers as Part of a Decent Economy. International, European and Comparative Perspective. A Handbook*, C.H. Beck; Westregård, Annamaria, 'Collective agreements regarding the working conditions of solo self-employed persons in Sweden' (2023) *Zeitschrift fur Vergleichende Rechtswissenschaft*, 122: 481-481.

[36] C(2022) 6846 Communication from the Commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons. 29.9.2022.

[37] Selberg (2023) p. 622.

[38] The seventh part of the French Labour Code is entirely devoted to 'certain professions and activities'. In most cases (except for platform workers), there is a presumption of salaried status. This means that these workers have an employment contract and that all labour legislation (including the rules on ICW) apply.

[39] ARPE = autorité des relations sociales des plateformes d'emploi. Art. L. 7345-1 et s. Code du travail. https://www.arpe.gouv.fr/ (28 November 2024).

[40] CoCoCo stands for 'Contratto di collaborazione coordinata e continuativa'; cf. https://www.lavoro.gov.it/temi-e-priorita/rapporti-di-lavoro-e-relazioni-industriali/focus-

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Redundancies Directive) are extended to 'Hetero organised workers' (self-employed, independent workers to whom the same rights as employees are granted).

Fourthly, in **Romania**, we see that later laws have sometimes been adopted in a manner which affects the earlier transposed law to broaden the scope of the latter. So, for the Framework Directive, e.g., solo self-employed persons working 'side-by-side' with workers and solo self-employed persons working through digital labour platforms are covered by information and consultation through their representatives. Furthermore, in Romania, economically dependent solo self-employed, although not explicitly mentioned in the transposing legislation, are also covered by information and consultation rights under the Framework Directive. This is because the new Law on social dialogue (no. 367/2022) establishes in detail the rights of information and consultation of workers' representatives (employees, non-standard workers and independent workers) on the recent and probable evolution of activities, on the economic situation of the undertaking and on decisions likely to lead to substantial changes in work organisation or in contractual relations or in the employment relationship. Similarly, non-standard workers, although not explicitly mentioned in the transposing legislation, are also covered by the Collective Redundancies legislation, according to Art. 5 (1c) of Law no 467/2006, transposing the Framework Directive, as well as the new Law on social dialogue (no. 367/2022). In terms of European Works Councils, information and consultation involves employees' representatives – defined as trade union representatives or elected employees' representatives (Art. 6§3). As trade unions may include non-standard workers, as well as genuinely solo self-employed workers, trade unions may also inform and take into consideration the interests of

on/disciplina-rapporto-lavoro/pagine/contratto-di-collaborazione-coordinata-e-continuativa (29 November 2024). E. Ales, The concept of employee. The position in Italy, in Waas/Van Voss (eds.), Restatement of Labour Law in Europe I (Hart 2017) pp. 371, 372.

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these workers in the consultation process. Theoretically, members of the special negotiating body could also be non-standard workers.

Thus, in several countries, the scope of ICW rights depend significantly on the role of collective agreements. So, we see in **Sweden**, and in **Romania** (in the case of Romania at least in the context of the Framework Directive) that sectoral collective agreements can *modify* the scope of the rights. In **Poland**, trade unions that represent non-employees may *apply* to the employer for information necessary for union activities (Art. 28 of the Law on Trade Unions) in respect of the Framework and Collective Redundancies Directives. In practice, though, this hardly ever happens. In **Italy**, under the Framework Directive, collective agreements may *exclude* the application of some ICW rights.

Therefore, the question as to whether trade unions can represent non-employees becomes important. Trade unions can represent non-employees in Spain, Sweden and Romania. In **Poland**, since 2019, the right to form and join trade unions has been extended to workers who are not employees and who perform paid work (and can include solo self-employed). However, while collective agreements are concluded in many sectors in Sweden, in Poland it remains rather theoretical that information and consultation rights of non-employees may be provided in collective agreements. In practice, it has hardly ever happened. Non-employees do not participate in any elected body (works councils, European Works Councils, etc.). However, trade unions that represent employees, as well as other workers performing paid work, enjoy the right to information which covers all matters necessary for union activities.

Furthermore, whether a country has a single channel or a dual channel of employee representation can be important. In Germany or Austria (dual-channel), most collective information and consultation rights are granted to the Works Council. In Sweden (single-channel) information and consultation rights belong solely to the trade union, never to the individual employee, under Sections 10-22 of the Co-determination Act. The established trade unions enjoy a privileged position with

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comprehensive rights to information and consultation (or in the wording of the law: negotiation). Also trade unions not bound by a collective agreement with the employer but with a member and previous member in the workplace have information and consultation rights, albeit more limited. In Poland, in theory there is a dual model, but in practice representation (if it exists at all) is via trade unions. In the Spanish case, both channels of representation enjoy the same rights since 1985.

1.2.2. Company restructuring directives focussing on individual rights

What seems particularly interesting is the personal scope of application of the Insolvency Directive: Unlike Directive 2008/94/EC[41], the Insolvency Directive does not aim to protect employees against the insolvency of their employer, but rather to protect companies themselves (cf. its Recital 1).

However, regarding the right to information and consultation, other workers than employees can have an interest in the information about insolvency of the undertaking. The concept is open to a broad interpretation at national level; especially since the Insolvency Directive does not create new individual rights for workers.

This hypothesis is reflected in the diversity of national interpretations: Whereas seven countries reserved ICW rights to employees with employment contracts (Austria, Estonia, Germany, Hungary, Luxembourg, Portugal, Spain), by contrast, in Romania, law 367/2022 gives to the social partners the possibility to extend the scope of ICW to self-employed workers; this also applies to the Insolvency Directive. Albeit for different reasons, the Insolvency Directive might apply to certain non-standard workers in France, Italy and Sweden.

[41] Directive 2008/94/EC 41 of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (2008) OJ L283/36.

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As regards the Acquired Rights Directive, although its principal focus is on safeguarding employees' rights, the assessment is similar to the one effectuated for the Insolvency Directive: In ten countries (Austria, Estonia, Germany, Hungary, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Turkey), only employees can benefit from the preservation of acquired benefits and are involved in the ICW relating to undertaking transfer. Again, for **Romania** and **Sweden**, the scope is determined by the trade unions. Here, **Poland** joins the group of countries that allow trade unions to choose the scope of the persons represented, including solo-self-employed workers (Art. 28 of the Law on Trade Unions).[42]

To conclude, information and consultation on rights which have significant financial consequences for individual workers is reserved for employees, unless collective autonomy decides otherwise. In the latter category of countries, where trade unions can, in theory, also represent solo self-employed, the actual situation varies. In Poland, e.g., actual membership rates are rather low, and despite some recent initiatives to attract solo self-employed, an appropriate strategy to attract more solo self-employed is missing. In Sweden, whereas many white collar trade unions as well as trade unions for academics offer membership to self employed (including, among many others, Unionen, Sweden's largest trade union on the private labour market and the largest white-collar trade union in the world), the national blue collar trade union confederation LO has recently stated that the role of their member trade unions is to organise employees and to advocate the most comprehensive concept of employee possible, but not to organise genuinely self-employed. Yet, with reference to platform work, LO stated that dependent contractors which would be defined as employees have typically always been organised by the unions and will continue to be so.[43] In Romania, for the time being trade unions do not proactively advertise membership for solo self-employed. This

[42] Interestingly to note, though, only about 1 % of trade union members are non-employees/solo self-employed, whereas these solo self-employed constitute around 20 % of the workforce
[43] LO organisational plan 2024 – Basis for decision for the 30th ordinary congress of LO in 2024.

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does not mean that trade unions do not accept solo self-employed as members, but they do not target this group of persons in order to recruit them as members.

1.2.3. Directives on so-called atypical employment relationships

The main purpose of these three directives is essentially to impose a principle of equality between workers on full-time and /or contracts of indefinite duration and those covered by each directive. The ICW requirements are weak. The framework agreements only mention 'appropriate information to existing bodies representing workers about part-time working in the enterprise' (clause 5), or 'employers should give consideration to the provision of appropriate information to existing workers' representative bodies about fixed-term work in the undertaking' (clause 7, §3). Their impact on self-employed workers therefore depends on whether or not national legislation or collective agreements treats them in the same way as employees.

Whereas the implementing provisions in the 'usual' ten countries apply only to employees, **Romania**, **Sweden**, and **France** stand out for the above-mentioned reasons (in particular link to trade union membership – Romania and Sweden – and extended scope of application as regards particular professions – France). In **Italy**, hetero-organised workers are included in the scope of the afore-mentioned ICW rights, provided that they fulfil the requirements of Art. 2 leg. Decree 81/215 (i.e. the performance or execution of work is organized by the contractual counterpart)

More interesting, though, is the example of temporary agency work. As a rule, workers are represented in the temporary employment agency, whereas the user company only has an obligation to inform the representative bodies of its own employees. However, this triangular situation is shaking things up in some countries; Poland and Austria in particular.

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In **Poland**, the employer is obliged to inform trade unions about the intention to entrust work to temporary workers, and, if the work is to be performed for a period longer than 6 months, the intention shall be agreed with company trade unions (Art. 22.1 of the Law on Temporary Work). These provisions are applied to temporary workers who are not employees.

In **Austria**, according to § 3 (4) AÜG (Temporary Agency Work Act), the provisions of the Act cover employees as well as employee-like persons. Employee-like persons are persons who, without being in an employment relationship, perform work on behalf of and for the account of certain people and are economically dependent. Therefore, it explicitly mentions economically dependent, solo self-employed as protected under the Act. However, as regards 'core' ICW rights (such as works council elections etc.), the Act does not create new rights. Thus, contrary to employees (who enjoy double-representation in the temporary works agency as well as in the user undertaking, as soon as work is performed for at least six months (case law) in the user undertaking), they do not enjoy ICW rights because the Act does not create new (ICW) rights. Nevertheless, from a material point of view, economically dependent solo self-employed agency workers can enjoy some rights provided for in company collective agreements (see § 10 para 3 AÜG; this concerns specific aspects as regards working time and holidays; nota bene that the respective legislative acts, the Working Time Act and the Holidays Act, do not include economically dependent, solo self-employed persons in their personal scope).

1.2.4. Directives on fundamental rights

Within the scope of the OSH Directive, the obligations to inform and consult employee representatives are not very well developed. What seems to be crucial, though, is a distinction between the application of the OSH-rules (generally speaking) to self-employed workers, on the one hand, and the rights of ICW of employee representatives, on the other.

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Of the countries examined, only four are unaware of the application of the OSH Directive to self-employed workers: **Luxembourg**, the **Netherland**s, **Hungary** and **Turkey.** Five countries (Estonia, Germany, Ireland, Poland, Sweden) apply the directive partially, and six others (Austria, France, Italy, Portugal, Romania, Spain) include self-employed workers in the scope of their transposition, even though it is rare that all self-employed workers are covered by this legislation.

In several countries, information and consultation remain the prerogative of traditional employee representatives. But the measures must have a broad personal scope in terms of workers involved;[44] this is the case of **Germany**, **Hungary**, **Ireland**, and **Sweden**. In Germany, for example, the employer's OSH-duties are extended to employee-like independent workers, however, they are not represented in the competent commission ('Arbeitsschutzausschuss') where employees are represented by members of the works council. In **Sweden**, the combination of a very wide concept of employee, which has expanded to nearly totally overlap the category 'dependent contractor' (and, in addition, the specific 'dormant' provision in the Co-determination Act stating that the act may also be applied to 'dependent contractors') and a very comprehensive right to information and consultation for the trade unions, most of the workers concerned in this study are considered employees and therefore covered by ICW. However, no worker/ 'dependent contractor' is 'involved' as the information and consultation rights belong exclusively to the trade union.

France limits the scope of ICW to workers presumed to be employees, that means genuine solo self-employed are excluded. However, for the scope of application of OSH, the Labour Code contains specific regulations on 'self-employed workers', but here again, the category is limited in terms of activities or exposure to certain risks.

[44] The personal scope of application is broad insofar as it is the employer who is responsible for the workers who provide services for him, even if they are not his contractual employees, as long as they are under his factual direction and control.

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Five countries clearly include workers 'with or without an employment relationship' in their national OSH-provisions: Austria, Spain, Italy, Portugal, and Romania. In **Spain**, self-employed workers are included in the application of the OSH's protection. In **Austria**, economically dependent, but not personally dependent solo self-employed are deemed to be employees under the Austrian OSH-Act.[45] Practice does not make a difference when it comes to inspections. As regards ICW, particularly important information on potential dangers is given to single employees (and therefore also to the above-mentioned solo self-employed). In case a so-called 'Sicherheitsvertrauensperson' (an employee in charge of transmission of OSH information at the workplace) is installed, this person is also responsible for the solo self-employed, contrary to employee representatives (who might also be in charge of transmission of OSH information at the workplace), since they do not represent solo self-employed. In **Romania** due to the broad definitions, solo self-employed persons working "side-by-side" with workers, solo self-employed persons working through digital labour platforms and economically dependent solo self-employed are covered by information and consultation rights, and they are also involved in the actual process.

Consequently, regarding OSH, it seems that, unlike most other directives, self-employed workers working in a company are covered by the employer's responsibility for protecting the health and safety of these workers, not least because of the employer's potential liability in case of damages. However, it seems that in most Member States, self-employed are neither involved in the respective ICW practices, nor included in the process of information and consultation.

1.3. Extending the personal scope of ICW rights?

As the Gil Otero/Schnittler-Report shows, from a dogmatic point of view it is questionable whether the directives that form part of the research allow for an extensive interpretation; first because in many cases they refer to national law when

[45] Binding Interpretation by the Central Labour Inspectorate from 8.11.1998, 60.010/20-3/98.

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it comes to the scope of application of ICW rights. Second, because it is unclear whether the competence bases of the directives – often Art. 151 and 153 TFEU – only cover employees or also the self-employed. There are reasons to believe that Art. 153 TFEU is limited to employees; in particular taking into account its wording or its very genesis,[46] although, as regards the wording, also arguments in favour of a broader scope of application can be brought forward, depending on the different language versions of the Treaty.[47] On the other hand, despite potential grammatical and historical restrictions, some instruments actually have been adopted under the competence title of Art. 153 TFEU and deal with self-employed workers, such as Directive (EU) 2017/159[48] implementing the Agreement concerning the implementation of the Work in Fishing Convention of the ILO, Directive 2002/15/EC on the organization of the working time of persons performing mobile road transport activities[49] and the Council Recommendation of 8 November 2019 on access to social protection for employed and self-employed workers.[50]

Systematic arguments can also be brought forward in favour and against extending the personal scope: Following the Guidelines on collective bargaining for solo self-

[46] Miranda Boto, Breves notas sobre la posición de los trabajadores por cuenta propia frente al Derecho social comunitario, XII Jornadas Luso-Hispano-Brasileñas de Derecho del Trabajo, 2007, 117-128; Martínez Yañez, 'La Carta de Derechos Fundamentales de la UE y los derechos profesionales de los trabajadores autónomos' (2020), Temas Laborales, 151, 106;

[47] See, amongst others, Schubert Economically-dependent Workers/Davies 169; Schubert Economically-dependent Workers/Krause 263.

[48] Directive (EU) 2017/159 of the Council of 19 December 2016 implementing the Agreement concerning the implementation of the Work in Fishing Convention, 2007 of the International Labour Organisation, concluded on 21 May 2012 between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche) (2017) OJ L25/12.

[49] 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 (2002) OJ L80/35. The ECJ settled the claims of some MS on the grounds that Art. 19 TFEU, which was also a competence basis of the Directive, allowed for the regulation of the rights of self-employed workers, but the CJEU did not expressly reject the basis of Art. 153 TFEU for self-employed workers (Cases 184/02 and 223/02 *Spain and Finland v Parliament and Council* (9 September 2004)).

[50] See also Franzen in Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht 5. Auflage 2024, Art. 153 paras 8-10, who, in conclusion, argues that the term "employee" in Art. 153 also cover persons who are in a situation comparable to employees, on particular because of the economic dependence.

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employed, it would only be logical to also extend the personal scope of ICW rights (which are often the prerequisite for meaningful bargaining) to certain categories of solo self-employed; in particular in those cases, where similar vulnerabilities compared to employees exist.[51] However, recent legislative developments, such as the Platform Work Directive, show that the EU legislator seems somewhat hesitant. While some rights in this directive apply not only to employees but to all 'persons performing platform work', irrespective of their contractual status, the therein established ICW rights only apply to employees.[52]

Yet, from a teleological point of view, taking into account that in many of the analyzed cases, certain solo self-employed, including the economically dependent, face the same or similar risks as employees, a risks-based-approach would require an extension of the personal scope of application, at least in some cases. As the Gil Otero/Schnittler-Report shows, the needs of economically dependent non-employees are the same as those of employees in case of threats to their employment. Thus, from a risk-based approach, the scope of the respective rights in Art. 4(2)a–c Framework Directive, e.g. would need to be extended. The same argument applies as regards viable interest in receiving information concerning safety and health risks at the workplace (Art. 10 and 11 OSH Directive), in particular in those cases where non-employees are integrated into the company and work side by side with the employees.

With a view to ensuring fair transitions and good working conditions not only for workers, but also for self-employed, enhancing Social Dialogue not only at European level, but also via ICW at company level, could be one piece of the puzzle in fostering the social market economy.[53] If not by extending the personal

[51] See also Franzen in Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht 5. Auflage 2024, Artikel 153 para 10.
[52] See its Recital 53, stating that ICW rights should not apply to self-employed workers, as they are "specific to workers under EU law".
[53] See in this respect President Von der Leyen's address to the Parliament in July 2024, https://ec.europa.eu/commission/presscorner/detail/ov/STATEMENT_24_3871 (26 September 2024).

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scope of application by adapting the respective legislative pieces, a respective systematic-teleological interpretation could cater for tailor-made results, taking into account the respective needs of certain groups of persons compared to others. The apparent obstacle – references to the national Member States' definitions, could be overcome by reference to the *effet-utile* principle as well as by a respective interpretation of national implementation provisions in light of Art. 27 EU-CFR. The necessary prerequisite step is, of course, to interpret Art. 27 EU-CFR broadly.

The follow-up question, of course, is whether national traditions would follow, extending the respective rights and obligations as regards employee representation at workplace level, to certain non-employees. Best practice examples are still scarce.

II. Applicable law in a cross-border context, or where is my works council?

One challenge that could undermine key values of labour law, including ICW rights, stems from the complexity of applicable laws in a cross-border context. Cross-border telework means that different laws might apply within the same company regarding collective ICW rights. Whereas some states follow the territoriality principle (i.e. that the states' laws only apply in case the company is located within the borders of the state; cf. e.g. **Austria**, **Germany**, **Spain**, **Luxembourg**; to some extent **France**), others rely on the law governing the employment contract as connecting factor for ICW rights (partially **Sweden**; **Romania**). Further connecting factors existing within the framework of EU Member States' ICW rules are trade union membership (partially **Sweden**; **Ireland**) or the place where workers habitually perform their work (**Italy**, **Hungary**; n.b. a nexus that can also be found in the Platform Work Directive as regards its territorial applicability (cf. recital 19; Art. 1(3)). Challenges derive also from the fact that companies themselves often do not have a physical worksite established within a specific state's territory, which then might lead to legal lacunae as regards

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application of – fundamental – ICW rights (in particular in the first scenario where states' laws follow the territoriality principle).

This complex legal situation has already been addressed at EU-level: In the first phase, consultation of European social partners under Art. 154 TFEU on possible EU action in the area of telework and workers' right to disconnect, open until 11 June 2024, "***geographical mobility and cross-border telework***" were identified as one of the five areas where challenges exist as regards telework.[54] The consultation document further states that "Member States' public administrations may also encounter difficulties when determining employers' and workers' rights and obligations in terms of social security, taxes and labour law".[55] Consequently, "addressing collective information and consultation rights" is identified as potential area of EU action. In the context of a potential EU initiative on telework, employers "could be required to **inform** and **consult workers' representatives** and, in their absence, workers themselves on any **changes to the organization of work**." Such an initiative could "aim to ensure that **teleworkers** enjoy the **same collective information and consultation rights** as they would **if working** from the **employer's premises** and as comparable workers do." Yet, the question is, where, i.e. in which Member State, should teleworkers enjoy the same collective (fundamental) ICW rights?

The need for respective solutions is highlighted in the social partners' responses to the aforementioned first phase consultation. As CEC European Managers highlight, "(t)he rise of digital nomads and cross-border teleworking necessitates a uniform legal framework to address various organisational and legal challenges." [56] Clear guidelines should be issued on labour laws for remote workers and employers, while at the same time, sector-specific bargaining should be promoted to tailor telework arrangements. Yet, in order to involve worker representatives in telework

[54] C(2024) 2990 final, p. 9.
[55] C(2024) 2990 final, p. 15.
[56] EU leaders call for comprehensive telework policies in response to European Commission's consultation - CEC European Managers (cec-managers.org) (2 October 2024).

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negotiations, as recommended by CEC European Managers, it is necessary to know which workers representatives, regulated by which country's rules, should be competent to engage in such negotiations. Both ETUC and BusinessEurope do not address the issue in-depth in their responses, but refer to the Framework Agreement on the application of Art. 16(1) Regulation 883/2004/EC[57] in case of habitual cross-border telework. As we are going to highlight infra, such a framework for determining the applicable law, i.e. a specific conflict-of-law set of rules, could be a potential solution for ICW rights, too. Nota bene that the existing framework of conflict of law rules does not address the exercise of collective ICW rights;[58] in particular, Art. 8 Rome I Regulation[59] does not apply since information and consultation rights, generally speaking,[60] are not "contractual obligations".

With a view to President von der Leyen's statement that "La démocratie européenne doit être plus participative"[61], we have set out to explore potential legal lacunae when it comes to ICW rights in a cross-border telework context. In other words, which Member State's jurisdiction applies in a cross-border telework context when it comes to ICW? Nota bene that we are aware of the fact that within some of the directives on 'collective rights', such as the EWC Directive (see supra 1.2.1.), solutions for large transnational ('community-scale') undertakings exist. However, their scope is too narrow and does not reflect current economic realities. Nowadays, not only community-scale undertakings with at least 1000 employees

[57] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L166/1.
[58] Contrary to the question of liability for collective action, e.g., which is regulated in Art. 9 Rome II Regulation (Regulation (EC) 2007/864 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (2007) OJ L199/40). Cf. Olaf Deinert, Für ein welt- und zukunftsoffenes IPR der Betriebsverfassung, in Brameshuber/Friedrich/Karl (eds.), Festschrift Franz Marhold (2020) 457 (458).
[59] Regulation (EC) 2008/593 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (2008) OJ L177/6 (Rome I Regulation).
[60] N.b., though, that in some member states dismissal protection is strongly linked to ICW rights. In Germany, e.g., protection against dismissal under the KSchG – including the respective works council rights – is to be determined according to Art. 8 Rome I Regulation. Cf. Deinert, ibid. 462; Deinert, Reichweite des deutschen Kündigungsschutzgesetzes bei internationalen Sachverhalten, RIW 2008, 148 et seq.
[61] https://ec.europa.eu/commission/presscorner/detail/ov/STATEMENT_24_3871 (26 September 2024).

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operate in a transnational way; taking into account that ICW rights are a fundamental right (see supra I.), the EU legislator should strive for enabling employees and their representatives to actually exercise their rights, not least by establishing clear conflict of law rules.

To this aim, we carried out two case studies based on a mass-redundancy scenario, one of the "classical" topics where information and consultation rights apply in all Member States, not least because of the need to implement the Framework Directive and the Collective Redundancies Directive. Nota bene, though, that the focus was on the information and consultation with the respective employee representative bodies (cf. Art. 2 Collective Redundancies Directive), not on notification of the competent public authorities (as provided for by Art. 3 and 4 Collective Redundancies Directive). The research has revealed, though, that the same question of the applicable law applies to the other 'classical' areas where information and consultation with employee representative bodies is required, be it transfer of undertakings or health and safety (under the OSH Directive). The explanation for this is that most of the relevant provisions in the mentioned directives refer to national law when it comes to the question of whom to inform and consult with[62] and within which entity the procedure should be established[63].

[62] Cf.
- Art. 2 (e) Framework Directive: '"employees' representatives" means the employees' representatives provided for by national laws and/or practices'.
- Art. 1(1)(b) Collective Redundancies Directive: 'workers' representatives` means the workers' representatives provided for by the laws or practices of the Member States.

[63] Cf.
- Art. 2 (a) Framework Directive: "undertaking" means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States
- Art. 2 (b) Framework Directive: "establishment" means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources

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It follows that relevant issues revealed by the case studies were the different approaches in the Member States on the entity in which ICW rights are vested and the applicable connecting factors.

A. Case study

The case study concerns an enterprise with 60 employees in the relevant Member States, 900 in total, and a management team of 4 persons. Three different situations are envisaged: (1) only workers are present in the so-called home Member State (i.e. the project partner's own jurisdiction), (2) only management (4 persons) is present in the home Member State, (3) both (60+4 persons) are present in the home Member State.

1. Only workers present in the home Member State

In the first situation, the management is in a fictitious Member State, while 60 persons work in the home state, i.e. the state where the project partner is situated. They all work as teleworkers in the sense that there is no common place of work, no central facilities in the home state, and, most importantly, no physical worksite. The research question was whether the ICW rights existed in case 30 of these workers were to be dismissed. The responses collected show a diverse pattern. A first relevant distinction needs to be made between the systems of representation in the Member States.

a) Member States that do *not* vest information & consultation rights in a Works Council

In some states (e.g. Ireland, Sweden, Estonia, Romania) no works council exists, and information and consultation rights are vested in the trade unions (Sweden, Ireland, Spain as an alternative option, Portugal if no works council exists, Italy), a staff association, or in the absence of a staff association or trade union, employees specifically elected for ICW purposes during the redundancy process (Ireland), or a trustee / shop steward (Estonia, Turkey). This also means that in these systems, it is

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not relevant whether an establishment exists in which a works council could be established.

Thus, as it is irrelevant whether an establishment exists, other connecting factors have to be used. This can be the seat of the contractual employer on the national territory, like in **Ireland**. The **Swedish** system links ICW rights to a Swedish trade union. If a trade union has concluded a collective agreement with an employer (as is the case for 90 % of employers), Swedish ICW rights are triggered.[64] A situation like the one at hand, where no employer exists in Sweden, only teleworkers working in/from Sweden, is hardly imaginable. In case of this unlikely situation, for ICW rights to be applied, a company across the border would need to enter into a collective agreement. Without such an agreement, though, ICW rights would not apply; a potential legal lacuna.

The **Irish** approach makes ICW conditional on the existence of a trade union/staff association that regularly bargains with the employer or ad hoc employee representatives. The law is silent on the issue of extra-territorial application. As the relevant factor in Irish law is the contractual seat of the employer, the ICW law of the fictitious Member State would apply.

The **Turkish** law also uses the existence and involvement of a Turkish trade union / shop steward as connecting factor for ICW rights. Other countries use the law applicable to the employment contract as connecting factor, like in **Poland**: if the employer wants to terminate employment contracts, Polish ICW rights apply only if the law applicable to the employment contracts is Polish law. The same is true for **Romania** in the case of collective redundancies.

[64] Also trade unions not bound by a collective agreement with the employer but with a member and previous member in the workplace have information and consultation rights, albeit more limited. In companies where the employer is not bound by any collective agreement and where all employees are non-union members, there is no employee representation unless otherwise explicitly stated in statutory law.

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b) Member States that established a system of works councils

Other Member States vest ICW rights in works councils, to be established in an establishment within the meaning of Directive 2002/14/EC (**Germany**, **Austria**, the **Netherlands**, **Portugal**, **Spain**; **Poland** and **France** under a different name).

In these countries, the connecting factor for ICW rights to be applied is usually twofold: there has to be an establishment according to national rules on the territory of the state in question (1) and the workers need to be integrated into/affiliated with that establishment (2). The main issue to be solved is whether an establishment exists on the national territory. This establishment must abide by the national rules on information and consultation procedures. The case study specifically also asked whether for an establishment to be present, national law requires some specific form or organisation, hierarchy, connectivity of a (common) physical workplace.

Concerning the question of the establishment, national rules necessitate a minimum number of employees (the range found was 5-50) on the territory of that Member State to trigger the geographically applicable rules on ICW. Sixty persons being present in the home Member State as such would fulfil the numerical requirement.

The question on the need for organisation and structure was an interesting one that showed different approaches. Certain countries (**Germany**, **Austria**, the **Netherlands**, **Estonia**, **Hungary**, **Turkey**, **France**, **Spain**) require a minimum of cohesion, hierarchy and direction for an establishment on the national territory to be present. Sixty teleworkers that do not work for the same purpose and have no internal hierarchy, structure or management, do not qualify as an establishment in any of the countries mentioned. Yet, doctrinal discussion in several countries shows that the integration of teleworkers into a company's hierarchy and structure can also be realized via appropriate communication options, e.g. videoconferencing.[65] Further doctrinal discussion centres around the question of whether – even without

[65] Cf. Eichmeyer/Egger, Ausgewählte Praxisfragen zum Homeoffice, RdW 2020, 848 (850 for Austria).

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any physical establishment present in the home Member State – working together via digital tools in order to reach a common company goal would actually be sufficient to trigger the home Member State's ICW rules.[66] This should be taken into account not least from the point of view of potential forum shopping: One simply needs to imagine that a company establishes its postal office in a Member State with rather weak ICW rights, although the majority of employees works in another Member State/in several other Member States. Without taking into consideration that ICW could also be triggered by persons working together via digital tools, companies could apply potential circumvention-strategies. The question not yet solved, though, is which state's ICW rights should apply in such a case. In other words, which elements (should) trigger the application of ICW rights?[67]

The **French** system works slightly differently, but with a similar outcome, as it requires an entity that acts as employer on French territory. This includes direction and control. In case these are exercised from abroad (as in the case study, with the managerial personnel acting from the fictitious Member State), no French "employer" exists. This also means that no information and consultation rights based on French law exist. However, in case of 'collectivity of interests' in France, the outcome is a different one: When employees work under the direction of the same authority (the same "employer" or its representative), they necessarily have common interests. They form a community of workers that can be represented, even if the company is structured in such a way that no permanent representative of the company is established on the French territory. Indeed, the employer can act as an employer from abroad. Thus, the presence of the workers carrying out their work under the same direction in France (even if the entity/person exercising this direction is located in another country) is enough to characterise a community of workers having common interest. Thus, they must be given the means to ensure ICW rights in France according to French law.

[66] Ludvik, Der Internationale Betrieb (Linde 2021).
[67] See infra II.C.

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Italian law requires a physical production unit established in Italy for national ICW rules to be applicable. Teleworkers will generally be deemed to be part of the production unit that issues their orders and directs their work. If the direction and control originate outside Italy, there is no Italian production unit and therefore Italian ICW rights will not apply.

On the requirement of a physical workplace, hardly any case law or doctrinal discussion exists (yet). The general view is that no state explicitly requires a common physical workplace but that the provisions currently in place seem to imply there should be a common centre of interest, direction and control. Therefore, the question whether a physical, common workspace is necessary for ICW rights to apply cannot yet be answered finally (mainly because the existing legal rules do not take account of such a scenario where no common physical workspace exists, and because there is hardly any case law yet which could serve as guidance to interpreting the existing rules).

2. Only management present in home Member State

In the **second situation**, it is the management that is present in the home Member State while no (other) employees are present; however, employees are present in several other Member States (60 in each of them). Also in this scenario, we wanted to know whether ICW rights of the home Member State apply. If so, the follow-up question was whether the employees that are dismissed but who physically work in the other Member States need to be taken into account as regards information and consultation rights.

Generally speaking, in this case the states that opt for representation of workers by a works council (see above sub b) were positive on the existence of an establishment on the national territory to which national information and consultation rights apply, although in some Member States, problems might arise as regards realisation of a common outcome within this establishment, if – apart

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from the management personnel – no workers are situated in the home Member State (question of territoriality; cf. **Austria** and **Germany**). In addition, all reports encountered problems regarding the thresholds for the establishment of a works council (the minimum encountered was 5 employees). Therefore, if only management is to count, no information and consultation rights apply.

However, the case study explicitly asked whether it is possible to take into account those employees working from across the border. As the establishment to which the employees would be linked is in the Member State, application of the national rules on information and consultation would not be an issue, as they are tied to an establishment within the territory. (Doctrine in) Several countries accept that employees based in another Member State but tied to the establishment in the home Member State by an employment contract or by other factors creating a certain kind of connection may be counted as employees. In **Austria**, doctrine frames this approach as the so-called "Ausstrahlung" (extension; employment contract with the establishment in the home Member State is not a conditio sine qua non[68]).[69] In **Germany**, the traditional concept to determine the personal scope is the "Zwei-Komponenten-Lehre". So, usually, a contractual relationship and the integration into the work-related purpose of the establishment are prerequisites to take employees into account. This is to determine the personal scope. And usually, the geographical scope is to be determined by the territoriality principle. But more recently, possibilities of "Ausstrahlung" (extension) have been admitted. For a person working from abroad to be taken into account, the person exercising directions regarding time, place and content of the services provided (the employer/persons on behalf of the employer) needs to be present in Germany. Thus,

[68] Provided that the „link" is strong enough (they are connected via digital tools; meet regularly online, work together as a team in order to create a certain outcome). Of course, in most cases those persons abroad will also be employees of the entity (Betrieb) in Austria, but not necessarily.

[69] Cf. *Mosler*, in: Reichel/Pfeil/Urnik (Hrsg.), Crowdinvesting und Crowdworking: Herausforderungen und Chancen, Wien 2018, S. 171 f.

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with regard to existing case law it does not seem impossible to include persons who work abroad.[70]

The **Dutch** system is comparable to the German doctrine, and also requires a real integration in the establishment (which, in theory may be a digital one) as well as an employment contract with the establishment, just as the Portuguese system does. If the contracts were established in **Portugal** (i.e. with a company situated in Portugal, and thus follow Portuguese contract law), if the employees working remotely are digitally connected and if the employer (based in Portugal) has real managing powers, the remote workers need to be taken into account as regards the threshold for ICW rights in Portugal, and need to be informed and consulted with.

Another group of states has a similar approach, but with extra requirements as to the place of hiring. This group consists of France, Italy and Spain. In **France**, if management is located in France, like in the present situation, the management must respect French law. Remote workers will only be taken into account as regards thresholds for ICW rights if they have been recruited in France, regardless of the law applicable to the employment contract.[71] The **Spanish** system works in a comparable way. Only employees hired in Spain (with an employment contract following Spanish law) and working for a Spanish establishment, even abroad, will be considered employees for the purpose of ICW rights. This also seems the only outcome in **Italy** to reconcile two contrary pieces of legislation: teleworkers could be attributed to the production unit if they are directed and controlled from that Italian unit and they are not hired abroad.

Still, other Member States seem to care less about the actual place of work. In **Hungary**, as a general rule, the Labour Code (including collective labour rights)

[70] Cf. BAG Urt. v. 24.5.2018 – 2 AZR 54/18, NZA 2018, 1396 f.

[71] The question of the law applicable to the employment contract is irrelevant for the determination of collective rights in France. If workers have be recruited in France, they will be part of the workforce and also be voters, regardless to the law applicable to the contract (see Cass. Soc. 4 may 1994, n° 91-60.008: employees working in Saudi Arabia, with local contracts, but recruited in France: they are part of the workforce for the elections in the company).

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shall apply if the habitual place of work is in Hungary. Nonetheless, the basic provisions on ICW rights (implementing the provisions of the Framework Directive) apply as imperative rules, as long as the employer's seat is in that country (i.e. Hungary). Whether or not the workers actually work in Hungary seems irrelevant for the application of these general provisions. However, the more detailed rules on the possible material scope of ICW rights apply only if the workers habitually work in Hungary. In **Sweden**, the employer is obliged to start information and consultation with the trade union that co-signed the applicable collective agreement or else, any trade union that has members amongst the employees. If the employees working from abroad are members of a Swedish trade union, this membership triggers ICW rights. The **Irish** system works in a slightly different way but leads to the same outcome: the duty to inform and consult lies with the employer, and if the law applicable to the contracts of employment is Irish law, then ICW rights may include the employees working from outside Ireland. This seems comparable to the **Spanish** model, where the law applicable to the employment contract is an important element. In addition, the work must be carried out for a Spanish employer, regardless of the country of execution. Remote workers are given the same information and consultation rights as workers present on a (central) location. Probably (there are neither cases nor doctrine), the same goes for **Poland**, where the connecting factor for being counted in seems to be the contractual employment relationship between the employer based in Poland and the employee. Thus, also in Poland, it is not unthinkable that the employees working remotely from abroad will be relevant when ICW rights are concerned, under the condition that they are engaged directly by the Polish company. In this case, it is argued that performing work from abroad is not decisive.

B. Interim results

The question of which country's ICW rights apply in cross-border situations, especially where management and labour are separated by a border and where no physical establishment exists, can bring about quite some difficulties, not least

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because in most countries the legislator does not directly refer to these situations. Case law hardly exists either, i.e. that many of the assumptions are based on interpretations of the existing provisions which have not yet been confirmed by courts. It also became clear that different systems and different connecting factors are used to vest ICW rights. This as such can lead to double protection or a "protection void", neither of which should be aspired.

Generally speaking, in countries that vest ICW rights in a works council, it can be easy to prevent an establishment from existing on national territory by keeping management decisions outside the country. Information and consultation rights will then be difficult to establish. If the rights are vested in a trade union or other partner, it all seems to depend on the employer's willingness to accept a "foreign" trade union as a bargaining partner. Considering the fundamental nature of ICW rights, their impact on "economic democracy" and employee voice, a more robust way of safeguarding these rights should be discussed.

C. A common nexus applicable to all jurisdictions as regards ICW rights in a cross-border telework-context

Taking into account the underlying rationale of ICW rights, i.e. mitigating negative consequences deriving not least from an ever-increasing pressure of competition between companies, namely by establishing anticipatory and permanent ICW at the workplace, but also contributing to an enhancement of a company's competitiveness,[72] and given the fundamental rights nature of ICW rights, it should be in the interests of all stakeholders to establish a set of rules facilitating the search for the most suitable ICW rights to be applied in a cross-border telework-context.

The underlying question to be answered is, which momentum, which criteria, which connecting factors are the ones best suited to decide which jurisdiction to apply? In other words, which is the focal point for ICW rights? Nota bene that there

[72] Cf. M Biagi, 'Quality of Work, Industrial Relations and Employee Involvement in Europe: Thinking the Unthinkable?' in M Biagi (ed), Quality of Work and Employee Involvement in Europe (Alphen a/d Rijn, Kluwer Law International, 2002) 3, 13.

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might not be a one-fits-all solution, given the fact that ICW rights do not only exist within the "classical" framework of the Framework Directive, but also as regards OSH, as regards fixed-term and part-time work and most recently also as regards platform work.

Within the DIGILARE project, by conducting a comparative analysis on the basis of the afore-mentioned case studies, we succeeded in filtering out the following existing connecting factors, acknowledged either by law or at least by doctrine in interpretation of existing rules and case law:

- Territoriality (establishment, physical or digital; and employees, but not necessarily)
- The law of the employment contract
- Trade union membership
- The law of the place where employees habitually perform their work
- The law of the state where the "collectivity of interest" is located

A future conflict of law set of rules should strive to find connecting factors that are suitable for cross-border telework cases, where teleworkers might be spread over different (Member) States, also taking into account that there might not exist a physical establishment at all. This, of course, is not to be mixed-up with the question of whether there is an employment relationship at all. Somewhere, an employer/an employing entity needs to 'sit', not least because directions need to be given and because the employment contract needs to be governed by one jurisdiction.

Academic propositions that deviate to a certain extent from the existing connecting factors, but which might enable a solution preventing a legal lacuna, concentrate on the company's focal point.[73] Yet, what is somewhat missing are the criteria according to which this focal point can be established. The company's seat might

[73] Deinert in FS Marhold 464; Junker, Internationales Arbeitsrecht im Konzern (1992) 374 ff; Martiny in MünchKommBGB[8] (2021) Art 8 Rom I-VO para 149.

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be one element. Other factors mentioned in the literature are a certain 'proximity' to the country, without defining how this 'proximity' can be established.[74] However, in particular in those cases where no physical establishment exists, this certainly cannot be the only, single criterion. In these cases, taking into account that ICW rights are rights between employees or their representatives on the one hand and the 'employer' – but not necessarily the contractual one, but the one deciding on organisational changes, health and safety at the workplace etc – on the other, it might prove necessary to actually take into account the place where the relevant decisions, activating ICW rights, are taken. This might be, in the 1st case study, the law of the fictitious state, in the 2nd case study the law of the home Member State, although no employees are present in the respective state. This is also reflected by the Dutch saying 'medezeggenschap hoort bij zeggenschap'[75] ('representation rights should take place where the decisions are taken'). One could also refer to a 'collective place of work'[76], which is not necessarily identical with the employment statute or the place where the employee actually sits and works.

Other criteria which are taken account of as connecting factors in some countries (e.g. **Poland**, **Portugal**, **Romania**), such as the law of the employment contract/a direct contractual legal link between the company located in the respective state and the worker (as in the case of Poland), are rejected in other countries (e.g. in **Germany**), at least when it comes to 'collective rights' stricto sensu (see supra 1.2.1.). The argument brought forward against the employment contract statute as connecting factor for a country's rules on ICW at the workplace are convincing: Within a 'workplace'/company, employees with different employment statutes might work together. Given the fact that the 'workplace'/company/undertaking is

[74] See Martiny in MünchKommBGB[8] (2021) Art 8 Rom I-VO para 149.
[75] I. Zaal, 'De reikwijdte van medezeggenschap', Kluwr, Deventer 2014, p. 2, with reference to R. van het Kaar, E. Smit, Vier scenario's voor de toekomst van medezeggenschap. Grensoverschrijdende organisatieontwikkelingen en medezeggenschap. Besluitvorming in internationaliserende ondernemingen, Van Gorcum, Assen 2002, p. 243; M. Chébti, 'Volgt medezeggenschap de formele of eitelijke zeggenschap in de onderneming, BB 2008, 69; Kantonrechter Rotterdam, 30 maart 2011, RO 2011/68.
[76] Junker, Internationales Arbeitsrecht im Konzern (1992) 375, with reference to Prager, Grenzen der deutschen Mitbestimmung (1979) 20 et seq (in particular 41).

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the entity where decisions are taken which are possibly affecting employees with employment contracts governed by different employment statutes (i.e. not all employment contracts are governed by the same national legislation), a uniform nexus for all these employees as regards the respective ICW rights is only logical.

The case studies as well as the research on the personal scope of ICW showed, though, that it might be necessary to apply different connecting factors within the different groups of directives and provisions legislation on ICW rights: Whereas it seems clear that as regards directives on 'collective rights' and the company restructuring directives, the aforementioned 'collective place of work'-nexus, taking into account of where decisions are actually taken, should prevail, other directives, in particular those on fundamental rights, might call for the necessity of establishing a different nexus, e.g. the one of the actual place of work of the employee.

III. Conclusions and Outlook

The comparative studies conducted within the first two coordinates of the DIGILARE project reflect the trends of industrial relations of each national system and revealed, once again, the difficulties of comparing legal labour systems which leave a great deal of collective autonomy to the social partners, such as Sweden or Romania (the latter one only as regards ICW rights), with countries such as France, which believe above all in legislative regulation. This observation involves not only collective relations, but also the very conception of the contractual employment relationship. While some countries (France, Italy, Poland) are increasing the number of employment statuses by law, others (Estonia, Sweden) are leaving it up to the unions to choose the categories of workers they represent.

Another observation can be made about the opening up of the scope of application of the directives when it comes to fundamental rights. These minimum rights must be recognised and implemented for all workers, whatever their legal status. Finally, it also seems that in several countries the scope of application of employees'

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information and consultation rights is being extended to economically dependent or solo self-employed workers (Romania). This trend follows that of EU law itself.

A third observation relates to the question of which jurisdiction is the competent one as regards ICW rights in a transnational setting. The first transnational seminar revealed that in practice, ICW rights are not yet the pressing issue; first and foremost, employers are concerned with social security and tax issues. Social security law, though, is a showcase example which allows for drawing some parallels with ICW rights. First, as regards social security in a cross-border context, no harmonisation has taken place so far, but rather coordination by Regulation (EC) 883/2004. Its Art. 12 et seq. establish rules on which social security regime to apply in cases where persons engage in economic activity (employed or self-employed) in more than one Member State. ICW rights are also a field of Union law where harmonisation hardly exists – although in some fields ICW rights are mandatorily established, no 'uniform' representative bodies exist, except in the case of some of the 'collective rights' directives, such as the EWC Directive. What is more important, though – again with the exception of the EWC Directive and the like – is that contrary to social security coordination, no 'coordination' of ICW rights in a transnational context exists. Whereas conflict of law rules exist on social security issues or on issues related to the individual employment contract (cf. Art. 8 and 9 Rome I Regulation), there is a legal lacuna as regards ICW rights in a transnational context.

The discussions with stakeholders during the first transnational seminar have revealed, that in practice, 'easy' solutions are being sought after, in particular by setting up companies/undertakings in all countries involved/where employees actually 'sit'. This often allows for applying the country's ICW rules where the company is established, which is often also the contractual partner of the employment relationship.

Yet, this might not be the solution envisaged by all companies (not least because of economic reasons). Thus, as suggested under II.C., a conflict of law set of rules

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should be sought after, establishing which country's jurisdiction applies. One possibility could be to state so in each of the mentioned directives. Another would be to amend either of the two Rome Regulations (although we acknowledge that neither fits 100 %) and establish respective rules. A third one would be to give the floor to social partners.

Topics that would need to be discussed when creating a conflict of law set of rules are:

1. The position of trade unions in national industrial relations systems: who can represent and whom do they represent (including employees located in other Member States?)
2. Are there significant differences between single and dual channel systems? For example, what is the significance of rights being granted to a Works Council rather than trade unions or individuals? What is the situation where a Works Council should or at least could exist (by law) but does not (in practice)?
3. Once it is established which country's rules should apply, is it necessary to provide for rules on which employees to take account of as regards thresholds, e.g. when it comes to establishing an employee representative body. Is it necessary to establish the extension of this country's rules to all employees affected by the decisions as regards the 'collective place of work', or does the mere establishment of a so-called collective place of work already imply its potential extension to employees located in other Member States?

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