



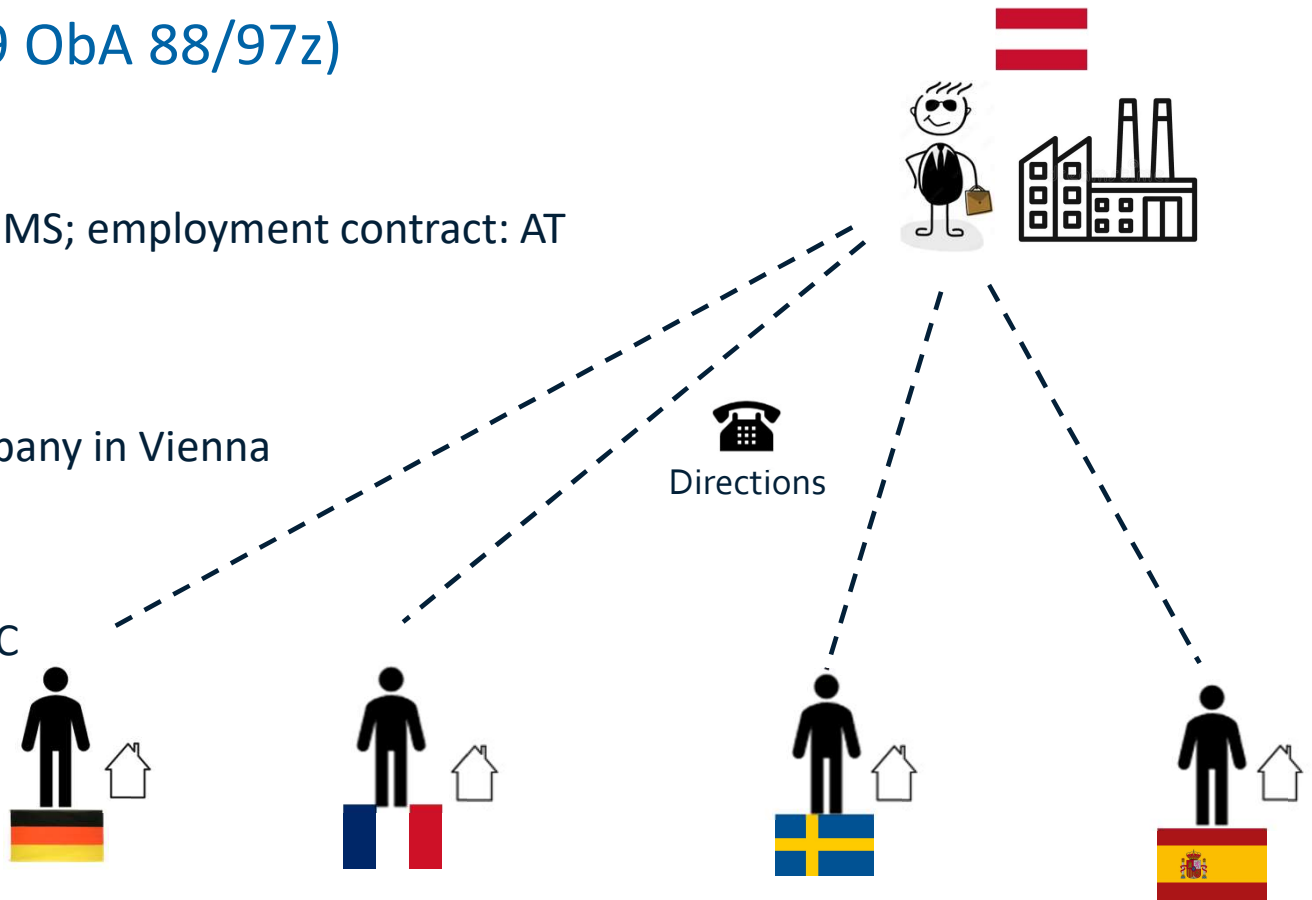
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Information and consultation rights in a transnational digital world of work: assessing the need for a conflict of law-rule

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1st example (OGH 26.3.1997, 9 ObA 88/97z)

- 4 sales representatives
 - Social security, taxes in home MS; employment contract: AT
- No workplace in Vienna
- Regular contact with head of company in Vienna
- Physical company in Vienna
- **Intro of AI management tool – I&C**
 - Works council in Vienna
 - Representation of sales reps?
 - Redundancy plan?

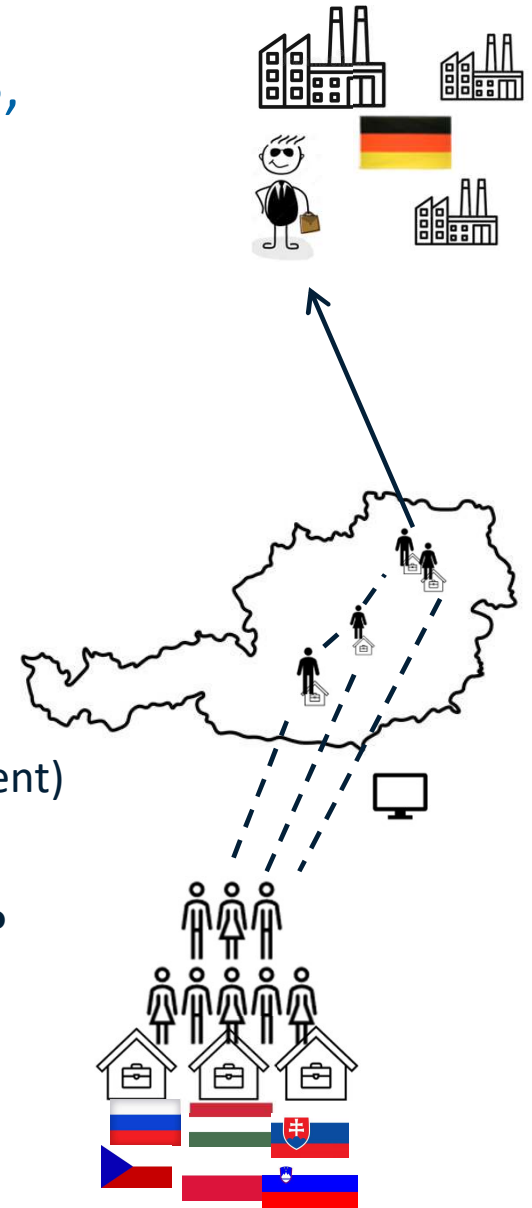


OGH (1997!):

Communication possibilities enabled sales reps to work together within one representative unit situated in Austria – **sales representatives belong to the Austrian establishment**

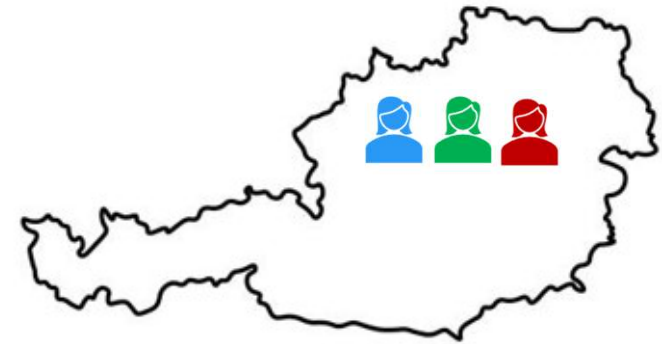
2nd example (cf. OGH 22.1.2020, 9 ObA 89/19g and 25.6.2025, 9 ObA 94/24z)

- Chemical industry; several production units, companies in GER; no physical production site in AT
- **„CEE Sales Team“**
 - Sale in Mid and Eastern Europe; 12 employees
 - 4 employees in AT; telework from home; head of CEE Sales Team in Vienna
 - 8 employees in different countries, teleworking from home
 - Digital communication
 - Head of CEE Sales team leads the team (coordination; leave management)
 - Report to head of sales in MUC
- **Intro of AI management tool – which rules regarding I&C apply? AT? GER?**
 - „establishment“ in AT/GER?
 - Min 5 employees; „extension“? GER: “Zwei-Komponenten-Lehre”



Transnational matrix-organisation (within one company)

- Central management in AT
- Employees of different company units work in different countries, but together via digital tools, sometimes from home, sometimes at one physical work site
- **Intro of AI management tool – which rules regarding I&C apply?**
- Each physical work site (in different MS) as „establishment“?
 - Not under AT law – no ‚uniform management‘
- Undertaking as „establishment“?
 - „extension“ to all employees not present in AT?
 - What if ‘situation’ in FR or ES fulfils national criteria for I&C?



Key question: which state's rules on employee representation?

- What is (relatively) clear:
 - Articles 8, 9 Rome I Regulation do not apply („individual employment contracts“)
 - (Purely) national approaches to regulating the collective dimension of the employment relationship (cf CJEU Erzberger/TUI, C-566/15)
- Why should we care?
 - Article 27 CFREU
 - Introduction of AI, algorithmic management systems: **I&C (Directive 2002/14; Art 26(7) AI Act)**, sometimes co-determination
 - We „learn“ democracy at the workplace
 - Competitive advantages for companies

Need for European
,coordination`

Menu

- Introduction 
- The conflict-of-laws conundrum at the transnational digital workplace
- Potential legal solutions: from territoriality towards a 28th legal regime?
 - [„Transnational‘ company agreements?]
 - A 28th connecting factor?
 - A conflict-of-laws framework
- Conclusion

The conflict-of-laws conundrum at the transnational digital workplace

- No easy solution to be found de lege lata nor by social partners
 - (Outdated) old Social Partner Framework Agreement on Telework (2002)
 - No new agreement (November 2023)
- Connecting factors for I&C under national law and practice [DIGILARE (101126503)]
 - Employment contract (IRL, PL, RO)
 - Trade union membership (SWE; IRL) – cf single/dual channel problematic
 - Establishment (AT, GER, NL, EST, TR, FR, ES)
 - Recruitment in the Member State (FR, ES); ‘collectivity of interests’ (FR)
 - Habitual place of work (HU)

EWC Directive
only for large companies
limited material scope
negotiated solution

The conflict-of-laws conundrum at the transnational digital workplace

- ‚Territoriality‘ as ‚conflict rule‘
 - Circumstances ‚taking place‘ within the territory of the state
 - ‚Extension‘ in some cases (cf 1st example)
 - Lacunae as regards I&C coverage (cf 2nd example)
- Territoriality and its conformity with EU law
 - Autonomous national rule - legal certainty – international harmony of decisions
 - Function: equivalent to Article 8(2) Rome I Regulation (‘in/from which employee habitually carries out her work’)

CJEU C-566/15, Erzberger/TUI

Potential legal solutions: from territoriality towards a 28th legal regime?

- (at least) legal certainty at national level: codification of national private international law (cf French 'projet de codification du droit international privé' 2022)?

'Les règles françaises en matière de représentation collective s'appliquent à tous les travailleurs intégrés de façon étroite et permanente à une communauté de travail ayant des liens prépondérants avec la France. Cette intégration est indépendante de la loi applicable au contrat de travail et du siège de l'employeur de chaque travailleur.'

- 'adapted' autonomous interpretation of central legal terms (eg 'establishment')?
- 28th connecting factor?

Potential legal solutions: from territoriality towards a 28th legal regime?

- 28th legal regime?
 - Cf 13th state-model (revisited) in social security matters (Pieters and Schoukens)
 - Cf EU Inc. proposal COM(2026) 321 final
 - Enhance efficient, competitive company structures
 - Lost opportunity to address employee representation in a broader sense
- DIGILARE(101126503): more comprehensive approach for (digital) cross-border situations, facilitating the internal market
 - Simplifying the application of employee representation mechanisms
 - Reducing the administrative burden on employers
 - Guaranteeing fundamental rights

A conflict-of-laws framework

- Determining which MS rules on employee representation apply in (digital) cross-border situations
- Legal basis: Article 81 TFEU
- Two key rules

A conflict-of-laws framework

In situations where

- (a) **central management** of the undertaking or group of undertakings is situated in **one Member State**, and
- (b) **more than 50 per cent** of employees perform **cross-border telework** in **two or more** Member States (with at least 25 per cent of that group in one Member State) to an extent of **at least 25 per cent** of their **total weekly working time**, whether as employees of the undertaking or of its controlled undertakings or establishments in the Member States, as regards **employee representation all employees** of the undertaking/group are covered by the law of the Member State where **central management is situated**, irrespective of the law governing their individual contracts and irrespective of the law covering the controlled undertakings or establishments.

A conflict-of-laws framework

Where **employees** in each Member State in which cross-border telework is performed meet the national **thresholds** for **representative bodies** and spend at least **50 per cent** of their **working time** in that **Member State**, the **employees** in each such state may decide, by an **all-member ballot** under national law and practice, to establish a **joint employee representative body** by simple majority.

The sole purpose of the joint body is to take the decision described below.

The joint body decides by **simple majority which Member State's rules** regarding employee representation apply. This may be the law of **central management** or the law of **any Member State** where the **thresholds are fulfilled**. If no controlled undertaking or establishment exists in that Member State, central management must designate a representative.

Conclusion

- Article 3(3) TFEU: ‚(...) a highly competitive social market economy, aiming at full employment and social progress’
- *‚La démocratie européenne doit être plus participative’* (von der Leyen, 2024)
- ESP Action Plan: ‘Social dialogue, **information, consultation** and participation of workers and their representatives at different levels (including company and sectoral level) play an **important role** (...), in particular with a view to the ongoing twin transitions and the **changes in the world of work.**’

Looking forward to fruitful and lively discussions!

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