



Project
funded by the
EUROPEAN UNION



**International
Labour
Organization**

FACILITIES FOR TRADE UNION OFFICIALS AND MEMBERS TO EXERCISE THEIR RIGHTS – A COMPARATIVE REVIEW¹

BY FILIP DORSEMONT

PROFESSOR OF LABOUR LAW
UNIVERSITÉ CATHOLIQUE DE
LOUVAIN VRIJE UNIVERSITEIT
BRUSSELS

¹ This technical support project is funded by the Structural Reform Support Programme, and is implemented in cooperation with the European Commission's Directorate-General for Structural Reform Support (DG REFORM) under contract SRSS/S2018/082.

JULY 2020

The content of this report does not reflect the official opinion of the International Labour Office or the European Union. Responsibility for the information and views expressed therein lies entirely with the author.





Table of Acronyms

CFA	Committee on Freedom of Association
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFREU	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ESC	European Social Charter
EU	European Union
EWC	European Works Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization

Table of Contents

Introduction: The background of the project.....	7
The freedom of association and the right to organize as a matrix.....	9
Part I: General Part.....	17
European and international law.....	17
Comparative labour law.....	21
Protection against acts of anti-union discrimination.....	21
Belgium.....	21
Denmark.....	22
France.....	23
Germany.....	23
Italy.....	23
Spain.....	24
Sweden.....	24
Comparative table and conclusions in relation to Anti-union discrimination.....	27
Protection against acts of interference.....	28
Belgium.....	28
Denmark.....	29
France.....	29
Germany.....	30
Italy.....	31
Spain.....	31
Sweden.....	31

Comparative table and conclusions in relation to the principle of non-interference.....	32
Part II: Facilities.....	35
European and international law.....	35
Comparative labour law.....	43
Access to the Workplace:.....	45
Belgium.....	47
Denmark.....	48
France.....	48
Germany.....	49
Italy.....	49
Spain.....	50
Sweden.....	50
Comparative table and conclusions in relation to Access to the Workplace.....	44
Facilities related to functioning (Temporal axe).....	47
Belgium.....	47
Denmark.....	48
France.....	48
Germany.....	49
Italy.....	49
Spain.....	50
Sweden.....	50
Comparative table and conclusions in relation to Functioning (Temporal Axe).....	51
Facilities within the Undertaking (Spatial Axis):.....	53
Belgium.....	53
Denmark.....	53
France.....	53
Germany.....	53
Italy.....	53
Spain.....	53

Comparative table and conclusions in relation with facilities in the Undertaking (Spatial Axe).....	54
Belgium.....	55
Denmark.....	55
France.....	55
Germany.....	55
Italy.....	56
Spain.....	56
Sweden.....	56
Comparative table and conclusions in relation with the communication with management.....	56
Communication with the Constituency:.....	57
Belgium.....	57
Denmark.....	57
France.....	58
Germany.....	58
Italy.....	58
Spain.....	58
Sweden.....	58
Comparative table and conclusions in relation to the communication with the constituency.....	61
Conclusion.....	61
References.....	67



Introduction

Context

1. From 2016 to 2020, the International Labour Office (hereinafter “the Office”) implemented a project in close collaboration with the Government and the social partners in Greece “Supporting the transition from informal to formal economy and addressing undeclared work in Greece”. The project, carried out in three phases, was funded by, and implemented in cooperation with, the European Commission’s Directorate-General for Structural Reform Support (DG REFORM, former SRSS). Following the national tripartite consensus reached about a national three-year roadmap, an Action plan on tackling undeclared work was prepared with the help of the project. The phase two project was then launched in 2018 to support the implementation of a number of actions described in the Action plan, while the third-phase project aimed at supporting the implementation of the Action plan until the end of the roadmap (December 2019). In 2019, the scope of the project was extended to review the framework on individual and collective dispute resolution and trade union rights and facilities for trade union representatives from a comparative European and international perspective.
2. This latest phase of the project has two main objectives. First, the project has provided technical support to the Ministry of Labour and Social Affairs (MoLSA) and to the Greek social partners in the areas of individual and collective dispute resolution and trade union facilities. Second, the project has also aimed at enhancing tripartite consultation and social dialogue on labour law reform processes in these areas.
3. The present report, namely “Facilities for trade union officials and members to exercise their rights – A comparative review” by Professor Filip Dorssemont was commissioned in the framework of the project.² Another report on the “Individual and collective labour dispute settlement systems – A comparative review” was written by Dr Aristeia Koukiadaki. Two background reports on Greece on the same topics had been drafted by Professor Costas Papadimitriou and relevant findings of those were incorporated into the international reports, as background information for the comparative analyses. The comparative report also draws on the outcomes of the inception mission by the ILO project team³ that took place in Athens from 29-31 January 2020, two rounds of individual workshops with government and social partners on 10-11 June 2020 for the presentation and discussion of the two comparative studies, and on 8-9 July 2020 for the presentation and discussion of draft policy recommendations, as well as a tripartite technical workshop on 20 July 2020 for the presentation and discussion of the revised draft policy recommendations. All workshops were carried out through videoconferences.⁴ The report also builds on the responses to the questionnaire that was shared with the Greek constituents in February 2020.

Introduction

² The author is very grateful for the support provided by the ILO project team and particularly for the helpful feedback by Verena Schmidt and Ambra Migliore. He would also like to thank the Greek social partners and the officials from the Ministry of Labour, SEPE and OMED for the enlightening discussions on trade union facilities.

³ The ILO project team comprises: Frédéric Lapeyre, Senior Coordinator on the Informal Economy, ILO; Verena Schmidt, Labour Relations and Collective Bargaining Specialist, ILO; Valérie van Goethem, Labour Law Specialist, ILO; Athina Malagardi, Senior National Consultant; Filip Dorssemont, Professor of Labour Law, Université Catholique de Louvain; Aristeia Koukiadaki, Senior Lecturer in Labour Law, University of Manchester; Costas Papadimitriou, Professor of Labour Law, University of Athens (until his appointment to OMED on 17.02.2020) and Ioannis Koukiadis, Professor Emeritus, Aristotle University of Thessaloniki (July 2020).

⁴ The EC-ILO project organized a tripartite technical meeting on 20 July 2020 via videoconference. During the meeting, the Ministry stated that the ILO technical assistance project on providing comparative practices in the fields of individual and collective disputes and trade union facilities will be the basis for a draft law on the above issues. The draft law is expected to be discussed at the Greek Parliament in the beginning of September 2020. The Ministry also stated that further technical assistance by the ILO would be sought on the reengineering of both SEPE and the “enlarged” OMED. The social partners called for social dialogue on the draft labour law. They also demanded various conditions for the transfer of conciliation services to OMED.

Scope and structure of the report

Scope and structure of the report

4. The report seeks to highlight the common denominator of the two main issues which will be analysed: the right to organize, *id est* the right to form and join organizations of workers or employers, and the facilities granted to workers' representatives. The former is of a more fundamental nature (freedom of assembly, non-discrimination and non-interference), whereas the latter (facilities) is more technical. The countries which will be examined are the following: Belgium, Denmark, France, Germany, Italy, Spain and Sweden.
5. The present report is published as Volume III in a series of three reports which were developed in the framework of the EU ILO project on "Supporting the implementation of the roadmap on tackling undeclared work in Greece". The series of reports read as follows:
 - "Policy recommendations on "Individual and Collective Labour Dispute Settlement Systems" and on "Facilities for trade union officials and members to exercise their rights" (Volume I)
 - Individual and collective labour dispute settlement systems – A comparative review" (by Dr Aristeia Koukiadaki) (Volume II)
 - "Facilities for trade union officials and members to exercise their rights – A comparative review" (by Prof. Filip Dorssemont) (Volume III).

The three reports can be read individually or in a series.

In response to the CEACR observations, the Ministry has stated the following:

- With respect to individual labour disputes, "the Ministry intends to separate the conciliation from labour disputes resolution as described in Article 23, para. 1, of Law 4144/2013, transferring all disputes to O.M.E.D. (collective disputes to be settled by collective agreements and individual disputes to be settled with the consent of the parties). To this end the independence and experience of O.M.E.D. in providing impartial mediation and arbitration services would be strengthened by also adding conciliation, while human resources, technical support and financing would be available. Training programmes for mediators, arbitrators and conciliators would be organized and extended also to the social partners and the Labour Inspectors, while certification procedures will be established for the new conciliators, mediators and arbitrators. Adequate transitional measures shall be taken to ensure the smooth addition of conciliation to O.M.E.D. The inspection of labour law, as the core competence of S.E.P.E., would be strengthened by improving individual disputes procedures, enhanced by the labour law background knowledge and labour market information to be made available as technical advice to employers and employees for the accurate implementation of labour law. Regular training of Labour Inspectors shall be provided."

- With respect to compulsory arbitration, the Ministry provides that "compulsory arbitration for collective disputes has been reformed by Law 4635/2019 and free collective bargaining is developing in Greece in line with international labour standards."

- With respect to the issue of trade union facilities, the Ministry provides that "Association of Persons is not a topic/thematic included in the deliverables requested in the framework of the technical assistance provided by the ILO. In any case, the Ministry always welcomes social dialogue."

Finally, the Ministry stated that "The discussion on all the above issues is expected to generate constructive social dialogue between the social partners, possibly extended to additional issues, and this would further the confidence in tripartite social dialogue on labour policies."

I. The freedom of association and the right to organize as a matrix

6. The right to organize, *id est* the right of workers to form and join workers' organizations of their own choosing and the right of employers to form and join employers' organizations enjoys fundamental right status in international, European and national labour laws. In international and European sources, it has been recognized as a species of a more generic freedom of association. This specificity has added value. Contrary to provisions recognizing the freedom of association in a generic way, it focuses on the holders of the right to organize (workers and employers) and it often highlights the horizon or the objectives of the fundamental right concerned (protection or furthering of interests). Contrary to ordinary associations, it obliges a State to guarantee that workers' and employers' organizations have the essential means to protect or promote the interests of their members.
7. At the **ILO-level**, freedom of association has been recognized – along with its corollary, the effective recognition of the right to collective bargaining⁵ – as a fundamental principle and right at work (1998 ILO Declaration on Fundamental Principles and Rights at Work). Thus, the Freedom of Association Convention, 1948 (No. 87) is one of the eight fundamental ILO Conventions.⁶ Freedom of association and the right to organize entail rights for workers as well as for employers, and their respective organizations and representatives. Contrary to the Right to Organize and Collective Bargaining Convention No. 98 (1949),⁷ which is not applicable to public servants engaged in the administration of the State, Convention No. 87 does not include such exemption stipulating in its Art. 2 that "workers, **without distinction whatsoever**, shall have the right to establish organizations of their own choosing".
8. The most innovative feature of ILO Convention No. 87, enshrined in its Article 2, is its universal application to all workers and employers (without any distinction whatsoever). This provision insists on a universal application of the right to organize and a broad understanding of the notions of workers and employers. It prevents States from adopting discriminatory standards, which prohibit workers or employers to form and join organizations based upon race, political opinion or nationality or that exclude workers or employers from the right to form and join organizations based on the nature of the contract or on the occupational category.⁸

I. The freedom of association and the right to organize as a matrix

⁵ Also included in the list of fundamental principles and rights at work, but less directly relevant to the present study are: The elimination of all forms of forced or compulsory labour; the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

⁶ This Convention was ratified by all the countries studied in this report (Belgium, Denmark, France, Germany, Greece, Italy, Spain and Sweden).

⁷ This Convention was ratified by all the countries studied in this report (Belgium, Denmark, France, Germany, Greece, Italy, Spain and Sweden).

⁸ See INTERNATIONAL LABOUR OFFICE, *Freedom of association. Compilation of decisions of the Freedom of Association Committee*, Geneva, 2018, Paras 315-418. This publication will be referred to as *COMPILATION (ILO)*, 2018.

See also: J. Hodges-Aberheard, "The right to organize in Article 2 of the Convention n° 87-What is meant by wording "without distinction whatsoever?", *International Labour Review*, 1989, pp. 177-194.

9. An important corollary to the right to organize recognized in Convention No. 87 has been added by ILO constituents a year after its adoption and is enshrined in the very first two articles of Convention No. 98. The other provisions of Convention No. 98 deal with the right to collective bargaining, which falls outside the scope of this report. Article 1 deals with the protection of workers and their representatives against acts of anti-union discrimination (Art.1). It states:
1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
 2. Such protection shall apply more particularly in respect of acts calculated to
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."
10. Article 2 of ILO Convention No. 98 applies to workers' and employers' organizations alike. This provision ensures "adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration". The only example given under this provision relates to interference affecting workers' organizations. Article 2 (2) states:
- "In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed to constitute acts of interference within the meaning of this Article."*

11. At the **UN level**, two international instruments need to be highlighted both recognizing the freedom of association specifically. Article 22 of the International Covenant on Civil and Political Rights (ICCPR (1966), acknowledges that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". Article 22 has a second paragraph, which sets the criteria to assess the legitimacy of restrictions to the freedom of association. However, this article shall not prevent the imposition of lawful restrictions on members of the armed forces and the police in their exercise of this right. Such restrictions still need to be lawful, although it is unclear whether the criteria under which this lawfulness needs to be assessed are distinct from the ones mentioned in Article 22 §2 ICCPR. Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) recognizes the right of "everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests." The provisions contain a similar set of criteria allowing the assessment of the legitimacy of restrictions on the exercise of the right to organize. It indicates that the article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or the police or the administration of the State. In summary, the two provisions are divergent from the ILO approach insofar as they do offer explicit tools to assess the legitimacy of restrictions.
- Another difference relates to the fact that the UN instruments do not contain specific provisions on the right to form and join employers' organizations. Furthermore, in Article 22 of the ICCPR, the objective of the trade unions is defined in a more defensive manner (protection of interests) as opposed to the more dynamic phrasing of Article 10 of ILO Convention No. 87 ("the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers"). However, these divergencies need to be mitigated for two distinct reasons. Firstly, this gap has been narrowed by the guidance developed by the ILO supervisory bodies. Secondly, both provisions contain a non-regression clause, precluding "State Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention" (Article 22 (3) of the ICESCR and Article 8 (3) of the ICCPR).

12. Despite the divergences between the two UN provisions, a recent declaration drafted by the two supervisory bodies of both instruments constitutes an interesting stepping-stone to overcome such divergences.⁹
13. At the level of Council of Europe, two fundamental rights instruments need to be put forward: the European Convention on Human Rights (ECHR) (1949) and the European Social Charter (ESC) (1961).
14. Article 11 of the ECHR recognizes that “everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests”. The article has a second paragraph which sets the cumulative criteria that need to be satisfied for a restriction of the right to organize to be legitimate. Although this paragraph states that “this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”, recent case law of the ECHR tends to assess these lawful restrictions in line with the aforementioned cumulative criteria.¹⁰
15. Article 5 of the ESC recognizes the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations.¹¹ Contrary to the ECHR, the European Social Charter includes a generic provision for the assessment of the legitimacy of the rights enshrined in the ESC (Article G) and defines the interests at stake to be protected by trade unions and their actions. They are formulated in a broad way (economic and social), thus precluding a narrow interpretation of these interests as mere occupational interests, as exemplified by a number of *obiter dicta* in cases ruled by the European Court on Human Rights.¹²
16. Unlike in ILO Convention No.87, there is no specific provision recognizing the employers’ right to organize in Article 11 of the ECHR. Instead of the dynamic formulation of “furthering and defending the interests” known from Article 10 of the older ILO Convention No. 87, a less ambitious phrase has been enshrined “protection of interests”. The notion of “protection” gives the erroneous idea that trade unions can only defend interests already protected by law.

⁹ Statement on freedom of association, including the right to form and join trade unions Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f66%2f5&Lang=en

¹⁰ ECtHR, 2 October 2014, nr 32191/09 (*Adefdromil vs France*) and 2 October 2014, nr 10609/10 (*Matelly v France*).

¹¹ Article 5 ESC provides a restriction: “The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations”.

17. At the level of the European Union, the Charter of Fundamental Rights of the **European Union** (CFREU) (2007) came into force more than half a century after the establishment of the European Economic Community. The CFREU has been able to overcome the Cold-War divide between so-called economic, social and cultural rights on the one hand, and civil and political rights on the other hand. Astonishingly, the right to form and join trade unions has not been added under the heading “Solidarity”, but under the heading “Freedom”. Article 12 of the CFREU recognizes the freedom of association at all levels, in particular in political, *trade union* and *civic matters*, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. Contrary to the provisions in the ICCPR and the ECHR, the trade unions have lost their status as the sole association to be explicitly mentioned, as Article 12 (2) also refers to the importance of political parties. No special attention is paid to the issue of employers’ organizations. The CFREU contains a horizontal provision (Article 52) dealing with the issue of the legitimacy of restrictions.
18. All the Nation States under examination have a written Constitution (Belgium, Denmark, France, Germany, Italy, Spain, Sweden). However a distinction can be made between Constitutions which proclaim the freedom of association in a merely generic way (Belgium, Denmark, Sweden), and those which contain specific provisions on the right to organize of workers (and employers). Constitutions which have been adopted rather than just amended after the second World War or after an era of totalitarianism, have frequently heralded the specific right to organize (Italy, France, Germany, Spain).
19. Neither the above-mentioned international treaties, nor the Constitutions address the issues of facilities granted to trade union representatives or workers’ representatives. The issue of facilities emerges in a number of technical ILO conventions and ILO recommendations:
Workers’ Representatives Convention, 1971 (No. 135)¹³
Workers’ Representatives Recommendation, 1971 (No. 143)
Labour Relations (Public Service) Convention, 1978 (No. 151)¹⁴
20. The Preamble of ILO Convention No.135 refers to ILO Convention No.98, whereas ILO Convention no 151 refers to both Conventions No.87 and No. 98.

¹² The approach of the ESC to the restrictions *ratione personae* is divergent from the one adopted in the ECHR. Article 5 of the ESC provides ample leeway for Member States to deprive members of the armed forces of the right to form and join trade unions, whereas Article 11 of the ECHR only allows for the restriction of the right to organize to the detriment of the members of the armed forces. In this respect, there is no distinction within the ECHR between the armed forces, the police and civil servants engaged in the administration of the State. Under the ESC the distinction between police and the armed forces is crucial. The question whether a part of the armed forces exercising police functions can be entirely deprived of the right to organize was examined by the ECSR, which stressed that the notion armed forces had an autonomous meaning. (Conclusions XVIII-1 (2006), Poland 522 European Council of Police Trade Unions (CESP) v. France, Complaint No. 101/2013, §59, European Council of Trade Unions (CESP) v. France, Complaint No.101/2013, Decision on the merits of 27 January 2016, §82) Member States have been given leeway to deprive the armed forces of the right to organize, insofar as these can be qualified as armed forces in this autonomous meaning of Article 5 of the ESC.

¹³ This Convention was ratified by Denmark, France, Germany, Greece, Italy, Spain, Sweden.

¹⁴ This Convention was ratified by Belgium, Denmark, Greece, Italy, Spain, Sweden.



21. In 1951 the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints of violations of freedom of association, whether or not the country concerned had ratified the relevant Conventions. Paragraph 14 of the Special procedures for the examination of complaints alleging violations of freedom of association provides that the mandate of the CFA “consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions.” The International Labour Office published a concise compilation of the decisions of the Freedom of Association Committee. This Compilation evidences on the basis of these decisions the conceptual link between the right to organize and the issue of facilities for workers’ representatives by integrating this issue into the compilation.¹⁵ Thus the following issues are listed under the heading of “facilities”:

- Trade union meetings
- Collection of dues
- Access to the management
- Access to the workplace
- Use of the undertakings facilities
- Free time accorded to workers’ representatives
- Facilities on plantations¹⁶

22. In a seminal contribution related to the justiciability of economic, social and cultural right, Van Hoof distinguished various kinds of State’s obligations stemming from human rights. He distinguishes between obligations to protect and obligations to promote human rights.¹⁷ In a first, more general part, the focus is on some State’s obligations to protect human rights from violations committed by third parties. The human rights concerned are the freedom of assembly and freedom of association, more specifically the right to organize. This part will focus on the importance of the freedom of assembly for trade unions and on the issue of combatting anti-union discrimination and interference. Whereas the former is an issue of constitutional law, the latter (anti-union discrimination and interference) raises issues of comparative labour law. The two parts need to be distinguished, but they cannot be entirely separated. Freedom of assembly, the principle of non-discrimination and the principle of non-interference are key prerequisites for the action of trade union representatives. Trade union representatives acting as agents of colleague workers need to be in touch with both trade unions and their constituency. In order to develop these lines of communication, freedom of assembly is crucial. In practice, they are the most targeted victims of discrimination. Last but not least, they can only be credible as representatives if their trade union is protected against acts of interference from the State and from the employer side.

23. The second part deals with a State’s obligation to *promote* human rights. A State needs to create the conditions which are conducive to the effective exercise of human rights. In the field of the right to organize, this boils down to an obligation to guarantee facilities for trade unions and for trade union representatives in the field of workers’ representation at large. These facilities will constitute obligations put in place incumbent upon the employers of workers’ representatives and even of trade union officials on the payroll of employers.

¹⁵ INTERNATIONAL LABOUR OFFICE, *Freedom of association. Compilation of decisions of the Freedom of Association Committee*, Geneva, 2018, Paras. 295-300. This publication will be referred to as *COMPILATION (ILO)*, 2018. The compilation is also accessible through an online database: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO::> [accessed 19.5.2020].

¹⁶ This study will however not deal with the specific, sectoral issue of facilities on plantations.

¹⁷ G. Van Hoof, “The legal nature of economic, social and cultural rights: a rebuttal of some traditional views”, in P. ALSTON and K. TOMASEVSKI (ed), *The right to food*, M. Nijhoff Publishers, 1984, 97-110.

II. Part I: General Part

European and international law

24. Freedom of assembly enjoys a special status in the field of industrial relations for a variety of reasons. A number of instruments have proclaimed freedom of assembly and freedom of association within the same provision.¹⁸ As early as 1970, the International Labour Conference adopted a resolution concerning trade union rights and their relation to civil liberties:¹⁹

II. Part I:
General Part

“Recognizes that the rights conferred upon workers’ and employers’ organizations must be based on respect for those civil liberties which have been enunciated in particular in the Universal Declaration of Human Rights and in the International Covenants on Civil and Political Rights and that the absence of these civil liberties removes all meaning from the concept of trade union rights.”

*Places special emphasis on the following civil liberties, as defined in the Universal Declaration of Human Rights, which are essential for the normal exercise of trade union rights:
(....)*

(c) freedom of assembly”.

25. The Compilation of decisions of the Committee on Freedom of Association clarifies why freedom of assembly is vital for the exercise of the freedom of association. In the Compilation, freedom of assembly is construed as a legal foundation for the holding of internal meetings of trade union organizations, federations and confederations as well as ensuring the international dimension of trade unionism and public demonstrations related to the defence of workers’ interests. Throughout its body of decisions, the Committee of Freedom of Association stresses the obligation of State authorities to respect the freedom of assembly, by means of not interfering in the internal meetings and by not refusing to authorize public demonstrations in an arbitrary way.²⁰ Freedom of Assembly also entails positive obligations for State authorities, as evidenced by standing case law of the European Court on Human Rights. Member States having ratified the ECHR have to take the necessary measures in order to protect people who want to demonstrate against acts of violence coming from opponents, rather than prohibiting demonstrations for reasons of disturbance of the public order.²¹ Although this case law relates to public demonstrations, there is no reason not to extend these obligations to the holding of internal trade union meetings. In this respect, it is worthwhile to indicate that freedom of expression is intertwined with freedom of association and has been recognized as an essential means to protect workers interests in the case *Palomo Sanchez vs Spain*.²²

¹⁸ Article 11, ECHR and Article 12, CFREU.

¹⁹ See COMPILATION (ILO), 2018, Para 77.

²⁰ COMPILATION (ILO), 2018, Paras 202-230

²¹ See in this respect: ECtHR, 21 June 1988, nr. 10126/82 (*Plattform  rtze f r das Lebe, vs Austria*); 21 October 2010, nr.4916/07 (*Alekseyev vs Russia*); ECtHR, 24 February 2015, 42757/09 (*Promo lex and others v Moldavia*); ECtHR, 1st May 2015, nr. 73235:12 (*Identoba vs Rusland*).

²² ECtHR, 12 September 2011, nr.28955/06 (*Palomo Sanchez vs Spain*).

26. Another important issue is the protection against acts of anti-union discrimination enshrined in Art. 1, ILO Convention No. 98. According to the ILO Committee on Freedom of Association, "Anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions".²³ Acts of anti-union discrimination affect workers as well as workers' representatives and can occur at all stages of the employment relation (recruitment, working condition, promotion, dismissal) as well as at all stages of trade union activity (while setting up a trade union, during its existence and after its dissolution).

27. Although the ILO Convention No. 98 does not set out any specific provision regarding the burden of proof in case of an anti-union discrimination complaint, Article 3 does provide that States have to ensure the establishment of "a machinery appropriate to national conditions for the purpose of ensuring respect for the right to organise". The absence of a mechanism providing the alleviation of the burden of proof in cases of anti-union discrimination is at variance with such an obligation. The ILO Workers' Representatives Recommendation 1971 (No. 143) states in this respect that:

"(1) Where there are not sufficient relevant protective measures applicable to workers in general, specific measures should be taken to ensure effective protection of workers' representatives.
(2) These might include such measures as the following:

(e) provision for laying upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative, the burden of proving that such action was justified;"

28. The Committee on Freedom of Association (CFA) has drawn attention to the Workers' Representatives Recommendation, 1971 (No. 143) in this respect just as well as the Committee of experts on the Application of Conventions and Recommendations.²⁴

²³ COMPILATION (ILO), 2018, Para1072.

²⁴ COMPILATION (ILO), 2018, Para 1146 and International Labour Conference, 101st Session, 2012, *Giving globalization a human face, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)*, nr. 191.

²⁵ ECtHR, 30 July 2009, 67336/01 (*Danilenkov and others v Russia*).

²⁶ In § 130 of *Danilenkov and others v Russia*, the ECtHR gives however a hint of such a reversal of the burden of proof, where it states:

"It therefore agrees that the clear negative effects of DUR membership on the applicants were sufficient to constitute a *prima facie* case of discrimination in the enjoyment of the rights guaranteed by Article 11 of the Convention."

29. Importantly, recognition of the protection that should be ensured for workers and their representatives against acts of anti-union discrimination is also enshrined in the jurisprudence of the European Court on Human Rights (ECHR), and in particular in *Danilenkov v Russia*²⁵ where:

124. *The Court finds crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages and other relief. Therefore, States are required under Articles 11 and 14 of the Convention to set up a judicial system that ensures real and effective protection against anti-union discrimination.*

Although the ECHR has indicated that a burden of proof "beyond reasonable doubt" is too heavy, it has not had the occasion to state that combatting anti-union discrimination requires a reversal of the burden of proof.²⁶

30. Furthermore, the CFA and the CEACR²⁷ have stated the importance of dissuasive and effective sanctions to ensure workers' effective protection against acts of anti-union discrimination. In this regard, whenever workers' or their trade union representatives suffer acts of anti-union discrimination the CFA has stated that "reinstatement should be available" to them.²⁸ Full compensation is seen as a subsidiary solution, if reinstatement is not possible for objective reasons, such as the amount of time elapsed since the dismissal which might make it impossible to reinstate the worker.²⁹ The CFA specifies that "the compensation should be adequate, taking into account both the damage incurred and the need to prevent the repetition of such situations in the future",³⁰ therefore recognizing the need for sanctions to be dissuasive.

31. The European Court on Human Rights in *Tek Gıda İş Sendikası v. Turkey* ruled that the subjective choice incumbent upon an employer between reinstatement and compensation of one year constituted a disproportionate restriction of the freedom of association.³¹

32. Last but not least, there is the concept that workers' organizations shall be protected from acts of interference from employers, their organizations and/or the State and/or public administrations. This protection does not primarily relate to individual workers or employers, but to the organizations set up by these workers and employers separately.

²⁷ International Labour Conference, 101st Session, 2012, *Giving globalization a human face, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)*, nr. 182.

²⁸ Cf. para. 1163 *Compilation of Decisions of the Committee on Freedom of Association*, 2018, International Labour Office, p.218

²⁹ COMPILATION (ILO), 2018, 1170 and 1172 *Compilation of Decisions of the Committee on*

³⁰ Cf. para. 1173, *Compilation of Decisions of the Committee on Freedom of Association*, 2018, International Labour Office, p.219

³¹ ECtHR, 4 April 2017, nr. 35009/05 (*Tek Gıda İş Sendikası v. Turkey*).

33. The protection against acts of interference stemming from the government is at the heart of numerous provisions of ILO Convention No. 87 (Articles 3, 4 and 7). Article 3.2 protects the internal autonomy of workers' and employers' organizations against acts of interference. Article 4 states that the "organizations cannot be held liable to be dissolved or suspended by administrative authority". Last but not least, Article 7 provides that "the acquisition of legal personality by workers' and employers' organizations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions".

34. The protection against acts of interference from each other is enshrined in Article 2 of the ILO Convention No. 98, which states that:

"1. Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed to constitute acts of interference within the meaning of this Article".

35. The textbook example is the case of yellow unions, *id est* unions at plant or enterprise level which lack an essential and decisive characteristic of what a worker organization is supposed to be: a structure which is independent from potential rivals having non identical and sometimes conflicting interests. Thus, §1195 of the Compilation provides:

1195. The intervention by an employer to promote the establishment of a parallel trade union constitutes an act of interference by the employer in the functioning of a workers' association, which is prohibited under Article 2 of Convention No. 98.

Comparative labour law

36. The analysis below is based on the country profiles in the ILO's "Global Legal Database on Industrial Relations"³² and an analysis of the primary sources quoted in these country profiles as well as a number of doctrinal manuals quoted in the bibliography below.

Protection against acts of anti-union discrimination

37. The question arises how a number of European States with different legal frameworks have tried to institute a protection against acts of anti-union discrimination.

Protection against acts of anti-union discrimination

Belgium

38. In Belgium, due to a decision of the Constitutional court, the legislator was instructed to add "trade union convictions" to a list of criteria listed in the Law of 10 May 2007 combatting various forms of discrimination.³³ The Constitutional Court argued that the legislator intended to combat all forms of discrimination associated with human rights. Unequal treatment of victims of discrimination could not be justified. Since, the statutory instrument solely protected victims of discrimination based upon religious and political convictions and not upon trade union convictions, the Constitutional Court instructed the legislator to add "trade union convictions". Thus, the statutory instrument now combats discrimination on a variety of grounds (religion or belief, political convictions and trade union convictions) (*convictions syndicales*). Anti-union discrimination had to be added to the list of criteria, since it is intertwined with the right to organize as a human right. The law addresses anti-union discrimination inter alia in the field of employment relations. It constitutes added value in respect of older and currently applicable provisions sanctioning forms of harassment and discrimination related to trade union membership. These older and currently applicable provisions are criminal provisions, deprived of a reversal of the burden of proof, and are based upon proof of the existence of a specific intention on the part of the employer to violate the freedom of association. Other provisions of a civil law nature neither provide for a reversal of the burden of proof, nor can they be enforced, as the 2007 law provides, by mild sanctions imposed through a fast procedure (*"action en référé"*).

Belgium

39. Under the Law of 10 May 2007, workers who claim to be victims of acts of anti-union discrimination enjoy the procedural safeguard of the reversal of the burden of proof provided that facts allow to presume the existence of discrimination. Workers can also opt for a compensation by means of a forfeit of 6 months, discharging them of the necessity to prove the extent of the damage or to demand the cessation of the discriminatory situation.

³² See: www.ilo.org/global/topics/collective-bargaining-labour-relations/WCMS_507552/lang-en/index.htm. Accessed on 12.5.2020.

³³ *Cour constitutionnelle*, 2 April 2009, nr. 64/2009.

40. The Belgian legislator offers an alternative protection against discriminatory dismissal suffered from workers' representatives having a seat in works councils and in health and safety committees (Law of 19 March 1991). This protection cannot be combined with the compensation offered in case of discriminatory dismissal, but usually will guarantee a compensation which is larger than the 6 months forfeit, depending on the remaining term of the representative's mandate. There is no right to reinstatement in neither of the two laws.

Denmark

- Denmark** 41. The system of industrial relations in Denmark is an example of a convention-based system. It is not primarily based on statutory legislation, but on (basic) agreements concluded between the major representative trade union (LO) and the major employers' organization (DA) ever since 1899. In this respect, the system of industrial relations could be described as what the Italian theory calls *ordinamento intersindacale*, i.e. it is not based upon statutory legislation but is instituted by autonomous rules made by social partners.
42. Acts of anti-union discrimination affecting unionized workers, who are covered by collective agreements, constitute violation of the implicit obligations stemming from these agreements. It runs counter to the idea of contractual good faith (*bonne foi, Treu und Glauben*). Acts of anti-union discrimination will thus be sanctioned according to the rules related to the enforcement of collective agreements. Therefore, the Labour court can adjudicate a financial penalty to an employer for the breach of a collective agreement. In this system the lawsuit needs to be brought before the Labour court not by the worker who has suffered the discriminatory treatment, but rather by the trade union as a signatory party to the collective agreement violated by the anti-union discriminatory act.
43. Furthermore, there is a special statutory act on the freedom of association (*Foreningsfrihedsloven*), which has been adopted in the aftermath of the ECtHR case law on the negative freedom of association.³⁴ The negative freedom of association relates to the right of a worker not to be member of a trade union. Hence, the conclusion of an employment contract cannot be made dependent upon membership (pre-entry closed shop) nor can the dismissal of a worker be based on the non-unionization of the worker (post-entry closed shop).
44. This special statutory act deals with the prohibition of dismissal on the basis of trade union membership or the absence of trade union membership. For both the private and the public sector, the sanction is reinstatement. However, if the employer belongs to the private sector, in the event of special circumstances which render reinstatement unreasonable, the employee is entitled to compensation equal to a maximum of twenty-four standard monthly salaries. Under this provision, the employee who has suffered discriminatory treatment has more direct access to justice.

³⁴ See ECtHR, 11 January 2006, 52562/99 52620/99 (*Sorensen and Rasmussen v Denmark*)

France

- France** 45. In France, Article L2141-5 of the Labour Code (*Code du travail*) prohibits employer discrimination against an employee due to membership in a trade union or the exercise of trade union activities. It applies to decisions on recruitment, work organization, training, promotion, remuneration, social benefits, disciplinary measures and dismissal. Violation of this provision entails legal consequences under both the civil and penal laws (See Article L2146-2, Code du travail). The civil sanctions in case of anti-union discrimination will entail the annulment of the discriminatory act and, therefore, reinstatement of the dismissed worker. The French judiciary has applied a reversal of the burden of proof, which was enshrined subsequently in Article 4 of the Law no. 2008-496 of 27 May 2008.

Germany

- Germany** 46. A key provision of German law on the combat against anti-union discrimination is §75 of the Labour Relations Act (*Betriebsverfassungsgesetz*). This provision bestows a duty on the employer and the works council, requesting them "to be vigilant" towards unfavourable treatment on the grounds of trade union activities (*gewerkschaftliche Betätigung*). The concrete legal effects of this duty of vigilance are unclear. Such duty seems to suggest that both employers and works councils are equally responsible to enforce, at grassroots level, the prohibition of anti-union discrimination. The more substantive legal ground to combat anti-union discrimination is Article 9 §3 of the German Basic Law. This constitutional provision does not simply consecrate the right to organize for the protection and promotion of workers' interests, but also stipulates a sanction, stating that agreements and measures which restrict or impede this right are null and void and that measures which seek to restrict or impede the right to organize are unlawful. This provision naturally deals with both trade union membership and activities.

Italy

- Italy** 47. In Italy, anti-union discrimination is prohibited by Article 15 of the Workers' Statute (*Statuto dei lavoratori*). This provision prohibits agreements and unilateral acts which intend to make recruitment dependent on affiliation or non-affiliation to a trade union or which seek to dismiss a worker, to discriminate against a worker in the assignment of certain tasks, in posting the worker, in inflicting a disciplinary sanction, or to provoke any kind of damage based on their trade union activity or participation in a strike. Any act of such kind is considered null and void. Furthermore, Article 38 of the *Statuto dei lavoratori* provides for criminal sanctions. Anti-union discrimination can also be organized more subtly, by granting advantages or extending a more favourable treatment in a way which is discriminatory all the same. Article 16 of the *Statuto dei lavoratori* prohibits this kind of (collective) favourable treatment. Overall, the Statute combats discrimination through a stick and carrot approach. This exemplary approach prefigures the Wilson and Palmer v UK judgment of the ECtHR.³⁵ The most severe act of anti-union discrimination is the discriminatory dismissal by reason of trade union activity. Article 18 of the *Statuto dei Lavoratori* foresees stipulates reinstatement as the sanction to be imposed upon the employer when a worker falls victim of such discriminatory act.

³⁵ ECtHR, 2 July 2002, Applications nos. 30668/96, 30671/96 and 30678/96, (*Wilson and Palmer vs UK*).

Spain

- Spain** 48. In Spain, Title V of the Organic Law on Trade Union Association safeguards the freedom of association against union-busting (*conductas antisindicales*). The law prohibits anti-union discrimination and provides several remedies such as nullity, compensation and even injunctions to stop the discriminatory conduct. No provision stipulating a reversal of the burden of proof has been enshrined. Trade unions can intervene in the legal action taken by the employee. Reinstatement is possible for workers' representatives instead of compensation at their discretion.

Sweden

- Sweden** 49. In Sweden, discrimination on grounds of trade union affiliation can be combatted on the basis of §§ 8 and 9 of the Co-determination Act. Section 8 provides in a generic way that the right of association cannot be infringed upon. The section presupposes that an employment contract has been concluded. Hence, there is no point in combatting discrimination on the basis of trade union association during hiring. The Act prohibits anti-union discrimination stemming from employers, employees, representatives and their respective organizations. Organizations are obliged to exercise their authority and to prevent their members from taking any action that would violate the right of association. Thus, a disciplinary sanction from these organizations might come into play. The Co-determination Act also provides for compensation to victims of anti-union discrimination (Section 54 of the Co-determination Act) payable by the perpetrators (employers, employees and their organizations). Furthermore, a discriminatory termination of the employment agreement may also be considered null and void (Section 8 Co-determination Act). Compensation and annulment can also be based upon the Employment Protection Act. In order to combat anti-union discrimination, the Supreme Labour Court (Arbetsdomstolen) has also alleviated the burden of proof.





Facilities for trade union officials and members to exercise their rights – A comparative review

Comparative table and conclusions in relation to Anti-union discrimination^{36, 37}

Table on Anti- Union discrimination

	Belgium	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Anti- Union discrimination	+	+	+	+	+	+	+	+
Reversal of the Burden of proof	+	-	+	-	-	-	+	+
Reinstatement	-	+	+	+	+	+	+	+

50. The comparative overview has demonstrated how countries, after having faced an era of totalitarianism, have endeavoured to inscribe a specific notion of the freedom of trade union association into their Constitution (France, Germany Italy, Spain) and how some of them have even adopted a specific statutory instrument (essentially) related to the right to organize (Italy, Spain). The political dimension of the right to organize has thus been sufficiently highlighted in these countries. Provisions combatting anti-union discrimination exist in all countries, irrespective of the size of the enterprise, and are not restricted to representatives of workers, but apply to all workers alike. Other good practices relate to an unambiguous reversal of the burden of proof (Belgium, Sweden), which is not enshrined in all legislations concerned. Last but not least, it is essential that employers do **not** have a choice between compensation and reinstatement, in case of discriminatory dismissal on the basis of trade union membership or involvement in trade union activities. Another important remedy relates to the possibility of a judge to issue an injunction to stop a discriminatory practice.

³⁶ The “+” symbol implies that there are provisions on anti-union discrimination, that there is a reversal of the burden of proof and that the legal system provides for reinstatement against the will of the employer.

³⁷ Greek Law 1264/1982 enshrines a general principle of anti-union discrimination based upon the membership of a trade union. The Law does not include a provision facilitating the proof of such a kind of discrimination by a reversal of the burden of proof, neither a summary procedure to cease the discriminatory practices. A discriminatory dismissal will be null and void. The dismissal of trade union leaders is subject to a preventive authorization of the bipartite Committee for the protection of trade union officers. Authorization can only be given on a number of limited important reasons, listed in the law.

Facilities for trade union officials and members to exercise their rights – A comparative review

Protection against acts of interference

Protection against acts of interference

51. The question arises how the legal orders of Belgium, Denmark, France, Germany, Italy, Spain and Sweden have tried to ensure a protection against acts of interference, or have ensured the independence or autonomy of trade unions and employers' organizations, especially illustrated by the case of management-controlled (or so-called "yellow") unions. Furthermore, if no provisions combatting management-controlled trade unions exist, the study will examine whether there are specific provisions which will disqualify a yellow union from being recognized as a representative trade union. Such provisions will constitute a barrier against the creation of yellow unions, since such a creation will not serve any useful purpose. In such a hypothesis, these yellow unions will not be competent to exercise the prerogatives attributed to representative trade unions, e.g. the conclusion of collective agreements with an employer having the binding force established by law.

Belgium

Belgium

52. In Belgian labour law, there are no formal rules prohibiting interference or preventing the institution of management-controlled unions in any explicit way. Neither do management-controlled unions arise. In Belgium, management-controlled unions will not be able to obtain the status of a representative trade union, neither at plant nor at intersectoral level. This is an important practical obstacle to the creation of a management-controlled union at plant level, since it will not be competent to exercise the prerogatives attributed to representative workers' organizations. The criteria for representativeness are such that for a trade union to be recognized as representative, it needs to be affiliated to a trade union which is representative at intersectoral level. There are, however, no formal guarantees that the representative intersectoral workers' organizations need to be independent in order to be recognized. The only example of trade unions which are not affiliated to the representative workers' organizations, is the ability of a number of highly qualified white-collar workers (cadres) to participate in the social elections for the works councils by submitting a list, supported by at least 10 percent of this category of employees in the enterprise. There is no control at all whether such a list is indeed not put forward by management. Non-representative trade unions can still be instituted, but they cannot exercise the relevant prerogatives of the industrial relations system. They may have recourse to strike action, but they cannot put forward lists in the elections for representatives in works councils, nor in health and safety committees, nor can they demand the institution of a trade union delegation. They cannot conclude a collective agreement in the meaning of the law on collective agreement.

53. It is standard practice that Belgian representative trade unions do not participate in the election of works councils or health and safety representatives at the employers' associations. This practice is justified by the social partners invoking the idea that they should not interfere in the administration of the other partner. Neither are representative workers' organizations members of an employers' organization, although they are employers.

Denmark

54. In Danish labour law, there are no formal rules prohibiting interference or preventing the institution of management-controlled unions in any explicit way. The principle of mutual non-interference of employers' organizations and trade unions can be deduced from § 1 of the basic agreement concluded between LO and DA, although this provision is more explicit on the issue of anti-union discrimination

Denmark

"§ 1. As it is desirable, that questions about salaries and working conditions are resolved through the conclusion of collective agreements, possibly with the assistance of the main organizations, the main organizations and their members willingly oblige to not directly nor indirectly hinder that employers and employees can organize themselves within the organizational framework of the main organizations. It would be considered hostile actions against the organization if one of the parties to this basic agreement engages in actions directed against another party by reason of trade union membership and not based on objective motives".

55. Under Danish law, there is a customary rule that members of the managerial staff cannot be admitted as members of LO, in order to prevent a conflict of interest. The rule is said to safeguard the proper functioning of the managerial staff. It can also be beneficial as a means to protect trade unions against interference by workers which are too close to the management. It does not constitute a restriction of the freedom of workers, without any distinction whatsoever, to become members of a trade union, provided these managerial staff can create their own unions.

France

56. In France, independence from management is not a formal or explicit condition for instituting a trade union (*syndicat*) in the meaning of the Loi Waldeck Rousseau (1884), now integrated into the Labour Code (Code du travail) (Title III, Book 1, Second Part of the Code du travail). However, the notion of independence becomes relevant in relation to prerogatives attributed to representative trade unions. In fact, in Article L 2121-1, the French Code du travail refers to "indépendance" as a criterion of representativeness. Although this criterion is mentioned in the context of representativeness, it makes more sense to construe it as an essential quality of a trade union. No case law has been found regarding the dissolution of a trade union at the demand of the Prosecutor (Procureur) on the alleged ground of lack of independence. The same provision also insists on the criterion of membership fees which need to be paid by the employees. In fact, ever since a modification of the system of works council (comités économiques et sociaux) occurred in 2008, non-representative trade unions can participate in elections as well. The latter should also meet this criterion of independence. Last but not least, Article L 2141-7 of the Code du travail prescribes an attitude of neutrality on behalf of employers with regard to trade unions. Employers cannot exercise any pressure in favour or against trade unions.

France

Germany

- Germany** 57. In German labour law, there are no formal rules prohibiting interference or preventing the institution of management-controlled unions in any explicit way. The risk of the creation of management unions is to a large extent countered by the distinction between the generic notion of association (*Koalition*) and the more specific notion of trade unions (*Gewerkschaft*).
58. A *Koalition* is an association of workers which has been created to protect workers' interests in the meaning of Article 9 of the German Basic Law. For such a *Koalition* to be qualified as a *Gewerkschaft* in the meaning of the Law on Collective Agreements (*Tarifvertragsgesetz*), it needs to have the ability to exercise pressure on an employer to force him/her to conclude a collective agreement and to be able to enforce this agreement (*Durchsetzungsfähigkeit*). A *Koalition* which lacks this power has neither the competence to conclude collective agreements nor the right to organize strikes. Gamillscheg has compared the notion of *Gewerkschaft* with the notion of a representative trade union.³⁸ Independence from the employer side is an essential prerequisite for a body to qualify as a *Koalition*. For this reason, an association of employees which is not sufficiently independent from the employer side cannot a fortiori be considered as a *Gewerkschaft* and cannot conclude collective agreements or organize a strike. One of the most important aspects of this independence, is the prerequisite of *Überbetrieblichkeit*, namely the fact of being organized not just at the level of one enterprise. An association which would be dominated by an employer and which would solely exist at the level of one enterprise, would hence not qualify as a *Koalition*, let alone a *Gewerkschaft*. The mere fact that a trade union refuses, on the basis of its constitution, to have recourse to strike will prevent it from being recognized as a *Gewerkschaft* which can conclude collective agreements. Therefore, there is only leeway to create sectoral yellow trade unions, but to qualify as trade unions, they still need to be independent from management. A yellow union will lack independence from management and will be unable to force the employer to conclude a collective agreement. For this reason, yellow unions cannot qualify as *Koalitionen*, let alone as *Gewerkschaften*. The existence of a legal distinction between *Koalitionen* and *Gewerkschaften* constitutes an obstacle to the creation of management-controlled unions.

³⁸F. Gamillscheg, *Kollektives Arbeitsrecht. Band I, München, Beck, 1997, 439.*

Italy

- Italy** 59. In Italian law, Article 28 of the *Statuto dei lavoratori* can be used to deduce a principle of non-interference. This provision prohibits an employer from adopting a conduct which seeks to obstruct or restrict trade union freedom and trade union activities. Sanctions are imposed by emergency procedure allowing the judge (*pretore*) to issue an injunction against the employer to cease these activities. Acts of interference qualify as such conduct. In Italy, Article 17 of the *Statuto dei lavoratori* prohibits employers and their organizations from instituting or financially supporting other trade unions. This provision also implies that the creation of “mixed” organizations (employers-employees) is a violation of Article 17 of the *Statuto*. This provision does not address any support which is not unilateral but the result of a bargaining process.

Spain

- Spain** 60. Article 13 of the Organic law on the freedom of association qualifies acts of interference as violations of the freedom of organization, thus opening up all the remedies prescribed in the law. It also defines acts of interference as acts aimed at encouraging the formation of unions dominated or controlled by an employer or business association, or at supporting, financially or otherwise, unions for the same purpose of control.

Sweden

- Sweden** 61. In Sweden Section 8 of the Codetermination Act stipulates that an employers' organization or an workers' organization need not tolerate any violation of the right of association that constitutes an infringement of its activities. This important principle ensures the mutual non- interference and independence of the employers' and workers' organizations.

Comparative table and conclusions in relation to the principle of non-interference^{39,40}

Table on prohibition of Interference

	Belguim	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Prohibition of interference	-	+	+	-	+	+	+	+
Provisions against management controlled unions	-	-	+	-	+	+	-	+
Provisions on independence	-	-	+	+	-	-	-	-
The notion of representativeness of trade union as a prerequisite (yellow unions are no unions, are not representative unions)	+	-	+	+	-	-	-	-

(Cf. The notion trade union (Gewerkschaft) as opposed to coalition (koalition).

62. As far as the issue of the prohibition of interference or the independence or autonomy of organizations is concerned, it is clear that this principle needs to be ensured to the benefit of both employers' and workers' organizations. Interference can stem from authorities as well as from workers' or employers' organizations and their members. Due to a certain imbalance of power, it will be much easier for an individual employer to interfere with the functioning of a trade union than it will be for a trade union, let alone individual members, to interfere with the functioning of an employers' organization. Thus, all the examples of interference highlighted in Article 2 (2) of ILO Convention No. 98 relate to interference affecting workers' organizations. By its nature, the prohibition of interference by authorities is not enshrined in statutory law. There is no formal expression of this auto-limitation.

63. The principle of **mutual** non-interference by organizations is not systematically enshrined in legal orders, except for Denmark and Sweden. In France, Italy and Spain the principle is only enshrined in favour of trade unions. In Belgium and France, there is no rule formally prohibiting interference.

The principle is also applied indirectly, since in all countries concerned, mixed bodies of employees and employers are not considered trade unions. Furthermore, autonomy or independence is an essential element for a body to be recognized as a trade union (Germany) or a representative trade union (see France). In Belgium and Germany, a trade union which solely exists at the level of one establishment, would not be considered to be a trade union (*Gewerkschaft*) or could not claim to be representative. In France, Italy and Spain there are explicit provisions against management-controlled unions.

³⁹ The "+" symbol means that there are provisions prohibiting interference, combatting management-controlled unions, provisions on the independence of trade unions from employers (and the State). As far as the notion of representativeness is concerned, a "+" means that the legal order makes a distinction between representative trade unions and non-representative unions, that yellow unions will not qualify as representative unions and for this reason will not be able to exercise the prerogatives exclusively attributed to representative unions.

⁴⁰ Greek Law 1264/1982 prohibits interference by employers in terms of intervening in any way in the administration, the functioning or activities of trade unions. It explicitly combats management-controlled unions by prohibiting employers to influence the institution of trade unions or by supporting them by financial or other means. A definition of trade unions is absent, hence also a formal reference to "independence". The law does include provisions on financial autonomy.

Part II: Facilities

European and international law

64. The ILO has adopted several instruments which deal with facilities attributed to workers' representatives.

65. **There are two generic instruments which list facilities:**

The Workers' Representatives Recommendation, 1971 (No. 143)
The Workers' Representatives Convention, 1971 (No. 135)

Reference should also be made to instruments specifically related to the Public Service:

The Labour Relations (Public Service) Convention, 1978 (No. 151)
The Labour Relations (Public Service) Recommendation, 1978 (No.159).

A first issue to be addressed is the notion of workers' representatives. A second issue relates to the impact of facilities offered to these workers' representatives on the functioning of workers' organizations, especially with regard to collective bargaining, which is considered a typical trade union prerogative. The issue of collective bargaining needs to be analysed in the light of the aforementioned ILO Convention No. 98 as well in the light of the more recent Collective Bargaining Convention 1981 (No. 154).

66. The notion of a workers' representative has been defined in Article 3 of ILO Convention No. 135.⁴¹ In combination with Article 1, this definition refers to workers' representatives who function **within an undertaking (dans l'entreprise)** and covers both:

i) the trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; and ii) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

ILO Recommendation No. 143 that complements ILO Convention No. 135 explicitly sets out that a trade union representative can be a person not employed in the undertaking who should be granted access to the undertaking if the trade union has members employed in the undertaking.⁴²

⁴¹ Article 3

For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are—

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

⁴² See COMPILATION (ILO), 2018, para 1587, 1593, 1594, 1596 and International Labour Conference, 81session 1994, CEACR, Freedom of Association and Collective Bargaining, ILO, 1994, nr. 128.

67. Some of these facilities (such as the organization of trade union meetings, access to the enterprise and to relevant information, and the collection of trade union dues) are associated with the right to organize and the effective guarantee of freedom of association. Dues can be defined as the membership fees which need to be paid by trade union members. Thus, ILO Workers' Representative Recommendation 1971 provides that

14. In the absence of other arrangements for the collection of trade union dues, workers' representatives authorised to do so by the trade union should be permitted to collect such dues regularly on the premises of the undertaking.

68. Other facilities might be indirectly linked to the right to organize, insofar as workers' representatives involved may be designated by the trade union or may represent the trade union or the workers affiliated to a trade union. However, some facilities are granted to workers' representatives, irrespective of their ties to the trade union movement. In this respect, it is important to recall Article 5 ILO Convention No.135:

*"Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives."*⁴³

69. Collective bargaining is, in essence, a prerogative of worker' organizations instead of elected representatives. The Collective Agreements Recommendation, 1951 (No. 91), emphasizes the role of workers' organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exists. In Article 2 of the ILO Convention No.154, collective bargaining is defined in a way which precludes such a hypothesis. It states that a collective agreement is *"all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations"*.

⁴³ See also Article 3 (2) Collective Bargaining Convention, 1981 and Workers' Representatives Recommendation, 1971 (No 143).

70. Article 3 of the ILO Convention No. 154 states that:

*1. Where national law or practice recognises the existence of workers' representatives as defined in Article 3, subparagraph (b), of the Workers' Representatives Convention, 1971, national law or practice may determine the extent to which the term **collective bargaining** shall also extend, for the purpose of this Convention, to negotiations with these representatives.*

*2. Where, in pursuance of paragraph 1 of this Article, the term **collective bargaining** also includes negotiations with the workers' representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organizations concerned.*

Number 1347 of the Compilation states in the same vein:

"1347 Collective agreements with the non-unionized workers should not be used to undermine the rights of workers belonging to the trade unions."

71. The Workers' Representatives Convention, 1971 (No.135) does not list these facilities in detail. Article 2 states that the facilities concerned need to be "appropriate in order to enable them (the workers' representatives) to carry out their functions promptly and efficiently". The same provision takes a balanced approach, stating that "the granting of such facilities shall not impair the efficient operation of the undertaking concerned".⁴⁴

72. The Workers' Representation Convention, 1971 (No.135) adopts an approach in favour of tailored solutions, where it states in Article 2 (2) that "account shall be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned". As far as the sources implementing these rights are concerned, both the Workers' Representation Convention, 1971 (No.135) as well as the ILO Workers' Representative Recommendation 1971 provide leeway for a variety of sources (national laws, regulations, collective agreements, or any in other manner consistent with national practices) and hence for a variety of levels of regulation.

73. Some of the issues related to facilities have been regulated by several EU Directives in a fragmented way. The right to information in the context and in support of collective bargaining appears in Article 4 (4) of the European Works Council Recast Directive 2009/38. This provision states:

"The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management within the meaning of the second subparagraph of paragraph 2 of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing the negotiations referred to in Article 5, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 2(1)(a) and (c)."

⁴⁴ In the same vein : IV of the Workers' Representatives Recommendation, 1971 (No 143) and Article 6 Labour Relations (Public Service) Convention, 1978 (No 151). See also COMPILATION (ILO) 2018, Para 1579.

**Article 3
of the ILO Convention
No. 154 states that:**

74. The notion of workers' representatives in the EWC Directive is defined by a referral (renvoi) to the law of the Member States or by a definition based in the agreement constituting the EWC. These representatives could be either elected representatives with no direct ties to trade unions or workers directly designated by trade unions or elected by their members.
75. Therefore, in the European Works Councils Recast Directive 2009/38, which repeals and replaces the older European Works Council Directive 1994/45, the **EU legislator** clearly recognizes the need to grant to the parties concerned a right to obtain the information required for commencing the negotiation between the special negotiating body and the central management of the controlling undertaking. These parties will conclude the agreement setting up the EWC. This information will be useful for the special negotiating body as well as for the workers or workers' representatives authorized to request the commencement of negotiations (see article 5 Recast Directive 2009/38).⁴⁵
76. More importantly, the EWC Recast Directive establishes the principle that workers' representatives should enjoy, in the exercise of their functions, protection and guarantees similar to those provided for workers' representatives by the national legislation and/or practice in force in their country of employment. This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6 (3), and the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties. As far as training is concerned, the EWC Recast Directive recognizes the right to training without loss of pay. The Recast EWC Directive also enshrines a right of workers' representatives of a EWC to communicate with their constituency. Thus article 10 states:
- "Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive."*
77. Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community is less explicit on the issue of facilities. It does not raise in a general way the issue of communication between representatives and their constituency, neither does it raise the issue of the recognition of the exercise of representatives' functions as working time, let alone the issue of the remuneration of that time. It does not recognize a right to training. Article 7 is the only provision in the Framework Directive recognizing the abstract principle of the right to adequate guarantees to enable workers' representatives to properly perform the duties assigned to them.

⁴⁵ At the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

78. In order to structure these facilities, a classification thereof according to a (chrono)logical order from the point of view of a trade union that wishes to "organize" and represent the workers of a given undertaking is being followed. These facilities can, furthermore, be structured according to a spatio-temporal divide. They are about the conquest of space and time needed for the organization and representation of workers. The distinction between time and space is not absolute.
79. Thus, a trade union needs to be willing to have the opportunity to contact the workers of an undertaking. At that moment, where -possibly, but not necessarily- no worker in the undertaking is yet affiliated, trade union officials need to be able to contact the workers in the undertaking. Therefore, the first issue to consider is **Access to the workplace**.
80. In this regard, ILO Workers' Representative Recommendation 1971 provides that:
- 12. Workers' representatives in the undertaking should be granted access to all workplaces in the undertaking, where such access is necessary to enable them to carry out their representation functions.*
- 17.(1) Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking.*
(2) The determination of the conditions for such access should be left to the methods of implementation referred to in Paragraphs 1 and 3 of this Recommendation.
81. Access to the workplace can help union representatives raise awareness about the necessity of workers' representation and will be beneficial for the institution of workers' representation, which can be dependent on a threshold of unionized workers. It is important that the **functioning** of these representatives be facilitated by allowing them to spend **time** during working hours for the exercise of their mandate, and to provide them with the **infrastructure** (including space) necessary to exercise their mandate.
82. Under the **temporal axis**, the following issues can be addressed:
- release (paid or unpaid) to enable workers to exercise their functions as workers' representatives
 - release to participate in training, congresses, sectoral- or national-level social dialogue processes, etc. during working hours outside of the undertaking

83. In this regard, ILO Workers' Representative Recommendation 1971 provides that:¹⁰

83.1 *1) Workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions in the undertaking.*

83.2 *(2) In the absence of appropriate provisions, a workers' representative may be required to obtain permission from his immediate supervisor or another appropriate representative of management designated for this purpose before he takes time off from work, such permission not to be unreasonably withheld.*

83.3 *(3) Reasonable limits may be set on the amount of time off which is granted to workers' representatives under subparagraph (1) of this Paragraph.*¹¹

83.4 *(1) In order to enable them to carry out their functions effectively, workers' representatives should be afforded the necessary time off for attending trade union meetings, training courses, seminars, congresses and conferences.*

83.5 *(2) Time off afforded under subparagraph (1) of this Paragraph should be afforded without loss of pay or social and fringe benefits, it being understood that the question of who should bear the resulting costs may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.*

84. Under the **spatial axis**, one can address the following issue:

provision of office space and/or other facilities (such as computers, locking filing cabinets, access to internal mailboxes, access to emails, access to photocopying free of charge) at the undertaking to union/ workers' representatives.

85. In this regard, ILO Workers' Representative Recommendation 1971 provides that:

16. The management should make available to workers' representatives, under the conditions and to the extent which may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation, such material facilities and information as may be necessary for the exercise of their functions.

86. A subsequent issue focuses on communication. Workers' representatives need to engage in communication with the management. The European Court of Human Rights has considered the right to be heard as an essential means to protect workers' interests.⁴⁶

⁴⁶ ECtHR, 27 October 1975, nr 4464/70 (*Syndicat national de la Police belge c Belgique*)

87. In this regard, ILO Workers' Representative Recommendation 1971 provides that:

13. Workers' representatives should be granted without undue delay access to the management of the undertaking and to management representatives empowered to take decisions, as may be necessary for the proper exercise of their functions.

88. Under this heading (communication), the following issue can be examined:

Communication between representatives and their constituency.

The perimeter of the constituency will depend on the role attributed to the representatives in the system of industrial relations concerned. In some systems, the constituency (at plant level) refers to the unionized workers, in other systems to all workers, irrespective of their unionization.

89. In the context of communication between representatives and their constituency, the following issues can be examined:

trade union meetings at the works premises

collection of union dues

usage of notice boards; the right to post and distribute trade union information; the usage of electronic communication tools

90. In this regard, ILO Workers' Representative Recommendation 1971 stipulates:

14. In the absence of other arrangements for the collection of trade union dues, workers' representatives authorised to do so by the trade union should be permitted to collect such dues regularly on the premises of the undertaking.

90.1 *(1) Workers' representatives acting on behalf of a trade union should be authorised to post trade union notices on the premises of the undertaking in a place or places agreed on with the management and to which the workers have easy access.*

90.2 *(2) The management should permit workers' representatives acting on behalf of a trade union to distribute news sheets, pamphlets, publications and other documents of the union among the workers of the undertaking.*

90.3 *(3) The union notices and documents referred to in this Paragraph should relate to normal trade union activities and their posting and distribution should not prejudice the orderly operation and tidiness of the undertaking.*

90.4 *(4) Workers' representatives who are elected representatives in the meaning of clause (b) of Paragraph 2 of this Recommendation should be given similar facilities consistent with their functions.*



Comparative labour law

Access to the Workplace:

Belgium

91. The issue of trade union officials' access to the workplace is a blind spot in **Belgian** labour law. There is no statutory provision allowing trade unions to enter the workplace or the premises of the workplace. Despite this obstacle, unionization rates are high.

Belgium

Denmark

92. In **Denmark**, there is no right for trade union officials to enter a workplace. This assessment, however, needs to be mitigated. Collective agreements might provide for such a right. There is a vicious circle since the conclusion of such a collective agreement would benefit from prior unionization of the workforce concerned, which would be facilitated if trade union officials could enter the premises of an establishment.

Denmark

France

93. In France, there is no right for trade union officials to enter a workplace.

France

Germany

94. In **Germany**, the only statutory provision enabling trade union officials to enter the workplace is restricted to permitting trade unions represented in the establishment to exercise the powers and duties established by §§ 2 of the *Betriebsverfassungsgesetz*. It does not relate to recruitment activities. However, the German Federal Labour Court (*Bundesarbeitsgericht*) and the Federal Constitutional Court (*Bundesverfassungsgericht*) have ruled that trade union officials (not employed within the firm) have the right to access the premises for the purpose of recruiting new members. This right needs to be exercised in a way which does not disturb the normal work organization. The legal basis for this right to access is Article 9 § 3 of the German Basic Law.

Germany

Italy

95. In **Italy**, there is no formal right for trade union officials to enter the workplace. The situation changes as soon as even one worker is unionized. Article 26 of the *Statuto dei lavoratori* provides that unionized workers have the right to engage in recruitment activities (*proselitismo sindacale*) for their trade unions at the premises of the workplace, as long as this does not disturb the normal functioning of the work organization.

Italy

Spain

96. In **Spain**, Article 9 of the law on trade union association provides that "those who hold elected office in the most representative trade union organizations, at the provincial, autonomous region or state level, shall have the right to visit and access workplaces to participate in activities of their union, or of the whole of the workers, having previously informed the employer, and without the exercise of this right interrupting the normal production process".

Spain

Sweden

Sweden 97. In Sweden, Section 3 of the Trade Union Representatives Act provides that:

"If the appointment relates to a place of work other than the representative's own place of work, the employer is obliged to allow the representative to perform his duties and to be active to the extent necessary to fulfil his duties. The activities may not, however, result in any significant impediment to the proper performance of work."

This provision does presuppose that some workers are already unionized and that there is trade union representation. It just refers to mobility within the undertaking, once access has been granted.

Comparative table and conclusions in relation to Access to the Workplace⁴⁷

Table on access to workplace

	Belgium	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Access	-	+	-	+	+	+	-	-
Conditions	-	Conclusion of a collective agreement	-	No disturbance	1 unionised worker No disturbance	previous information to the workers -no disturbance	-	During labour inspections
Objectives	-	Defined in the collective agreement	-	-control of the functioning of the works council/recruitment	recruitment	-participation in trade union activities	-	- To collect dues outside working time

Access to the workplace

98. **Access to the workplace.** The right of trade union officials to enter the workplace to engage in recruitment activities is of great practical importance in undertakings which have no or few unionized members. Some legal orders have not recognized such a right (Belgium, France). Good practices can be found in Spain and Germany, where there is a right, either of a statutory nature (Spain) or recognized by a judge (Germany), for trade union officials to visit the workplace. In both cases, it is essential that the employer is duly notified and that the visit does not abnormally disrupt the work organization. The Italian provision presupposes that at least one worker is unionized. In this case, the unionized worker (who is not a trade union official on the payroll of the trade union) can engage in proselitismo sindacale. However, access to the workplace is not just relevant for recruitment, but also for enforcement of collective agreements and labour law in general. Although the Greek legal order does not seem to explicitly enshrine access of trade union officials to the workplace for recruitment purposes, however, it gives these trade union officials the right to be present during inspections carried out by the Labour Inspectorate. In the same vein, in Denmark, trade unions have access to the workplace to monitor whether working conditions enshrined in a collective agreement are respected.

⁴⁷ The "+" symbol relates to the existence of legal provisions providing a right for trade unions to enter the workplace. Under the heading objectives, where such a right exists, it will be indicated for which purposes such a right to access exists.





Facilities related to functioning (Temporal axe)

Belgium

99. Under **Belgian law**, three different types of actors can be qualified as workers' representatives. There are the so-called trade union delegates, who formally represent unionized workers of an employer and the elected representatives of works councils and health and safety committees. Article 21 of Collective Agreement No. 5, a framework agreement regarding union delegations, provides that the delegates should be given the necessary time and facilities to exercise their mandate, which should be remunerated as working time. This should be specified more concretely and precisely by means of sectoral or plant level collective agreements.
100. Taking into account the constraints of the work organization, union delegates should be given time and facilities to attend training during working hours without loss of wages, organized by their unions, insofar as it is relevant to obtain the economic, social and technical skills required for their mandate as representatives. CCT No.5 does not provide that the employers should actually pay for the cost of training.
101. Article 23 of the Law on the Organization of the Economy (*Loi portant organisation de l'économie*) provides that works council meetings are considered to be genuine and remunerated working time, even if organized outside working hours. Furthermore, costs related to transport will be incumbent upon the employer. The provision is mute on time spent for the preparation of these council meetings. However, a complementary provision (article 17 of CCT No.9) is helpful since it provides that insofar as the constraints of the work organization are being taken into account, the workers' representatives need to have sufficient time and facilities to exercise their mandate. Article 18 of CCT No. 9 provides release for training under conditions which are identical to the release given to union delegates.
102. Article 66 of the Law on the well-being of workers of 4 August 1996 (*Loi du 4 août 1996 relative au bien-être des travailleurs*) indicates that the work performed by members of the health and safety committees (including by workers' representatives), even outside working hours, is equivalent to effective working time, as regards remuneration as well. Article II 7 -30 of the *Code du bien-être au travail* provides that workers' representatives have a right to adequate training for the exercise of their functions. The provision clearly states that attendance to training must take place during working hours and that the costs of such training should not be borne by the representatives.

Belgium

Denmark

- Denmark** 103. Under **Danish law**, one needs to distinguish three types of workers' representatives: local trade union representatives, health and safety representatives and representatives in cooperation committees. On the basis of the Basic Agreement in combination with collective agreements at lower levels, local trade union shop stewards can be instituted. The rules regarding the functioning of these shop stewards tend to provide that these representatives exercise their mandate outside their working hours. Insofar as the employer allows them to ad hoc exercise their mandate during working hours, at the employer's request, the exercise of the mandate will be remunerated as working time. Some collective agreements even provide that the exercise of their mandate will be financed by the employer, even if duties are carried out at the request of fellow employees or the union. As far as health and safety is concerned, a statutory Act regarding the work environment organization (AML Act) provides that time spent by the elected H&S representatives in the exercise of their function will be considered and remunerated as working time. The institution of cooperation committees is based upon a national agreement concluded between LO and DA. The agreement ensures that time spent during the meetings of this mixed body needs to be remunerated irrespective of whether they are organized during working hours or not.

France

- France** 104. In **France**, workers are represented by their representatives in the so-called "comités économiques et sociaux" (at enterprise level or at the level of an economic and social unit) and the "comités de groupe" at group level. Facilities to be granted to "comités économiques et sociaux" are regulated in greater detail than the facilities of the "comités de groupe". Whereas the statutory law just provides that the time spent by workers' representatives for the "comités de groupe" is considered and remunerated as working time, article L 2315-7 of the Code du travail stipulates that the employer needs to grant the time necessary for the workers' representatives in the "comités économiques et sociaux" to exercise their functions. Furthermore, the expression "time spent for meetings" lacks some precision. It is unclear whether the time granted to the workers' representatives at the group committees also includes time for preparation of the meetings or for travel time needed to attend the meetings.
105. Furthermore, the legislator has instructed the government to institute an elaborate system of time credits (*crédit d'heures*) for the members of the "comités économiques et sociaux". The number of hours depends on the size of the undertaking and the number of representatives. The remunerated time credits can be used for a variety of purposes: the time of the actual meetings, the time spent for their preparation, the time used for inquiries in the area of health and safety, the time needed to go to the meetings.
106. The *Code du Travail* also provides detailed rules on the right to training of the members of the "Comité économique et social". They are entitled to attend a training provided that the timing does not disrupt the work organization. The yearly maximum amount is 12 days.

Germany

- Germany** 107. In **German law**, the issue of release for workers' representatives is restricted to members of the works council. There is no statutory trade union delegation, therefore the issue of release for trade union representatives is not an issue. However, in practice, trade union delegates are and can be chosen among unionized workers in an enterprise (*gewerkschaftrechtlicher Vertrauensleute* (shop steward)). No statutory rules exist with regard to facilities to be granted to these trade union representatives. Therefore, any kind of facilities will have to be based on collective agreements, usually at enterprise level.
108. The release for members of the German works council is regulated in detail in the *Betriebsverfassungsgesetz*. Although § 37 of the *Betriebsverfassungsgesetz* states that membership to a works council (*Betriebsrat*) is an honorary function, this provision indicates that members can exercise this function without loss of pay, insofar as the activities they carry out are necessary for the functioning of the works council. They need to fulfill these functions during working hours, if not, it should be considered as overtime which needs to be paid accordingly. § 37 of the *Betriebsverfassungsgesetz* states that the release also covers the time spent for training, insofar as this training is necessary. The provision states that this shall amount to at least 3 to 4 weeks during the regular term of office of the works council. In principle, training costs are covered by the employer.
109. In enterprises with at least 200 workers, a system of complete release from all other professional activities is mandatory. The number of representatives who are entitled to time off depends on the size of the enterprise. In enterprises between nine and ten thousand employees, this can be up to 12 employees (§ 38 *Betriebsverfassungsgesetz*).

Italy

- Italy** 110. In Italy, the *Statuto dei lavoratori* regulates time-off from work without loss of pay (*permessi retribuiti*) on the basis of a number of parameters, for the exercise of the function of trade union representative. These parameters relate to the size of the undertaking and are instrumental in identifying the number of trade union representatives (rsa) entitled to enjoy release, and also affect the quantity of the releases without loss of pay. The workers need to inform the employer when they want to make use of such release (Article 23). Furthermore, Article 24 of the *Statuto dei lavoratori* allows for releases with loss of pay for trade union leaders (*dirigenti sindacali aziendali*) in order to participate in collective bargaining procedures and in trade union congresses and meetings. These trade union leaders on the payroll of an employer need to inform their employer of the fact that they want to take leave of absence within a period of three days. These unpaid releases will amount to a statutory minimum of eight days.
111. The system of releases has been construed as a statutory minimum. Collective agreements can extend these.

Spain

- Spain 112.** In **Spain**, the Workers' Statute (Estatuto de los Trabajadores) distinguishes shop stewards from members of the works councils as workers' representatives. The former operate in enterprises employing from 10 up to 50 employees, whereas the latter are relevant for enterprises with at least 50 employees. The leave of absence granted to these representatives is based on the size of the enterprise. Article 68 provides that hours of leave are granted as follows, for both workers' representatives and for members of the works council:
- (e) each council member or staff delegate in each workplace shall have one hour of paid time-off per month for the exercise of their representative functions, in accordance with the following scale:
- staff delegates or works council members:
- up to 100 employees, 15 hours
 - from 101 to 250 workers, 20 hours
 - from 251 to 500 workers, 30 hours
 - from 501 to 750 workers, 35 hours
 - over 751 workers, 40 hours.

Sweden

- Sweden 113.** In **Sweden**, one needs to distinguish trade union representatives which can be qualified as persons appointed by a workers' organization to represent the workers of a particular workplace with regard to matters concerning the relationship with the employers (Trade Union Representatives Act) from the so-called "safety representatives" in the meaning of the Work Environment Act. The Co-determination Act does not provide for a works council. In undertakings with over 50 workers, trade union representatives will sit on the Safety Committee.
- 114.** As far as time-off is concerned, Section 7 of the Trade Union Representatives Act provides that the right to time-off is granted without loss of benefits, irrespective of whether it is during normal working hours or not. According to Section 6, the exercise of the right to time-off should relate to the performance of the trade union duties and not exceed what is reasonable, taking account of circumstances prevailing at the place of work. Neither can time be scheduled in such a manner as to cause any significant impediment to the proper performance of work. The amount of time-off and the time at which it is to be taken shall be determined following deliberations between the employer and the local workers' organization.
- 115.** Section 5, par. 2 of the Work Environment Act provides that Safety representatives, are entitled to the leave of absence required for the performance of their function. Representatives retain their employment benefits during any such leave.

Comparative table and conclusions in relation to Functioning (Temporal Axe)^{48, 49}

Table on leaves (time) for workers' representatives

	Belgium	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Meetings	+	+	+	+	+	+	+	+
Time outside meetings	+	+(Health and Safety)	+	+	+	+	+	+
Training	+	-	+	+		+	+	X
Conditionality	- In so far as necessary for the exercise of the function - No disruption of work organization	-	Extent of time depends upon size of the enterprise - Training should not disrupt functioning	- Necessary link with the function - Dispensation is linked to size of the enterprise	Dispensation are linked to size of the undertaking - Notification to the employer	In so far as necessary for the exercise of the functioning	- In so far as reasonable - In so far as not disturbing the performance of the function	Needs to be exercised in the context of the mandate.

- 116.** A comparison between the various countries with regard to the right to time-off (*id est*: working time) recognized to workers' representatives *sensu lato* is a complicated endeavour. The notion of workers' representatives can cover genuine union delegates, *id est* workers of the company designated by the union or elected among its unionized members working in an undertaking, and elected workers' representatives who may have no ties with the trade union movement. There are cases with dual channels, where both types exist, and single channel where only one type exists. This paper does not deal with the specific missions attributed to these representatives. Another actor may be the trade union officials who are on the payroll of a company, but exercise functions inside the trade union which are not related with the issue of representing workers of the company where they work. In some countries this latter situation will not occur. In these countries, trade unions are essentially created at sectoral level and will try to finance their trade union officials and staff members on the basis of the dues of the members.

⁴⁸ The "+" symbol indicates whether there is a right to have leave for meetings, for time spent in the exercise of the function outside meetings and whether there is a right to training. Under the heading "conditionality", we examine whether these rights are subject to conditionality.

⁴⁹ Greek Law 1264/1982 regulates the leave granted to union representatives. In general, the employer needs to grant trade union representatives facilities enabling them to exercise their functions. The Law distinguishes leave with or without pay. The amount of leave is dependent upon the nature of the trade union (secondary, tertiary), its size, the function held in the trade union. There are a few rules on conditionality of leave, for example, it needs to be exercised for the purpose of the exercise of the mandate. The Greek law does not take into account the size of the enterprise for the calculation of the leave. The Greek law also provides leave for elected representatives, members of the works council. These facilities are enshrined in Law 1767/1988). Works councils do not need to be set up in small companies with less than 50 employees. The chair and all other members of the works council are entitled to two hours off every week for works council business. They also have a legal right to 12 days paid leave for trade union training during their two-year period in office.

117. Leave can relate to time spent during meetings for the exercise of a mandate in the area of workers' representation, to the issue of the internal trade union operations, to the preparation of these meetings, and to training. Leave can be granted with or without loss of pay. Another issue relates to the costs of the exercise of such a mandate especially the cost of training. Thus, the question arises whether it has to be borne by the employer or not.
118. All these issues tend to be treated differently in the countries concerned. These differences relate to the structure of the representation (single, or dual) and to the emphasis placed in dual systems on the trade union related representatives or the elected representatives. Various countries take into account the size of the enterprise. The latter has an impact on the number of representatives and on the length of the releases awarded (see especially France, Germany, Italy, Spain). The involvement of workers, in the firm, as trade union officials, has the advantage that trade unions will remain in touch with their constituencies.



Facilities within the Undertaking (Spatial Axis):

Belgium

119. Article 21 of the **Belgian** Collective Agreement No. 5, a framework agreement regarding union delegations, provides that the delegates should be given a space (local) allowing them to adequately exercise their mandate. The commentary attached to CCT No. 5 provides that this can be an office space to be used on a permanent or occasional basis. No specific provisions exist for office space to be made available for the works councils or the Health and Safety committees.

Belgium

Denmark

120. Under **Danish** law, no statutory provisions exist regarding such facilities.

Denmark

France

121. In **France**, the Code du Travail provides an obligation for the employer to provide a space for both the "comité économique et social" as a works council and the union representatives. Furthermore, the law provides that the employer needs to provide the necessary material for the works council to function. It is worthwhile to state that the "comité économique et social" also receives an allowance (grant) from the employer. It has a budget.

France

Germany

122. § 40 of the **German Betriebsverfassungsgesetz** states that the employer is responsible for the costs of the works councils. Therefore, the employer needs to ensure the space, the means, the information and communication techniques and the staff.

Germany

Italy

123. Article 27 of the **Italian Statuto dei lavoratori** provides a right for the rsa (*rappresentanze sindacali aziendali*) in establishments (*unità produttive*) with over 200 employees for permanent use of an office space within the premises or near the premises. For smaller establishments, the rsa have the right to make use of an appropriate meeting room upon request.

Italy

Spain

124. Article 81 of the **Spanish Estatuto dei Trabajadores** provides that in the companies or workplaces with suitable characteristics, adequate premises must be made available to the staff delegates or the works councils, in which they can carry out their activities and communicate with the workers, including one or more notice boards.

Spain

Sweden

125. Article 3 of the **Swedish** Act on Trade Union Representation provides that:

The representative shall be provided with the use of premises or other space at his own place of work as necessary for the performance of the trade union activity carried out there.

Sweden

The Work Environment Act does not include a similar provision providing such facilities to the benefit of safety representatives.

Comparative table and conclusions in relation with facilities in the Undertaking (Spatial Axe)^{50,51}

Table on facilities (issues of space-infrastructure)

	Belgium	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Meeting rooms	+	-	+(works council)	+(works council)	+(ras <200 employees)	-	-	+
Office Space	+(union delegates)	-	+(works council-union delegates)	+(works council)	+(ras <200 employees)	+	+	+
Equipment	-	-	+(works council)	+(works council)	-	-	-	-
Budget	-	-	+(works councils)	+(works councils)	-	-	-	-
Conditionality	-	-	As necessary		Size of the undertaking	-	As necessary	-

For the proper functioning of workers' representatives, a minimum of infrastructure is key. All legal orders contain an abstract principle that facilities need to be adequate. They do not go into detail about the extent of these facilities. The question arises whether a proper understanding of subsidiarity does not require that the precise extent of the facilities to be exercised at the level of the undertaking is best regulated at plant level, in view of the specific situation of the undertaking. Therefore, collective regulations at plant level seem more appropriate than statutory rules to provide such details. It is essential to provide meeting rooms if worker representatives are part of a body of representatives (union delegations composed of delegates or works councils). In the case of mixed works councils, it is practically unthinkable that an employer presiding over a meeting would not arrange for a meeting room. Another issue is the availability of offices other than meeting rooms, which are necessary for workers' representatives getting structural dispensations to exercise their mandate, which cannot be restricted just to the participation in meetings. The need for offices will in practice differ according to the size of the enterprise, since these dispensations depend upon the threshold of the workforce. In those countries where regulations provide for the holding of assemblies with the constituency, a meeting point is also essential. This issue will be treated *infra*. Another element of infrastructure, *id est* notice boards, will be dealt with under the *rubrica* dedicated to communication.

⁵⁰ The "+" symbol refers to the existence of the provisions ensuring a right to meeting rooms, office rooms, equipment, a budget. Under the heading "conditionality", the question is examined of the conditions related to the existence of such rights, if existing at all.

⁵¹ Greek Law 1264/1982 provides that the employer in establishments employing more than 100 employees shall place at the disposal of the most representative trade union adequate space to serve as an office at the workplace depending on the employer's possibilities. There is no obligation to furnish it or to provide equipment. The Greek Law provides space and infrastructure for elected representatives, members of the works council. These facilities are enshrined in Law 1767/1988). The employer has to provide suitable office space. There are no provisions relating to a budget for the works council. The Health and Safety delegates (in companies with 20 employees or more) also receive paid leave.

Communication with management:

Belgium

126. In **Belgium**, the union delegate has the right to be heard (le droit d'être reçu) by the manager in relation to individual as well as collective disputes. Individual disputes relate to disputes between a (unionized) worker and the employer. The intervention of the union delegate in an individual dispute entails that the parties concerned have not been able to reach a solution among themselves. The collective agreement does not distinguish between disputes related to a legal conflict or to a conflict of interests.

Belgium

127. There are no specific provisions related to the communication between management and the members of a works council. However, since the works councils are mixed bodies, communication takes place within the works councils. Furthermore, the secretary of the works councils will be a workers' representative. The practical organization of the meetings will require communication between the manager and the secretary. The same is true for the workers' representatives of the Health and Safety committees.

128. Article II 7 -17 of the *Code du bien-être* provides that the employers must allow the workers' representatives to have all necessary contact with the employer, with his representatives, with the members of the corporate hierarchy, with prevention councilors⁵² and with the workers concerned.

129. Denmark

Under **Danish** law there is communication between workers' representatives and the management within the so-called cooperation committees. The latter are mixed bodies presided over by a management representative. As far as the functioning of the local trade union shop stewards is concerned, plant level collective agreements can provide rules on communication between the shop stewards and the local management, e.g. for the purpose of assisting individual employees in a dispute with their employer.

Denmark

130. France

The same observation can be made with regard to the communication between the workers' representatives in **France** and the employer. Since the "*comité économique et social*" is presided over by the manager, the meetings will allow for such a communication.

France

Germany

131. In **Germany** communication between management and workers' representatives is ensured by the *Betriebsverfassungsgesetz*. Though the works council is not a mixed body, § 74 of the *Betriebsverfassungsgesetz* ensures that the employer and the works council meet every month. They need to try to find an arrangement on issues which might be a source of division, especially when the works council has veto right.

Germany

⁵² Prevention counsellors are internal or external experts assisting the employer in the design of the Health and safety Policy.

Italy

Italy 132. The **Italian Statuto dei lavoratori** does not include explicit provisions on the communication between representatives and the management.

Spain

Spain 133. The **Spanish Estatuto de los trabajadores** grants the right to a dialogue with management in an implicit way, since, in § 62, it recognizes that workers' representatives exercise representation in relation to the employer and, in § 64, ensures the right to information to the benefit of the works council.

Sweden

Sweden 134. In **Sweden** neither the Trade Union Representatives Act nor the Co-determination Act include explicit provisions on communication between representatives and employers. The Work Environment Act institutes Safety Committees which are mixed bodies by nature, ensuring communication between management and labour.

Comparative table and conclusions in relation with the communication with management^{53,54}

Table on communication with management

	Belgium	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Explicit right to be heard	+	+	-	+	-	-	-	+
	(union delegates)	(union delegates)						(at least once a month)
Implicit right due to the nature of the body	+	+	+	-	-	+	+	+
	(works councils)	(works councils)	(works councils)				(H1S committees)	(employers are obliged to inform and consult works councils on economic and social issues)

135. Communication between management and representatives will naturally take place within mixed bodies (works councils presided over by the employer in Belgium, Denmark, France or Safety Committees in Sweden and Belgium). In countries where works councils are not "mixed bodies", statutory provisions may put forward such a communication, *id est* a duty for an employer to meet the works council in a more explicit way (Germany).

⁵³ The "+" symbol relates to the existence of legal provisions providing for a right to be heard by the management (access to management). The implicit right to be heard flows from the fact that there is an institutionalised system of social dialogue, based upon a joint or mixed body.

⁵⁴ According to Greek Law 1264/82, the employer, or a fully authorized representative of the employer, has the obligation to meet the representatives of the trade union organizations, at their request, at least once a month and to endeavour to settle issues which are a cause of concern to the workers or their organizations. When trade unions enter into bargaining with an employer, they are entitled to receive information necessary for the bargaining process. Although the works councils are not mixed bodies, the employer is obliged to inform and consult their members on a number of economic and social issues.

Communication with the Constituency:

Belgium

136. Article 23 of the CCT No.5 provides that the **Belgian** union delegates have a right to communicate with the personnel (unionized or not) in an oral or written manner, on condition that this does not affect the work organization. The subject needs to be work related or trade union related. The provision also allows union delegates to organize a meeting with the personnel during working hours, subject to the employer's consent, which cannot be withheld arbitrarily. The commentary provides that this meeting should not per se take place at the premises of the workplace, thus taking into account that for some professions the premises can be situated elsewhere.

The Belgian Loi portant organisation de l'économie does not provide rules on the communication between the workers' representatives and the constituency, neither does CCT No.9. Article 32 of the Royal Decree of 27 November 1973 does indicate that workers' representatives in the works council need to ensure that the personnel is being informed on the basis of the data conveyed to the representatives. Representatives need to communicate discretely to safeguard the firm's interests. The majority of legal theory considers that confidential information cannot be communicated to the personnel. Written communication to the personnel needs to be submitted previously to the secretary of the works council.

137. In Belgium, there are no specific rules about the collection of trade union dues.

138. As far as the H&S committee is concerned, Article II 7 -20 of the *Code du bien-être* provides that the employer needs to provide representatives with an announcement board (*panneau d'affichages*) or another adequate means of communication allowing them to reach all workers concerned. Although the provision does not refer to access to email or intranet, there is no doubt that such means of communication would qualify.

Denmark

139. No specific statutory provisions can be found in **Danish** laws regarding communication between workers' representatives on the one hand and their constituency on the other hand. However, trade unions that have signed a collective agreement with a firm or with an employers' organization to which a given employer is affiliated, are considered to have a right, as part of the implicit obligatory part of the agreement, to have access to the undertakings as a means of enforcing the working conditions prescribed in the agreement. There are no indications that such a right to access exists with regard to undertakings not covered by a collective agreement on the basis of an extensive interpretation of the right to organize, which is not as such enshrined in the Danish Constitution in any specific way.

140. Communication between trade union shop stewards and their constituency is an issue for collective agreements at plant level. The Basic Agreement does not provide guidance.

141. Nor can any provisions be found in the relevant national agreement concluded between LO and DA on the functioning of cooperation committees with regard to communication between workers' representatives on the one hand and the constituency of workers on the other. The same is true for the Act on the Work Environment Organization (AML) regarding communication between the elected Health and Safety workers' representatives and the workers of the enterprise (for enterprises reaching a threshold of 10 workers). No provisions exist with regard to the collection of dues at the workplace.

France

- France** 142. As far as communication with the constituency is concerned, the French Code du travail provides, as a matter of principle, that the workers' representatives have the right to leave their plant during the *crédits d'heures* and that they can circulate during these allocated hours and also outside their working time to contact workers, (Article L 2315-4, *Code du Travail*) on condition that this does not constitute a significant disturbance of the work organization. The members of the economic and social committee can also disseminate communications without prior notification to the manager. The union delegates can actually collect dues on the premises (Article L2142-2, *Code du travail*).

Germany

- Germany** 143. In **Germany**, the works council (*Betriebsrat*) has a statutory right to organize an assembly (§§ 43 of the *Betriebsverfassungsgesetz*) every calendar quarter, enabling the representatives to report to their constituency. These meetings can normally be organized during working hours and without loss of pay. Though the *Betriebsrat* is not a mixed body, the employer needs to be invited to these meetings and has the right to address the assembly. Once a year, the employer is obliged to address the assembly on a limited number of issues: the staff and employment situation at the company, including the equality of men and women, the economic situation and the company's prospects, as well as environmental issues. The works council also has the right to organize the so called *Sprechstunden* (contact hours) at a time and a place to be agreed with the employer (§ 39 *Betriebsverfassungsgesetz*).

Italy

- Italy** 144. Article 20 of the **Italian Statuto dei lavoratori** provides that workers of a plant (*unità produttiva*) have the right to organize a meeting either during or outside working hours (with a limit of 10 hours per year) without loss of pay. These meetings will be helpful to allow workers' representatives (*rappresentanza sindacale aziendale*) to communicate with their constituency. The employer needs to be informed of the agenda of these meetings, which must deal with trade union or work related issues. Trade union officials have the right to attend these meetings. Article 25 of the *Statuto* provides that "The company's trade union representatives have the right to post publications, texts and press releases relating to matters of trade union and labour interest in dedicated areas, which the employer must provide in places accessible to all workers within the production unit".

Spain

- Spain** 145. The **Spanish Estatuto de los Trabajadores** has instituted the *asamblea* (workplace meetings) which allows workers' representatives or work council members to have a dialogue with their constituency. Such a meeting can be convened at the initiative of either the representatives or the workers. The employer has to be informed of these meetings which take place at the firm's premises. The notice of the meeting, along with the draft agenda proposed by the conveners, shall be communicated to the employer at least forty-eight hours in advance, and the employer shall acknowledge receipt. The holding of the assembly cannot, as a matter of principle, disrupt the normal functioning of the enterprise, since it takes place outside working hours, unless otherwise agreed with the employer. Provided there is a company trade union branch (*sección sindical de empresa*), the TUA provides that it can collect dues on the premises and distribute union information.

Sweden

- Sweden** 146. In **Sweden**, neither the Work Environment Act nor the Trade Union Representatives Act include provisions on the communication between representatives and their constituency

Comparative table and conclusions in relation to the communication with the constituency^{55,56}

Table on communication with constituency

	Belgium	Denmark	France	Germany	Italy	Spain	Sweden	Greece
Assembly	-	-	-	+	+	+	-	+
Posting of messages	+	-	+	-	+	-	-	+
Collection of Dues	+	-	+	-	-	+	-	+
Conditionality	Assembly with the consent of the employer which cannot be refused arbitrarily	-	Right to circulate provided no disturbance	Assembly in the presence of the employer	Notification to employer of agenda Limited to trade union issues related to work (assembly)	Assemblies outside working hours Notification of invitation and agenda to employer	-	Outside of working hours and in a production site

147. The notion of representation is based upon a relation between the representatives and their constituency. In their capacity as representatives, workers' representatives get information which is ultimately addressed to the workforce. Furthermore, in order to properly represent the interests of the workers, it is essential that they are not just consulted by management, but that they can consult their own constituency.

148. Communication between representatives and their constituency is a less obvious issue. It requires use of the employer's space or working time. In many legal orders there is emphasis on the principle that this communication needs to take place after prior notification of the employer and outside working hours to minimize the burden. In several legal orders, trade unions (Italy, Spain) or the works council (Germany) have the right to organize a so-called assembly of the workers at the premises of the workplace. Another instrument might be the right of representatives to contact individual workers by meeting them during their release (credit hours) (cf. France) or the right of the works council to organize so-called *Sprechstunden* (Germany). Another means of communication might relate to written communication on a board (France, Belgium, Italy). Some legal orders allow for the collection of dues at the premises of the undertaking by trade unions (Italy, France, Spain).

⁵⁵ The "+" symbol refers to the existence of a legal provision ensuring the right to hold an assembly, the right to post messages and the right to collect dues at the premises. Conditionality refers to the condition under which these rights are granted. When no rights exist, no conditions can be mentioned.

⁵⁶ Greek law provides various tools enabling a trade union to communicate with its constituency. The Law provides for a right for the most representative trade unions to hold an assembly at the workplace. However, it needs to be outside working hours and not in a production area. The Law also provides a right to collect dues. Trade union officers of the primary organizations may enter the workplace to collect dues outside the working hours. Article 16 § 2 of law 1264/82 provides that primary trade unions shall be entitled to have notice boards for their purposes at the workplace and at places agreed upon in each case between the employer and the executive council of the basic trade union concerned.



III. Conclusion

Conclusion

149. This study examines ten issues which are relevant for an effective exercise of freedom of association, namely freedom of assembly, protection against acts of anti-union discrimination, the principle of mutual non-interference, management-controlled unions, trade union meetings, collection of trade union dues, access to management, access to the workplace, use of the undertakings' facilities and release accorded to workers' representatives. These issues have been analysed from a comparative point of view, involving seven European Member States, with the exception of freedom of assembly which has been studied solely from an international and European human rights perspective. This comparative review has been conducted in the light of three subsequent international legal orders (International Labour Standards of the ILO, Council of Europe, European Union). The standards of these international and European legal orders have served a twofold purpose: on the one hand they were used as tools to structure the report from a conceptual point of view, and on the other they served as a benchmark against which labour and trade union rights granted in the different legal systems of the countries examined (Belgium, Denmark, France, Germany, Italy, Spain and Sweden) were assessed.
150. The protection against acts of anti-union discrimination and interference, the protection of civil and human rights of trade union leaders and members, including their freedom of assembly, form the essence (*Kernbereich*) of freedom of association. Those principles are enshrined in the two fundamental ILO Conventions No. 87 and No. 98. The first recognizes the right of all workers "without distinction whatsoever" to establish and join organization of their own choosing (Art. 2) protecting the right of such organizations to operate in full freedom and autonomy when it comes to drawing up their constitutions, organize their administration and activities, formulate their programmes (Art.3) and administrate their finances while at the same protecting them from administrative dissolution and suspension (Art. 4). Convention No. 98, then establishes the principle of protection of workers against acts of anti-union discrimination and the principle of mutual non-interference in an explicit way. The issues related to facilities have a more technical character and have been fleshed out in ILO instruments related to workers' representatives (specifically: ILO Convention No. 135 and ILO Recommendation No. 143). These technical instruments provide considerable leeway to Member States for the implementation of those standards at country level, recognizing that due consideration should be given to the specificities of the industrial relations system. Furthermore, they also take explicitly into account the employers' interests, referring to the needs, size and capabilities of the undertaking and recognizing that the exercise of these facilities shall not impair the efficient operation of the undertaking concerned. Although the design of the facilities needs to be tailored, their recognition is intertwined with the principle of freedom of association. Thus, ILO Convention No 135 refers to ILO Convention No. 98.
151. These facilities have been structured in four main dimensions: access to the undertaking, the temporal axis, the spatial axis and the issue of communication (with management and with the constituency).

152. The comparative overview has demonstrated how countries, after having faced a period of totalitarianism, have endeavoured to introduce a specific notion of freedom of association as exercised by trade union organizations, enshrining it into their Constitutions in the immediate aftermath of such period (France, Germany Italy, Spain), and how some of them have even adopted a specific statutory instrument (essentially) related to the right to organize at a later stage (Italy, Spain). The political dimension of the right to organize has thus been sufficiently highlighted in these countries. Provisions protecting workers against acts of anti-union discrimination are foreseen in all countries, irrespective of the size of the enterprise and are not limited to trade union or workers' representatives but apply to all workers alike. Other good practices relate to an unambiguous reversal of the burden of proof (Belgium, Sweden), which is not enshrined in all legislations concerned. Last but not least, it is essential that employers do **not** have a choice between compensation and reinstatement, in case of a discriminatory dismissal based upon trade union membership or involvement in trade union activities, and that reinstatement is always granted whenever workers have been discriminated against by reason of trade union activity. Another important remedy relates to the possibility of a judge to issue an injunction to stop a discriminatory practice.
153. As far as the issue of the prohibition of interference or the independence or autonomy of organizations is concerned, it is clear that this principle needs to be ensured to the benefit of both employers' and workers' organizations. Interference can stem from authorities as well as from workers' or employers' organizations and their members. Due to a structural imbalance of power inherent in the employment relationship, it will be much easier for an individual employer to interfere with the functioning of a trade union than it will be for a trade union, let alone its members, to interfere with the functioning of an employers' organization. Thus, all the examples of interference highlighted in Article 2 (2) of ILO Convention No.98 relate to interference affecting workers' organizations. By its nature, the prohibition of interference by authorities is not enshrined in statutory law. There is no formal expression of this auto-limitation.
154. The principle of **mutual** non-interference by organizations is not systematically enshrined in legal orders, except for Denmark and Sweden. In France, Italy and Spain the principle is only enshrined in favour of trade unions. In Belgium and France, there is no rule formally prohibit interference. However, the principle is applied indirectly, since in all countries concerned, mixed bodies of employees and employers are not considered trade unions. Furthermore, autonomy or independence is an essential element for a body to be recognized as a trade union (Germany) or a representative trade union (see France). In Belgium and Germany, a trade union which solely exists at the level of one establishment, would not be considered to be a trade union (*Gewerkschaft*) or could not claim to be representative. In France, Italy and Spain there are explicit provisions against management-controlled unions.

155. The right of trade union officials to enter the workplace to engage in recruitment activities is of great practical importance in undertakings which have no or few unionized members. Some legal orders have not recognized such a right (Belgium, France). Good practices can be found in Spain and Germany, where there is a right, either of a statutory nature or recognized by a judge, for trade union officials to visit the workplace. In both cases, it is essential that the employer is duly notified and that the visit does not abnormally disrupt the work organization. The Italian provision presupposes that at least one worker is unionized. In this case, the unionized worker (who is not a trade union official on the payroll of the trade union) can engage in recruitment activities (*proselitismo sindacale*). However, access to the workplace is not just relevant for recruitment, but also for enforcement of collective agreements and labour law in general. Although the Greek legal order does not seem to explicitly enshrine access of trade union officials to the workplace for recruitment purposes, however, it gives trade union officials the right to be present during inspections carried out by the Labour Inspectorate. In the same vein, in Denmark trade unions have access to the workplace to monitor whether working conditions enshrined in a collective agreement are respected.
156. A comparison between the various countries with regard to the right to release provisions (*id est*: working time) recognized to workers' representatives *sensu lato* is a complicated endeavour. The notion of workers' representatives can cover genuine union delegates, *id est* workers of the company designated by the union or elected among its unionized members working in an undertaking, and workers' representatives elected by all the workers of such an undertaking which may have no ties with the trade union movement. There are cases with dual channels where both types exist, and single channel where only one type exists. This paper does not deal with the specific missions attributed to these representatives. Another actor may be the trade union officials who are on the payroll of a company, but exercise functions inside the trade union which are not related with the issue of representing workers of the company where they work. In some countries this latter situation will not occur. In these countries, trade unions are essentially created at sectoral level and will try to finance their trade union officials and staff members on the basis of the dues of the members.
157. Release can relate to time spent during meetings for the exercise of a mandate in the area of workers' representation, to the issue of the internal trade union operations, to the preparation of these meetings, and to training. Leave can be granted with or without loss of pay. Another issue relates to the costs of the exercise of such a mandate especially the cost of training. Thus, the question arises whether it has to be borne by the employer or not.
158. All these issues tend to be treated differently in the countries concerned. These differences relate to the structure of the representation (single, or dual) and to the emphasis placed in dual systems on the trade union related representatives or the elected representatives. Various countries take into account the size of the enterprise. The latter has an impact upon the number of representatives and on the length of the releases awarded (see especially France, Germany, Italy, Spain). The involvement of workers, in the firm, as trade union officials, has the advantage that trade unions will remain in touch with their constituencies.

159. For the proper functioning of workers' representatives, a minimum of infrastructure is key. All legal orders contain an abstract principle that facilities need to be adequate. They do not go into detail about the extent of these facilities. The question arises whether a proper understanding of subsidiarity does not require that the precise extent of the facilities to be exercised at the level of the undertaking is best regulated at plant level in view of the specific situation of the undertaking. Therefore, collective regulations at plant level seem more appropriate than statutory rules to provide such details. It is essential to provide meeting rooms if worker representatives are part of a body of representatives (union delegations composed of delegates or works councils). In the case of mixed works councils, it is practically unthinkable that an employer presiding over a meeting would not arrange for a meeting room. Another issue is the availability of offices other than meeting rooms, which are necessary for workers' representatives getting structural dispensations to exercise their mandate, which cannot be restricted just to the participation in meetings. The need for offices will in practice differ according to the size of the enterprise since these dispensations depend upon the threshold of the workforce. In those countries where regulations provide for the holding of assemblies with the constituency, a meeting point is also essential.
160. Communication between management and representatives will naturally take place within mixed bodies (works councils presided over by the employer in Belgium, Denmark, France or Safety Committees in Sweden and Belgium). In countries where works councils are not "mixed bodies" statutory provisions may put forward such a communication, *id est* a duty for an employer to meet the works council in a more explicit way (Germany).
161. The notion of representation is based upon a relation between the representatives and their constituency. In their capacity as representatives, they get information which is ultimately addressed to the workforce. Furthermore, in order to properly represent the interests of the workers, it is essential that they are not just consulted by management, but that they can consult their constituency.
162. Communication between representatives and their constituency is a less obvious issue. It requires use of the employer's space or working time. In many legal orders there is emphasis on the principle that this communication need to take place after prior notification of the employer and outside working hours to minimize the burden. In several legal orders, trade unions (Italy, Spain) or the works council (Germany) have the right to organize a so-called assembly of the workers at the premises of the workplace) Another instrument might be the right of representatives to contact workers not taken collectively by meeting them during their leave (credit hours) (cf. France) or by the organization by the works council of so-called *Sprechstunden*. Another means of communication might relate to written communication on a board (France, Belgium, Italy). Some legal orders allow for the collection of dues at the premises of the undertaking by trade unions (Italy, France, Spain).





References

Ales, E., M. Bell, O. Deinert and S. Robin-Olivier, *International and European Labour law*, Baden-Baden, Nomos, 2018.

Bruun, N., K. Loercher, I. Schoemann, *The European Social Charter and the Employment Relation*, Hart Publishing, Oxford, 2017.

Craven, M. *The International Covenant of economic, social and cultural rights*, Oxford, Clarendon Press, 1995.

Dorssemont, F., K. Loercher, S. Clauwaert and M. Schmitt, *The Charter of fundamental rights of the European Union and the employment relation*, Hart publishing, Oxford, 2019.

Carinci, F., *Il diritto sindacale*, in *Il lavoro subordinato*, Torino, Giappichelli, 2007.

Cohen, M. and L. Millet, *Le droit des comités sociaux et économiques et des comités de groupe*, Paris, LGDJ, 2020.

Däubler, W., *Gewerkschaftsrechte im Betrieb*, Baden-Baden, Nomos, 2017.

Decaux, E. and O. De Schutter, *Le Pacte international relatif aux droits économiques, sociaux et culturels*, Paris, Economica, 2019.

Gamillscheg, F., *Kollektives Arbeitsrecht. Band I*, München, Beck, 1997.

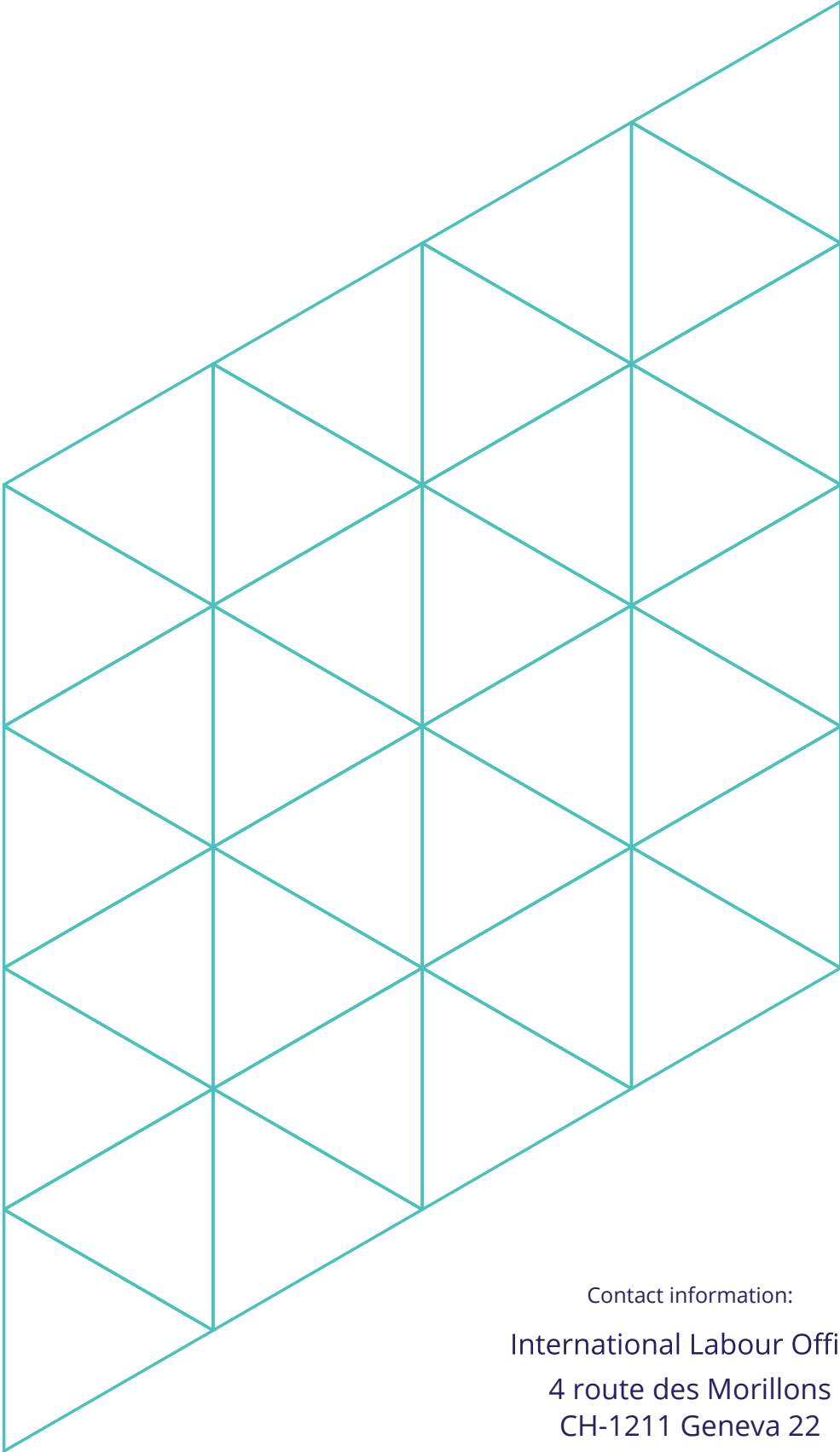
Giugni, G., *Diritto sindacale*, Bari, Cacucci, 2000.

Hendrickx, F., *International Encyclopaedia of Labour Law*, Wolters, Kluwer, online
Hodges-Aberheard, J., "The right to organize in Article 2 of the Convention n° 87-What is meant by wording "without distinction whatsoever?", *International Labour Review*, 1989, pp. 177-194.

ILO Legal Database on Industrial Relations (IRLex). See: <https://www.ilo.org/dyn/irlex/en/f?p=14100:1:0::NO::> [accessed on 19.05.20]. INTERNATIONAL LABOUR OFFICE, *Freedom of association. Compilation of decisions of the Freedom of Association Committee*, Geneva, 2018.

Steyaert, J., F. Dorssemont, C. De Ganck and M. De Gols, *Het paritair overleg in de onderneming*, Mechelen, Kluwer, 2009.

Van Hoof, G., "The legal nature of economic, social and cultural rights: a rebuttal of some traditional views", in P. ALSTON and K. TOMASEVSKI (ed), *The right to food*, M. Nijhoff Publishers, 1984, 97-110.



Contact information:
International Labour Office
4 route des Morillons
CH-1211 Geneva 22
Switzerland



Project
funded by the
EUROPEAN UNION



**International
Labour
Organization**