

EWC and swiss law

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- European treaties ¹
- Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups undertakings for the purposes of informing and consulting employees ²
- Bilateral agreements between Switzerland and the EU (Accord entre la Confédération suisse, d'une part, et la Communauté européenne et ses Etats membres, d'autre part, sur la libre circulation des personnes, entré en vigueur le 1er juin 2002) ³
- Swiss federal Constitution (Constitution de la Confédération suisse, du 18 avril 1999) ⁴

¹ <http://europa.eu.int/eur-lex/lex/en/treaties/index.htm>

² http://europa.eu.int/eur-lex/en/consleg/main/1994/en_1994L0045_index.html

³ <http://www.europa.admin.ch/ba/off/abkommen/f/personen.pdf>

⁴ <http://www.admin.ch/ch/f/rs/c101.html>

- Code civil suisse (swiss civil code) ⁵
- Code des obligations (swiss obligation code) ⁶
- Swiss law on participation of workers (Loi fédérale du 17 décembre 1993 sur l'information et la consultation des travailleurs dans les entreprises (Loi sur la participation)) ⁷
- Franz Werro – Thomas Probst, Le droit privé suisse face au droit communautaire européen, Staempfli Editions, Berne, 2005
- Zur Relevanz der RL 94/45/EG („Betriebsratsrichtlinie“) in der Schweiz Rechtsgutachten erstellt im Auftrag des Verbandes Schweizerischer Angestelltenvereine der Maschinen- und Elektroindustrie (VSAM) - Prof. Dr. Astrid Epiney, LL.M. - Mag. iur. Angelika Sitz (non publié)
- www.euro-betriebsrat.de
- Other sources are mentioned as footnotes

2. Abbreviations

CO : Code des obligations; swiss obligation code

CCS : Code civil suisse; swiss civil code

CWC : Collective Work Conventions

EU : European Union

EWC : European worker's council

Lpart : Swiss law on participation of workers (Loi fédérale du 17 décembre 1993 sur l'information et la consultation des travailleurs dans les entreprises (Loi sur la participation))

3. Preliminary statement

The present demonstration aims at being as comprehensive as possible to be understood by a large public, especially workers representatives and managers involved in social partnership.

It is therefore not a law analysis in the strict sense legal professional would normally present it.

It nevertheless is based on a narrow analysis of swiss law, doctrine and jurisprudence and any precision can be asked to the author anytime.

4. Summary

Swiss law does not contain any single mention of the EWC although reality shows our country, the world and european companies and their employees are directly concerned by it.

Superficially, it seems the EWC Directive 94/45 cannot directly be applied in Switzerland, EU law being obviously only applicable to EU member States, of which Switzerland does not count.

⁵ <http://www.admin.ch/ch/f/rs/c210.html>

⁶ <http://www.admin.ch/ch/f/rs/c220.html>

⁷ http://www.admin.ch/ch/f/rs/c822_14.html

Since 2002, Switzerland has agreed with EU to apply the principles of free circulation of persons in swiss law. Therefore, the legal situation of workers in the EU applies almost ⁸ identically in Switzerland.

The Lpart, the swiss law framing social partnership on a national level, was adopted in 1993 and allows explicitly any measure or body improving rights of information and participation of workers in undertakings active in Switzerland.

Therefore, as long as undertakings in Switzerland meet the EWC Directive 94/45's standards, swiss law has to be interpreted as fully applying this EU Directive and swiss representatives in EWC having the same rights as EU representatives.

5. Introduction

Participation of employees as a social body within the entreprise is the center of the action of the Swiss Association of Employees ⁹.

In swiss law, the question is generally regulated by the law on participation of workers (hereafter: Lpart). The Lpart only establishes general rules, details being largely left to be agreed upon in the processes of social partnership, mainly in Collective Work Conventions (hereafter CWC¹⁰). The later are agreed upon by workers associations ¹¹ and employers associations, generally within an industrial or service branch. The legal corset is rather smooth ¹², the content of those collective contracts being left to the appreciation of the contracting parties, without much constraining rules of law (although minimal standard are nevertheless set by swiss labor laws ¹³).

Through it's particular geographical, economical and legal situation in Europe, Switzerland is moreover specifically concerned by the Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups undertakings for the purposes of informing and consulting employees (hereafter EWC Directive 94/45) because many companies active in Europe and abiding by the EWC Directive 94/45 have either an establishment (fulfilling the Directive's standards) or even their seats in our country.

Consequently, it is not rare to see representatives of swiss workers in EWCs. Their rights within specific EWCs range from observer to fully embodied representative with the same rights as european representatives.

But the swiss legal situation of these special representatives is far from clear.

This demonstration aims at more transparency ¹⁴ of swiss law toward EWC and is an appeal for active transnational social partnership.

⁸ Differences are mainly to be found in the progressive introduction of free circulation in Switzerland (shrinking with time) and some limits set to integration of the « Acquis communautaire » posterior to June 1st 2002, but those differences are not relevant regarding our demonstration.

⁹ <http://www.angestellte.ch>

¹⁰ 356 and following CO

¹¹ Trade unions or/and employees associations

¹² See below

¹³ Mainly in fields regarding health and safety and individual contractual relationships.

¹⁴ If possible considering the awkward swiss choice towards Europe which complicates without doubt legal interpretation and implementation

6. EWC – Factual situation of Switzerland

As stressed, Switzerland hosts many establishments of European and international firms that are submitted to the EWC Directive 94/45.

As a matter of facts, Switzerland has, for its size, a fair amount of seats of firms concerned by the Directive 94/45¹⁵. And, to my knowledge, there is no official count of the establishments of European and world companies also concerned by it, but they are certainly not few.

As far as organisational rating is concerned, Switzerland lies in the bottom average of the European countries¹⁶. Less than 35% of workers seem to be organized in trade unions or employee's associations.

Finally, though legal constraints are much less than in Germany, for example, the Swiss social partnership model is much similar to the German one, without the institutional legal power of the « Betriebsrat ». Nevertheless, this model cannot be totally generalized since a large freedom of content of CWCs can sometimes lead it away from this reference model.

7. EWC field of application according to European law

Switzerland not being a member of the EU, the Directive 94/45 cannot logically be enforced directly according to European law¹⁷.

But Switzerland and the EU have recently concluded and enforced¹⁸ bilateral agreements which extend, in certain fields and in certain time limits, the application of European law to Switzerland. Among them, we will mention more thoroughly the Bilateral agreement concerning freedom of circulation of persons in the following pages.

In conclusion, although no direct application of the Directive 94/45 in Switzerland can be expected, the EWC reality shows that cases concerning eventually¹⁹ Swiss based EWC or Swiss members of EWC could be raised and have to find a legal solution in our silent Swiss law. For example, in some situations that European courts have already experienced: scope of consultation legally binding and time of appropriate information, but also election problem within an EWC concerning a Swiss representative.

All those questions are not only theoretical, because in Europe also the Directive 94/45 has no direct effects, the member states having to implement national laws, among other reasons to determine the competent national Tribunal to solve claims. Therefore, whether in front of EU or Swiss courts²⁰, such claims may arise.

¹⁵ See graphic 1 at the end of the document

¹⁶ See graphic 2 at the end of the document

¹⁷ Art. 299 European Community Treaty - http://europa.eu.int/eur-lex/fr/treaties/dat/EC_consol.pdf – The same conclusion arises from the legal advice of Professor Astrid Epiney and Mag. iur. Angelika Sitz (Zur Relevanz der RL 94/45/EG („Betriebsratsrichtlinie“) in der Schweiz Rechtsgutachten erstellt im Auftrag des Verbandes Schweizerischer Angestelltenvereine der Maschinen- und Elektroindustrie (VSAM) - To be complete, the Judgment of the EU Gerichtshof in the case Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG gegen Kühne & Nagel AG & Co. KG comes also to the same conclusion on the principle, but it is not significant since the case was dealing with a different factual situation than the question raised in the present paper.

¹⁸ As of June 1st 2002

¹⁹ Generally, although the seat of the company may be in Switzerland, many such EWC are based, according to their statutes, within the EU

²⁰ Article 3.6. of the EWC Directive 94/45 shows it concretely

8. Does the EWC Directive 94/45 apply in Switzerland ?

8.1. Generalities

Preliminarily, we must admit that swiss law is particularly silent concerning the EWC, although, as the practical importance of the question should encourage, clear rules of law should be able to ensure the efficiency of social partnership on that level.

Historically, it has not solely to do with the rather chilled enthusiasm of a majority of swiss citizens for the european construction, but is also intimately bound with the swiss contractual law culture which is largely inspired by the liberal model in which codified constraints in commercial relationship ought to be minimal.

In civil labour law, although compulsory rules have been introduced with time, social partnership is largely submitted to contractual freedom and the collective participative side of the labour legal relationship left to solve by the concerned parties (employees and employers associations and trade unions), mainly in CWCs ²¹.

Since swiss worker's associations have only recently discovered the importance of the EWCs, the discussion is not gone very far and is rarely mentioned in CWCs.

Swiss law is therefore dumb on EWCs.

On the political and legislative scene, the subject is rarely raised and quickly dug because of the political trickiness of the european issue in this country ²². But since 1998, the situation has largely evolved.

Today, it is generally (the foreign policy commission of the swiss Senat, highest of the parliament chamber, being quoted) admitted that « **materially, social EU law does not present fundamental differences with swiss law. These last years, swiss legislation have evolved to approach EU rules in many domains (equality, Swisslex, among them ... and adoption of the law on participation ...)** » ²³.

On judicial side, the swiss high court has had to solve cases that apply EU law in Switzerland and, although it has been rather shy to act as a law maker when the law was silent or very unclear on the issue, is being forced in developing a jurisprudence and adapting methods of interpretations which take largely social and economical realities into account in the fast moving legal environment Europe has set at all our borders.

8.2. The legal base in swiss law for EWC

The comparison between the swiss and the european rule concerning social partnership on internal and transborder level sets a good start to solve the question of the EWC legal status in swiss law.

Article 1.1 of the Directive 94/45 states:

The purpose of this Directive is to improve the right to information and to consultation of

²¹ Art. 356 and following CO

²² http://search.parlament.ch/f/cv-geschaefte?gesch_id=19983504

²³ « *Sur le plan matériel, le droit social communautaire ne présente pas de différences fondamentales avec le droit suisse. Ces dernières années, la législation suisse a évolué pour se rapprocher des dispositions communautaires dans de nombreux domaines (loi sur l'égalité; **Swisslex, dont modifications du CO et adoption de la loi sur la participation**; ordonnances portant application des lois sur le travail et sur l'assurance-accidents)* » Rapport de la Commission de politique extérieure du Conseil des Etats sur les options de la politique d'intégration de la Suisse du 18 mars 2002 (FF 2002, page 5908)

employees in Community-scale undertakings and Community-scale groups of undertakings.

The Lpart fits exactly in the same goal but, evidently, cannot have an external effectivity, and has, therefore, a field of application ²⁴ limited to undertakings active in Switzerland.

The implementation of social partnership is, as one can examine in the swiss Lpart, very near if not exactly, at least in the principles, the same in swiss and EU law, even if the Directive 94/45 gives a specific role to EWC, that is some rights of information and participation limited to transnational situations.

Therefore, should a case arise concerning EWC in swiss court, it is most likely, the Juge would apply the swiss Lpart and the Directive 94/45, whether directly or by analogy ²⁵, to take into account the transnational character of the case.

Moreover, it has to be stressed that the swiss law expressly allows participating rules that are in favour of the worker (article 2 Lpart).

As it is difficult to imagine in what way the Directive 94/45's application in Switzerland would disadvantage the swiss workers concerned, the Directive 94/45 seems therefore completely compatible with swiss law.

And the more so, because swiss civil labor law is a legal tissue made of minimal legal rules (in our Code of obligation ²⁶, mostly) and very detailed rules negotiated regularly by social partners in renewed and improved CWCs.

8.3. Further legal arguments

No such EWC case having been raised until now in swiss courts, demonstration can only be found in some cases or doctrine essais dealing with similar problems, basically of integration and interpretation of EU law in the swiss legal environment.

First of all, two doctrine authors ²⁷ tend to consolidate my point of view.

According to them, part of the recent swiss legislation has to be interpreted (to various degrees depending on the law concerned) in accordance with EU law, especially a pack of laws known as SWISSLEX, adopted in the early 90s specifically to adapt some swiss laws to the EU law body.

For SWISSLEX, those authors go as far as to pretend they should be adapted or interpreted dynamically, that is even in accordance with the constant evolutions in EU law ²⁸. If such arguments can only be followed cautiously, that is in no case generalized, since jurisprudence hasn't gone so far yet to my knowledge, the logic developed by these authors make alot of sense, especially when compared with the views of our highest legislative body ²⁹.

The Lpart is part of the SWISSLEX pack and even if one does not share the enthusiasm of

²⁴ Article 1 Lpart

²⁵ Or any other method of interpretation that may be found appropriate to suite the developping logic in matter concerning integration of EU rules in the swiss law body.

²⁶ As far as the contractual relationship is concerned

²⁷ See above, last reference: Franz Werro and Thomas Probst...

²⁸ Normally, with the bilateral agreements, the « Aquis communautaire » was incorporated in swiss law (in the field of application of those conventions) as of june 1st 2002. Any development of European law (being legal or jurisprudential) is not binding for Switzerland.

²⁹ See above mentioned view of the foreign policy commission of the swiss Senat

the above mentioned authors, the Directive 94/45 and the Lpart were enforced in the same period and, as allready stressed, do not conflict with one another. It is even all the contrary because the Directive 94/45 completes it while improving the participating rights of swiss workers.

Therefore, one cannot see, apart from chilling political arguments without much common sens (or intentions that go so far as to destroy modern social partnership), any sensible reason why application of the Directive 94/45 could not extend to Switzerland through interpretation of the Lpart.

Swiss jurisprudence is more difficult to interpret without a clear case but, has, since long, nevertheless allready given positive signs in direction of compatibility of swiss law with EU law.

Among some interesting judgments, one may underline that the swiss high court has accepted, already in 1997, that foreign law may influence swiss law when neither swiss law nor international law applicable in Switzerland adress a specific issue ³⁰. Allthough the case did not ³¹ lead to acceptance of foreign law rules, it is interesting to quote some of it:

« *In particular, in traditional transnational legal commerce, it is difficult to achieve a proper legal analysis and the necessary gap filling without basis of legal comparasion (...). It is particularly valid where urgent economical policy questions are raised which command to avoid motivations privileging or discriminating through legal isolationism.* »
³²

In this sens, one could argue that, since both legal texts date back to the same period, there is no gap in swiss law, because our legislator should have known about the legislativ process of the Directive 94/45 and would have said so if he wanted it to be taken into account in swiss law.

This short sighted view can easily be countered.

One should not overestimate any legislator and legislative research on discussions of the SWISSLEX pack of law because this pack was globally thriving for compatibility with EU law.

As a matter of fact, allthough the possibility of tailored integration of Switzerland in the EU was declined by a popular vote in 1992, it did not hinder our legislator to adopt the SWISSLEX pack of laws without changes confirming therefore its intention ³³ to harmonize certain fields of laws with EU law.

Finally, cases of competence of the EWC are precisely situations where « *urgent economical policy* » *questions* are raised ³⁴, when one thinks of the consequences of large scale lay-offs, or other big changes in transnational undertakings, on regional economies.

Moreover, the absence of reference to EWC in swiss laws does not automatically mean that swiss law has a gap. The above demonstration clearly shows that the EWC Directive 94/45 is fully compliant with the swiss Lpart and serves as a perfect legal base for EWC Directive 94/45

³⁰ BGE 126 III 129

³¹ It dealt with a very touchy subject, parrallel imports in Switzerland

³² « *Namentlich im traditionell grenzüberschreitenden Rechtsverkehr lässt sich überdies eine sachgerechte Rechtsfindung und damit auch Lückenfüllung ohne rechtsvergleichende Grundlage nicht verwirklichen (...). Dies gilt besonders, wo sich vordringlich wirtschaftspolitische Fragen stellen und darauf zu achten ist, dass durch einen isolationistischen Rechtszustand weder Privilegierungen noch Diskriminierungen auf dem internationalen Markt begründet werden...* » BGE 126 III 129

³³ And the absolute necessity.

³⁴ To paraphrase our High Court in the above mentioned jurisprudence

in swiss law and also sees, to a certain extent - which has to be completed within specific CWCs according to our legal system -, to its practical implementation in Switzerland, as EU member states have to according to article 7 EWC Directive 94/45 ³⁵.

8.4. The Bilateral agreement on free circulation of persons

Since then, Switzerland has negotiated and concluded Bilateral agreements with the EU, among them the Bilateral agreement on free circulation of persons.

Astonishingly, since this agreement clearly aims, amongst other goals, at non discrimination of workers ³⁶, it does not mention what should be done with respect to the EWC Directive 94/45.

This bilateral agreement only sets a special bilateral commission ³⁷ which is to solve specific problems of the application and has the right to see that later ³⁸ EU law development apply nevertheless ³⁹ in Switzerland.

As of today and to my knowledge, this commission has not yet thought important to raise this question.

And jurisprudence concerning this bilateral agreement mainly addresses questions dealing with social security.

But, finally, it is interesting to quote some of the explanations given on the official swiss web site concerning those Bilateral agreements:

« The sectorial agreements are based on the principle of equivalence of legislations of contracting parties. Those should have, not identical laws, but compatible ones in their effects and range »⁴⁰

How can it be said in a better way when one compares the Lpart and the Directive 94/45 and how come it has been overlooked ?

8.5. Is there a gap in swiss law concerning EWC?

To be perfectly clear, we finally have to determine if the absence of express mention of EWC in swiss law is to be considered as a gap according to article 1 CCS, which allows the Juge to act as a legislative body to fill it.

As already set by jurisprudence since long, the high Court distinguishes two types of gaps, that is gaps properly defined and apparent gaps ⁴¹.

The first category corresponds to situation where the omission of ruling on something by the legislator is an error. It has to do with situations, the legislator has completely overlooked.

Apparent gaps are also omission of the legislator to rule on an issue, but, in that case, it is

³⁵ It is interesting to note that the system of applicable state laws to solve definitions is perfectly compatible with swiss law: see article 3.6 of the EWC Directive 94/46

³⁶ Article 2 of the Accord entre la Confédération suisse, d'une part, et la Communauté européenne et ses Etats membres, d'autre part, sur la libre circulation des personnes.

³⁷ The mixte Committee

³⁸ If it has a possibility to interpret long time existing EU law that seem to have been totally overlooked, is another question. But, one would hope so for the sake of a clear solution to this legal problem.

³⁹ All the bilateral agreements only integrate the « Acquis communautaire » until enforcement, that is June 1st 2002.

⁴⁰ « Les accords sectoriels se basent essentiellement sur le principe de l'équivalence de la législation des parties contractantes. Celles-ci doivent avoir des lois non pas identiques, mais compatibles dans leur effet et leur portée. » (<http://www.admin.ch/ch/f/eur/gemrec.html>)

⁴¹ Respectively: « lacune proprement dite » and « lacune improprement dite »

voluntary.

Considering the above demonstration, it is clear that the absence of mention of EWC in swiss law doesn't fall in any of these categories.

At the time of adoption of the Lpart, the legislator was clearly aiming at adapting our laws to the EU legal environment.

With acceptance (through a popular vote) of the Bilateral agreements with the EU this strategy has been confirmed at least referring to free circulation and non discrimination between EU and swiss cityzens.

Furthermore, interpretation of swiss law allows full implementation of the EWC Directive 94/45 in Switzerland, without much more application difficulties that may arise in EU member states.

Therefore, it is now clear that swiss law has no gap concerning EWC.

9. Conclusion

Although nothing is said about EWC in swiss law, the EWC Directive 94/45 and the Lpart aren't only obviously compatible with one another, but they are complementary bodies of law because the Directive 94/45 enriches social partnership as discribed by the Lpart.

And since the economical reality shows a very strong interrelation between Switzerland and the EU, through companies legally established in Switzerland and having to abide by the Directive 94/45, one cannot imagine those companies denying swiss workers ⁴² the rights of participation on transnational level, all the more if a recent convention (the bilateral agreement on free circulation of persons) sets a principle of non discrimination between EU and swiss workers.

Any other interpretation would be, in Europe and in the XXIst century, very harmful to social partnership and more largely to the common values Switzerland fully shares with Europe.

But legal questions as this one take time to be solved clearly.

In this case, it is now evident that swiss law is flawless. The swiss Lpart can be used as a link to the full implementation of the EWC Directive 94/45 in the swiss labor law system.

Considering the liberal model of swiss labor law, swiss social partners, especally trade unions and employees associations, have now to take the mesure of the scope of possibilities offered by modern european social partnership by integrating contractual rules referring to EWCs in their CWCs and see to it that the swiss representatives are trained accordingly.

A sign of the mixte Committee set by the Bilateral agreements would also be welcome to make things equal clearly.

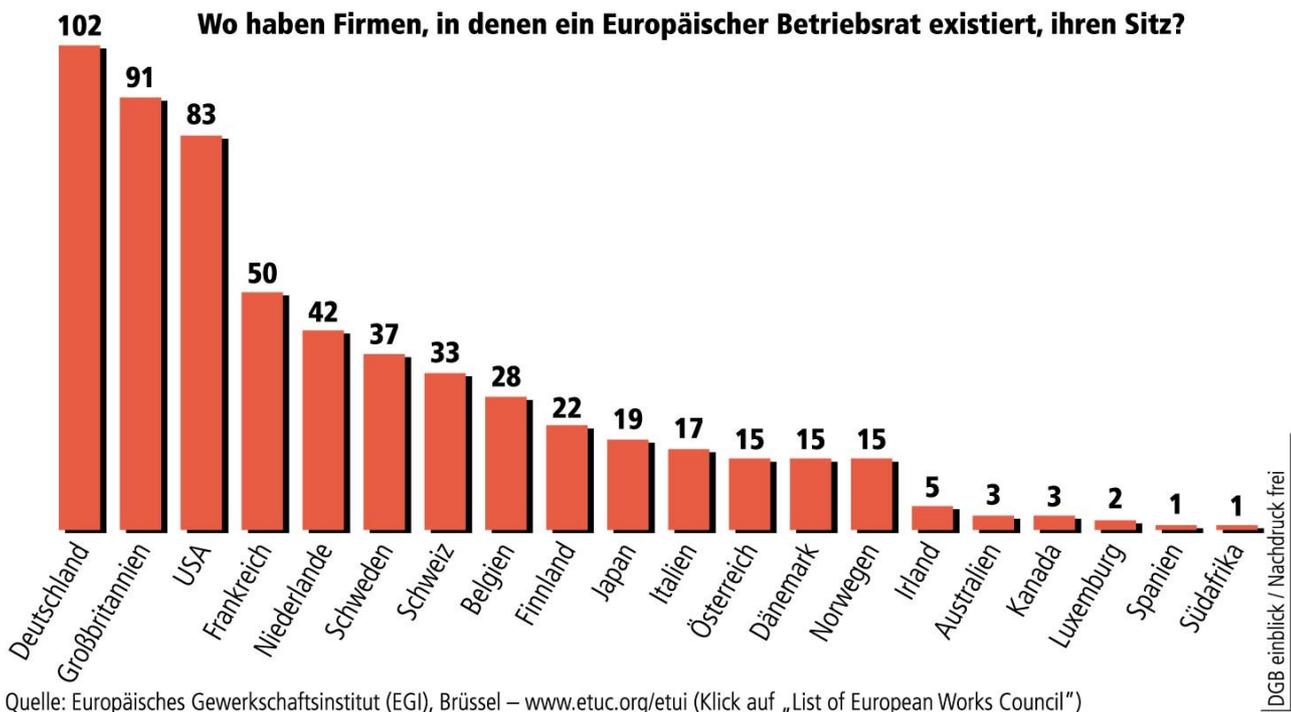
Let us only hope this issue is quickly cleared for the sake of constructive social partnership in Switzerland as well as in Europe.

The protection of workers in our globalising world badly needs it in Switzerland and in the world.

Pierre Serge Heger, lawyer at the bar, legal counsel to Swiss Association of Employees (www.angestellte.ch) for the french part of Switzerland and EWC. (Octobre 16, 2006)

⁴² Some of whom are EU cityzens.

Grafic 1: Seats of european firms concerned by the Directive 94/45 (not considering establishments; source: www.euro-betriebsrat.de, 2004)



Grafic 2: Organisation rate of workers in Europe (source: www.euro-betriebsrat.de, 2004)

